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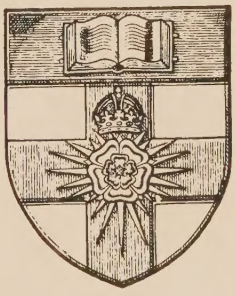

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ERRATA

Page 92: *For* CROSS *v.* EDNEY *read* CROSS *v.* EDEY.

Page 100: The title of the case should read: HAMZEH MALAS & SONS *v.* BRITISH IMEX INDUSTRIES LTD. and *not* as printed.

Page 450: The title of the case beginning on that page should read: *In re* AUSTIN MOTOR CO. LTD.'S AGREEMENTS, and *not* as printed.

Page 358: Appearances—G. AVGHERINOS appeared with Ian Campbell Q.C. for the tenant.

Page 464: *Headnote.* Owing to a printer's error the second and third lines of the holding have become transposed. The passage should read: "*Held*, that the bequest of the business did not include the testator's "bank balance, but included the stock-in-trade, the book debts and the "freehold property at Bowes Park. . . ."

Page 464: Headnote, last line: *for* [1941] 4 All E.R. 347, *read* [1940] 4 All E.R. 347.

Page 758: Cases referred to in argument: *add*

Green v. *Farmer* (1768) 4 Burr. 2214;

Allen v. *Cameron* (1833) 1 Cr. & M. 832;

Donald Campbell & Co. Ltd. v. *Pollak* [1927] A.C. 732; 43 T.L.R. 787;

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Page 852: Cases referred to in argument: *add*

Beattie v. *E. & F. Beattie Ltd.* [1938] 1 Ch. 708; 54 T.L.R. 964; [1938] 3 All E.R. 214.

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4. —— *Parties — Enforcement by third party—Money had and received—Debtor and creditor—Debtor's promise to pay money to third party as gift from creditor—Failure to pay — Whether action for money had and received will lie at suit of third party — Whether "fund" in hands of or accruing to debtor.*

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2. —— *Infringement — Musical work—Gramophone records — Distribution for cash price to members of public sending chocolate wrappers—Whether sale "by retail"—Copyright Act*, 1956 (4 & 5 *Eliz.* 2, *c.* 74), *s.* 8—*Copyright Royalty System (Records) Regulations*, 1957 (*S.I.* 1957, *No.* 866), *para.* 1.
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6. —— *Sentence—Probation order—Breach—Sentence of two months in a detention centre for subsequent offence — Minimum sentence three months — Illegal sentence—Whether conviction amounted to breach of probation order—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 6 (4) (*b*) (6), 8 (5).
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Gold Coast—Courts Ordinance (Laws of the Gold Coast, 1936, c. 4), s. 63, Sch. III, Ord. 41, rr. 1, 2 52
Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, ss. 15, 22 994
Pakistani Residents (Citizenship) (Amendment) Act, No. 37 of 1950, s. 4 994
Singapore—Evidence Ordinance (Laws of Singapore, 1955, c. 4), ss. 107, 115 599
U.S.A.—1936 Carriage of Goods by Sea Act, ss. 2, 3 (1), 4 (1) (2), 5, 13 688

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Aliens Order, 1953 (S.I. 1953, No. 1671), arts. 2 (1) (*b*) (2) 453
Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145), reg. 90 (1) 882
Companies (Winding-up) Rules, 1949 (S.I. 1949, No. 330 (L.4)) 126
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Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O., 1947, No. 806), Sch., art. II (1) (*i*) (3); art. III (2) (3) 636
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Ord. 22, r. 1 (2) 224
Ord. 53D, r. 3 (2) 975

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[CHANCERY DIVISION.]

WEINBERGS WEATHERPROOFS LTD. *v.* RADCLIFFE PAPER MILL CO. LTD.

1957
Nov. 5, 6, 27.

Harman J.

Landlord and Tenant—Business premises (Security of Tenure)—Break clause — Notice to determine terms — Whether notice effective — Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 24.

By a lease dated October 17, 1950, certain rooms in a building were demised to the plaintiffs for a term of 20 years from September 29, 1950. Clause 5 of the lease provided that if either the landlords or tenants were desirous of determining the lease on the expiration of the first seven or 14 years of the term they should give six months' notice in writing to the other side. In January, 1957, the landlords sold the entire building to the defendants, who informed the plaintiffs of the sale, and on January 18, 1957, the defendants served on the plaintiffs a notice of their intention to determine the lease and the term thereby created on September 29, 1957:—

Held, that the notice was effective to cut down the term demised by the lease and the plaintiffs were holding over merely by virtue of the Landlord and Tenant Act, 1954; the defendants could, however, at any time serve a statutory notice under section 25 of the Act and the plaintiffs could at any time apply for a new tenancy under section 26.

Castle Laundry (London) Ltd. v. *Read* [1955] 1 Q.B. 586; [1955] 2 W.L.R. 943; [1955] 2 All E.R. 154 considered.

Per curiam. The bargain entered into by the parties to a lease should not be altered by statute more than was necessary to give the statute its proper effect.

ADJOURNED SUMMONS.

By this summons the plaintiffs, Weinbergs Weatherproofs Ltd., asked the court to determine whether a notice dated January 18, 1957, and served on the plaintiffs by the defendants, the Radcliffe Paper Mill Co. Ltd., was effective to determine the terms demised by two leases dated, respectively, October 17, 1950, and January 7, 1953.

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By a lease dated October 17, 1950, the Bleachers Association Ltd. as landlords demised to the plaintiffs certain rooms in part of a building known as The Clough Bleachworks, Radcliffe, Lancashire, for a term of 20 years from September 29, 1950, at a rent of £270 per annum payable quarterly in arrear. The lease contained the usual lessee's covenants to repair, a proviso for re-entry and a covenant for quiet enjoyment. Clause 5 provided: "Provided always and it is hereby agreed that if the "[tenants] shall be desirous of determining this present lease "at the expiration of the first seven or fourteen years of the "term hereby granted and of such their desire shall give six "calendar months' previous notice in writing to the [landlords] "and shall pay all the rent and perform and observe all the "covenants hereinbefore reserved and contained and on the part "of the [tenants] to be paid performed and observed up to such "determination or if the [landlords] shall be desirous of deter-"mining this present lease at the expiration of the first seven or "fourteen years of the term hereby granted and of such their "desire shall give six months' previous notice in writing to the "[tenants] then in either of the said cases immediately after "the expiration of the said terms of seven years or fourteen "years as the case may be this present demise and everything "herein contained shall cease and be void."

By a second lease dated January 7, 1953, between the same parties and expressed to be supplemental to the first, the landlords demised to the tenants further rooms in the same building for a term of 18 years from September 29, 1952, at a rent of £130 per annum. The lessee's covenants were made by reference to the principal lease and clause 3 provided: "The "covenant on the part of the [tenants] contained in clause 4 "of the principal lease and provisos contained in clauses 3 and 5 "thereof shall be deemed incorporated herein as if the same were "herein repeated." The plaintiffs occupied all the rooms demised by both leases.

In 1957 the landlords sold the whole of the Clough Bleachworks to the defendants and on January 17 communicated this fact to the plaintiffs. On January 18 the defendants sent to the plaintiffs a document in the following terms: "In pursuance of "the powers contained in the leases made October 17, 1950, and "January 7, 1953, between the Bleachers Association Ltd. of "the one part and yourselves of the other part under which the "rooms numbered . . . thereby demised are held we—and then "[the solicitors to the defendants]—hereby give you notice that "it is the intention of the said Radcliffe Paper Mill Company Ltd. "to determine the said leases and to put an end to the terms "thereby respectively created on September 29, 1957, being the "end of the first seven years of the said terms." The plaintiffs, to whom Part II of the Landlord and Tenant Act, 1954, applied, have sought a declaration that as to the true construction of the leases and the Landlord and Tenant Act, 1954, the notice dated

January 18, 1957, was ineffective to determine the terms granted by the leases and that the defendants were not entitled to give the plaintiffs a notice under the Act to terminate their tenancy on any date before September 29, 1964. No point was taken on behalf of the plaintiffs that Michaelmas, 1957, was not the end of the first seven years of the second term.

A. J. Balcombe for the tenants.
Alan Fletcher for the landlords.

The following case, in addition to those mentioned in the judgment, was cited in argument: *Bagettes Ltd.* v. *G. P. Estates Co. Ltd.*[1]

Cur. adv. vult.

November 27. HARMAN J. read the following judgment in which he stated the facts and continued: It is the contention of the plaintiffs that by reason of the Landlord and Tenant Act, 1954, section 24, this notice is of no effect, and that they remain in occupation of the demised property under the two leases which cannot now be broken until 1964. The defendants on the other hand do not contend that the notice was sufficient to put an end to the leases at Michaelmas, 1957, but they argue that it was sufficient to abridge the leases at that date with the result that the plaintiffs are now in occupation merely by the effect of the statute. It is no part of the plaintiffs' case that the notice of January 18, 1957, would not have been sufficient but for the statute, to bring the terms under both leases to an end. No point was made that in respect of the second lease, Michaelmas, 1957, was not the end of the first seven years of the term thereby granted (as the notice states) but the end of the fifth year.

A reference to the long title of the Landlord and Tenant Act, 1954, shows that the object of Part II was "to enable tenants "occupying property for business . . . purposes to obtain new "tenancies in certain cases." It is agreed that the plaintiffs are tenants answering that description and that Part II of the Act applies to them. I need not therefore read section 23. Section 24 is in these terms: "(1) A tenancy to which this Part "of this Act applies shall not come to an end unless terminated "in accordance with the provisions of this Part of this Act." Section 25 (1) provides: "The landlord may terminate a tenancy "to which this Part of this Act applies by a notice given to the "tenant in the prescribed form specifying the date at which the "tenancy is to come to an end (hereinafter referred to as 'the "'date of termination')." "(2) Subject to the provisions of "the next following subsection, a notice under this section shall "not have effect unless it is given not more than twelve nor less "than six months before the date of termination specified "therein." Subsections (3), (4), (5) and (6) of section 25 deal

[1] [1956] Ch. 290; [1956] 2 W.L.R. 773; [1956] 1 All E.R. 729.

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further with notices given under section 25. It is not suggested that such a notice has been given. Section 26 deals with the tenant's request for a new tenancy and no such request has been made here. The definition section, section 69, under the heading "Notice to Quit" is in these terms: "'Notice to quit' means a "notice to terminate a tenancy (whether a periodical tenancy or "a tenancy for a term of years certain) given in accordance with "the provisions (whether express or implied) of that tenancy."

The result is that a notice exercising a right to break a lease for a term of years is included in the expression "notice to quit" in this Act. It is to be observed, however, that this phrase does not refer to a notice given by the landlord under the Act, but to the common law notice given in accordance with the terms of the lease or the law apart from the Act.

The plaintiffs' argument has the merit of simplicity, namely, that their tenancies are tenancies of 20 years' and 18 years' duration ending at Michaelmas, 1970, and are still continuing as such because no notice has been given in accordance with section 25. The defendants argue that the notice was, notwithstanding the Act, effective to cut down the terms of the two demises to seven and five years, respectively, and that the plaintiffs are now holding over merely by virtue of the statute and not by virtue of the leases alone. If this be right the defendants are in a position to serve on the plaintiffs at any time a notice conforming to section 25 and thus set the machinery of the Act in motion and so put an end to the plaintiffs' right of occupation unless they successfully apply for a new tenancy under section 26. In that view it would also be open to the plaintiffs to apply for a new tenancy whether or not they be served by the defendants with notice under section 25.

These sections have been discussed in the Queen's Bench Division. In *Orman Brothers Ltd.* v. *Greenbaum*,[1] the Court of Appeal, affirming Devlin J., held that a notice to quit not in conformity with the Act was invalid because though given before the Act came into force it was given for a date after that event. Lord Goddard C.J. said this[2]: "Therefore the position is that "the Act was passed on July 30, and was to come into force on "October 1; and when the Act is in force there can be no doubt "that the landlord must give a notice in the prescribed form. "I do not think anyone doubts that the words 'A tenancy to "'which this Part of this Act applies shall not come to an end "'unless terminated in accordance with the provisions of this "'Part of this Act' means 'shall not come to an end unless it "'is brought to an end by the method laid down by the Act'; "that is to say, by notice to quit in the prescribed form. Section "66 of the Act is in these terms: '(1) Any form of notice

[1] [1954] 1 W.L.R. 1520; [1955] 1 W.L.R. 248 (C.A.); affirming [1954] 3 All E.R. 731; [1955] 1 All E.R. 610.

[2] [1955] 1 W.L.R. 248, 251.

" ' required by this Act to be prescribed shall be prescribed by " ' regulations made by the Lord Chancellor by statutory instru- " ' ment.' " He added[3]: " I desire to say that we are here " considering a notice to quit given after the regulations came " into force—because the regulations came into force on August " 27—which became effective on a day after the Act came into " force. It is not a notice to quit given before the regulations " came into force, nor is this a case in which the notice to quit " was given for a day before the Act came into force. It is a " case where the regulations had come into force three days " before the notice to quit was given, and where the date of " expiry of the notice to quit was October 4, that is, three days " after the Act came into operation. When one bears that in " mind, it is really unarguable that the landlord had not to use " the statutory form, because the provisions of the Act are, first " of all, that the Lord Chancellor can by regulation prescribe " when a particular form is to become effective." That judgment must of course be considered in relation to the facts of the case. The tenancy was a four-weekly one and no question of a break in a term arose. The only question was one of dates. It has no materiality for my purposes.

More relevant is *Castle Laundry (London) Ltd.* v. *Read.*[4] In that case the lease was for a term of 21 years, determinable at the seventh or fourteenth year on six months' notice in writing. Such a notice was served by the landlords on June 11, 1954, before the Act was passed and was admittedly a good notice when served. The defendants argued that it was invalidated by the Act which came into force during its currency on October 1, 1954. The judge held that this was not so, that it was effective to cut the term down to seven years though not to put an end to the tenancy which was, as he held, terminated by a six months' notice in the statutory form dated January 19, 1955. The argument there was chiefly as to the efficacy of the second or statutory notice, but the validity of that depended of course on whether the earlier notice cutting down the term to seven years was effective. The judge said this[5]: " The desire of the landlord " being to invoke that clause—[as to the break]—and to terminate " the lease at the first opportunity at the end of the seven year " period, he gave notice on June 11, 1954, expressing his desire, " and giving the tenants, the plaintiffs in this action, notice to " quit and to deliver up possession on December 25, 1954. It is " agreed that that was a proper notice under the lease and one " which, so far as the contractual relationship between the " parties was concerned, would have brought this lease to an end " on December 25, 1954, and that the other provisions in the " lease which were available for its further performance would, " in accordance with clause 3 (b), have ceased to have any

[3] [1955] 1 W.L.R. 248, 252.

[4] [1955] 1 Q.B. 586; [1955] 2 W.L.R. 943; [1955] 2 All E.R. 154.

[5] [1955] 1 Q.B. 586, 591.

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" effect, and everything else would have been void." Then he discusses the intervention of the Act and goes on to say [6]: " The " notice of January 19, 1955, given by the landlord was a notice " terminating the tenancy on July 22, 1955, which complies with " section 25 (2) as regards duration. What is said on behalf of " the landlord—and, I think, accurately said—is that, having " regard to the fact that October 1, 1954, had passed, the Act " makes it impossible to terminate a tenancy unless it is termi- " nated in accordance with the provisions of the Act, and the " Act, through the regulations, has specified the appropriate form " of notice terminating the tenancy, and that that notice has been " given. The contractual tenancy, it is said, came to an end on " December 25, 1954, but, because of the operation of section 24, " the tenancy did not come to an end and could not come to an " end unless terminated in accordance with the Act; the tenancy " was said, I think rightly, to continue as a business statutory " tenancy which, the landlord now contends, has been terminated " by the notice which the Act requires."

The case is distinguishable from the present in that there the notice to break the term was given before the Act was passed and was, therefore, undoubtedly valid when given, and what the judge held was that the coming into force of the Act did not invalidate it so far as it operated to break the term, though it made it ineffective to end the tenancy which continued as what he called a business statutory tenancy. This is a convenient phrase so long as one does not confuse it with the so-called statutory tenancy under the Rent Restrictions Acts, that, of course, being not a tenancy at all, whereas having regard to the language used in the Act of 1954 the term must be thought of as continuing by way of a statutory extension (see the observations of Denning L.J. in *H. L. Bolton* v. *Graham*,[7] where the following appears: " In his Lordship's opinion the right view was that the " common law tenancy subsisted with a statutory variation as to " the mode of termination "). Sellers J. also speaks of the " contractual relationship " between the parties.[8] It does not appear from the report whether the landlord giving the notice was the original lessor, though it does appear that the plaintiffs were the original lessees. The point was taken before me that here, anyhow, the parties were not the original lessor and lessee and there was no privity of contract between them but only privity of estate. In my view this has no importance, for it is not to be denied that an assign of the reversion retains as against an assign of the lease the right originally made by contract between the original lessor and lessee to break the term by notice. The decision of Sellers J. has been adversely commented upon in a note in the Law Quarterly Review, Vol. 71, 1955, p. 329, where

[6] [1955] 1 Q.B. 586, 592.

[7] [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804, 809; [1956] 3 All E.R. 624.

[8] [1955] 1 Q.B. 586.

it is called a hard case. With all respect to the author of that note I do not agree with him. Nevertheless the case, right or wrong, is not an authority for the view that a notice served as here after the coming into force of the Act of 1954 is still valid to abridge the term of the lease. My attention was also called to a note of a decision of Pilcher J. in 1956.[9] The note is to be found in the Second Permanent Supplement to Woodfall's Landlord and Tenant, 25th edn., p. 337, and appears to afford some support to the defendants, but the report is so brief as to be of little value. I say no more with regard to it.

In this state of the authorities I must in effect make up my own mind. In my judgment the notice has the limited effect for which the defendants contend. Having regard to section 24 of the Act of 1954 it is not effective to put an end to the tenancies, but I do not see why it should be of no effect at all. What were the terms of years created by the leases? —not 20 years and 18 years certain but 20 and 18 years determinable by notice at Michaelmas, 1957. This was the bargain made between the plaintiffs as parties to the leases, and the rights and obligations under them have devolved on the parties to this suit. It does not seem to me to be necessary, in order to give to the Act that effect which the statute intended, to deprive the landlords of the right to shorten the term in this way. The Act still leaves the tenants with the right of occupation which they would have had if the terms had originally been of seven and five years respectively, and the right to claim a new tenancy whether the landlords serve a statutory notice to determine under section 25 or not. The tenants have therefore got the right to obtain a new tenancy which they are promised in the long title to the Act and I do not see why they should have something more which the instruments of lease under which they held did not give them. The principle must be that the bargain should not be altered by the statute more than is necessary to give the statute its proper effect and I hold, accordingly, that though section 24 operated to prevent the notice from causing the terms to come to an end it was effective to break the terms as the instruments of lease provided that it should do. There is still time for the tenants to exercise their rights under section 26 (2) if no statutory notice be served by the landlords, or under section 29 (2) and (3) if such a notice shall be served.

I drew some comfort from the fact that the learned editors of the second permanent supplement to Woodfall's Landlord and Tenant, 25th ed., appear to take the same view as I have done on this question (see p. 226).

If the view above expressed be wrong I have some difficulty in seeing how a landlord can ever avail himself of his right under a "break clause" in a lease. To take the present case

[9] *Milletts (Victoria) Ltd.* v. *Northley House* (unreported).

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the landlords, in order to exercise their rights at the end of the first seven or fourteen years of the term of the lease dated October 17, 1950, must give six previous months' notice in writing to the lessees of their desire to determine the lease. This is to be contrasted with the requirements of section 25 (1) whereby the tenancy can only be determined by a notice "in "the prescribed form." These forms were prescribed by the Lord Chancellor originally by Statutory Instrument No. 1107 of 1954, which as amended in respects not here relevant, was in force up to July 9, 1957. Under this instrument (paragraph 4) it is provided that the forms in the appendix or forms substantially to the like effect shall be used for, among other things, a notice under the provisions of section 25 of the Act. Turning to form (vii), I do not myself see how, if the notice is to be substantially to the effect of that form, it can comply with the break clause, with the result that either the right to break will not be effectually exercised or the notice will not be in the statutory form and will therefore be ineffective. In the present case the result would be that no effective notice could ever be served until the 20th year, a departure from the bargain between the parties which I cannot think to have been contemplated by the legislature.

I hold, therefore, that the notice was effective to determine the terms given by the leases subject, nevertheless, to the provisions of the Act.

Declaration accordingly.

Solicitors: *Carr, Sandelson & Co.; Woodcock, Ryland & Co. for Woodcock & Sons, Haslingden, Lancs.*

P. P.

[PROBATE, ETC., DIVISION.]

1957
Nov. 13, 14, 15, 18, 19.

Sachs J.

GILBERT *v.* GILBERT AND ABDON (ADAMS INTERVENING).

Husband and Wife—Practice (in matrimonial cases)—Submission of no case—Divorce—Submission of no case by intervener—Election—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 5.

In the exercise of its powers under section 5 of the Matrimonial Causes Act, 1950, the court has an unfettered discretion to decide whether or not to put counsel who invokes the section to his election, and is not subject to any rule of practice that counsel must automatically be put to his election.

Alexander v. *Rayson* [1936] 1 K.B. 165; 52 T.L.R. 131; *Yuill* v. *Yuill* [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183 and *Beal* v. *Beal* (*Reade cited*) [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1228n. considered.

[Reported by R. M. OVERTON FOX, Esq., Barrister-at-Law.]

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DEFENDED PETITION for divorce.

The husband in his petition alleged that his wife had committed adultery with the co-respondent, the wife in her answer admitted the adultery but alleged that the husband had previously to such adultery committed adultery himself with the intervener and that (1) his adultery was, inter alia, misconduct conducing to her adultery, and (2) she be entitled to a decree on her answer on the ground of his adultery. At the trial counsel for the intervener submitted at the close of the wife's case that the court should exercise its discretionary power under section 5 of the Matrimonial Causes Act, 1950,* to dismiss him from the suit. He further submitted that the court should not put him to his election because the discretion given to the court by section 5 was quite independent of the common law practice of putting a party, who wishes to make a submission of no case, to his election. In the course of this submission counsel for the husband, in reply to a question by Sachs J., stated that he intended to call the husband to give evidence as to whether he had committed adultery with the intervener and that he was not going to take his stand on section 32 (3) of the Matrimonial Causes Act, 1950.†

The report is confined to the ruling given by Sachs J. on this point.

R. J. A. Temple Q.C. and *Colin Sleeman* for the petitioner.
W. A. L. Raeburn Q.C. and *Maurice Share* for the respondent.
Joseph Jackson for the intervener.

All the cases cited in argument are referred to in the judge's ruling.

SACHS J. This is not the first occasion that an application by a co-respondent or intervener has been made to me in similar circumstances. The last such application was in *Hopper* v. *Hopper*[1] at Leeds Assizes in July, 1955. There is, however, apparently no direct decision on the point so far as it concerns co-respondents and interveners, though there are the very helpful

* Matrimonial Causes Act, 1950, s. 5: "In any case in which, on the "petition of a husband for divorce on "the ground of adultery, the alleged "adulterer is made a co-respondent "or in which, on the petition of a "wife for divorce on the ground of "adultery, the person with whom the "husband is alleged to have committed "adultery is made a respondent, the "court may, after the close of the "evidence on the part of the peti-"tioner, direct the co-respondent or "the respondent, as the case may be, "to be dismissed from the proceedings "if the court is of the opinion that "there is not sufficient evidence against "him or her."

† Matrimonial Causes Act, 1950, s. 32 (3): "The parties to any pro-"ceedings instituted in consequence "of adultery and the husbands and "wives of the parties shall be com-"petent to give evidence in the pro-"ceedings, but no witness in any "such proceedings, whether a party "thereto or not, shall be liable to be "asked or be bound to answer any "question tending to show that he "or she has been guilty of adultery "unless he or she has already given "evidence in the same proceedings in "disproof of the alleged adultery."

[1] July, 1955; unreported.

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observations of Mr. Commissioner Latey in *Beal* v. *Beal* (*Reade cited*).[2] Mr. Temple, to whom I put the question as amicus curiae, was unable to bring to mind any case since *Yuill* v. *Yuill*,[3] where a co-respondent or intervener had been dismissed from the suit at the stage now under consideration. On the other hand, there is the recent case in New Zealand of *Matina* v. *Matina*,[4] where the court, on parallel provisions in their matrimonial causes Acts, dismissed a co-respondent from the suit.

As the evidence in the case before me, in so far as it concerns the alleged adultery of the intervener, is of a type which merits the court's attention being directed to the provisions of the above section 5, it becomes necessary, before examining that evidence, to consider what is the correct approach to Mr. Jackson's application, having regard to *Alexander* v. *Rayson*,[5] *Yuill* v. *Yuill*,[6] and the observations of Mr. Commissioner Latey in *Beal* v. *Beal* (*Reade cited*).[7]

Section 5 of the Matrimonial Causes Act, 1950, being part of a recently consolidated statute, it is clear that it remains effective; and I doubt whether that part of the judgment of Mr. Commissioner Latey in *Beal* v. *Beal* (*Reade cited*) which is phrased: "I have now come to the conclusion that the section is really "obsolete,"[8] was meant to convey anything more than that, under modern practice, the occasions in which the discretion conferred by the section will be exercised in favour of an intervener are likely to be somewhat rare.

To my mind, section 5 of the Matrimonial Causes Act, 1950, gives the court a statutory discretion under which in suitable cases it may in future, as in the past, dismiss a co-respondent or an intervener at the conclusion of the evidence of the party seeking to make a case of adultery against that co-respondent or intervener. Nothing in the way of a rule of practice could prevail against the provisions of that section or take away that discretion from the courts: whether or not to put a co-respondent or intervener to election as to calling evidence must depend on the circumstances of the case under consideration.

The factors which have to be taken into account when applying one's mind to the question of discretion must, of course, include those which the authorities show to be the basis of the decisions in *Alexander* v. *Rayson*[9] and the cases which followed it. High amongst the factors to be taken into account is the danger of causing litigation to be made additionally expensive and additionally protracted where the judge has to make a ruling in a borderline case such as the one now before me. Another, and to my mind a cogent, factor is the danger of producing an absurd result in a particular case. For instance, the spouse accused of

[2] [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1228n.
[3] [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183.
[4] [1957] N.Z.L.R. 440.
[5] [1936] 1 K.B. 165; 52 T.L.R. 131.
[6] [1945] P. 15.
[7] [1953] 1 W.L.R. 1365.
[8] Ibid. 1369.
[9] [1936] 1 K.B. 165.

adultery may yet, after the ruling of the court under section 5, go into the witness-box and there give in testimony facts which tend both against him or her and against the party with whom adultery is alleged and which, when added to the previous evidence, may result in a finding that that adultery took place. In such a case one could then come upon the position that the adultery had been proved against the intervener upon the totality of evidence available against him or her, and yet that intervener had been already dismissed from the suit. It was for that reason that I felt it appropriate to ask Mr. Temple whether he was going to call the husband in the present case to testify on the issue as to whether there had been adultery, or whether he was going to take his stand on section 32 (3) of the Matrimonial Causes Act, 1950. Mr. Temple gave an unequivocal answer that he was going to call his client on the point which I have mentioned.

In the circumstances I have come to the conclusion in this case—as in the one which fell for decision at Leeds Assizes—that counsel for the intervener should be put to his election. This, accordingly, I propose to do. In the nature of things a similar result may ensue in the great bulk of causes where applications are made by co-respondents and interveners under the provisions of section 5. That, however, does not alter the position that each such application must be the subject of a discretion to be exercised on the facts of the case as opposed to one which should be exercised according to automatic rule.

Solicitors: *Braund & Fedrick, Woolwich; Benson, Mazure & Co.; Tatton, Gaskell & Tatton.*

[HOUSE OF LORDS.]

TAYLOR . . . . . APPELLANT;

AND

NATIONAL ASSISTANCE BOARD AND ANOTHER RESPONDENTS.

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1957
Oct. 9, 10,
Dec. 4.

Legal Aid—Disposable income—Subject-matter of dispute—Order for alimony pending suit after application but before computation by National Assistance Board—Whether claim for alimony pending suit "the subject-matter of the dispute"—Legal Aid and Advice Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 51), *s.* 4 (3)—*Legal Aid (Assessment of Resources) Regulations,* 1950 (*S.I.* 1950, *No.* 1358), *reg.* 2—*Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166).

By section 4 (3) of the Legal Aid and Advice Act, 1949, the regulations made thereunder "shall include provision for securing "that the resources of a person seeking or receiving legal aid shall "be treated as not including the subject-matter of the dispute."

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN and LORD KEITH OF AVONHOLM.

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Taylor v. National Assistance Board.

On June 14, 1955, a wife respondent in a divorce suit applied for a civil aid certificate to defend divorce proceedings. On June 27, 1955, an interim order for alimony pending suit at the rate of £450 per annum less tax was made in her favour. That sum represented her sole income at the material time. On August 18, 1955, the National Assistance Board assessed the wife's disposable income and capital, and fixed her maximum contribution at £107; in doing so, the board took into account as part of her resources the amount of alimony pending suit ordered; and the Law Society offered her a civil certificate on that footing:—

Held, that the sum of alimony pending suit had been properly taken into account. At the date of the application there was nothing to be included in the computation because a mere claim for alimony was not a resource on which a value could be put, but, once the order for alimony was made, the wife's disposable income included the sum payable and nothing excluded it from being taken into account, since it was never the subject-matter of the dispute.

Thorogood v. *Thorogood* (1955) The Times, October 20, p. 5, approved and distinguished.

Decision of the Court of Appeal [1957] P. 101; [1957] 2 W.L.R. 189; [1957] 1 All E.R. 183 affirmed.

Appeal from the Court of Appeal (Denning and Hodson L.JJ. and Ormerod J.).

This was an appeal from three orders of the Court of Appeal, dated December 19, 1956, whereby the respective appeals of the respondents, the National Assistance Board and the Law Society, from an order made by Lord Merriman P., dated May 14, 1956, were allowed, and a notice in support of his order, dated July 12, 1956, and served by the present appellant, Mrs. Millicent Alexander Taylor, was dismissed.

The facts are fully stated in the opinion of Viscount Simonds.

Roger Ormrod and *R. B. Holroyd Pearce* for the appellant.

Sir Harry Hylton-Foster Q.C., *S.-G.*, and *Rodger Winn* for the National Assistance Board.

John Latey Q.C. and *B. H. Anns* for the Law Society.

Counsel referred to *Thorogood* v. *Thorogood*[1] and *Moss* v. *Moss*.[2]

Their Lordships took time for consideration.

Dec. 4. Viscount Simonds. My Lords, in this case the appellant obtained from the learned President of the Probate, Divorce and Admiralty Division a pronouncement and declaration that in relation to an application made by her for a civil aid certificate to enable her to defend and to cross-petition in a suit for divorce brought by her husband she was entitled not to have the amount of any sum ordered to be paid to her for alimony pendente lite included in the computation of her disposable income

[1] (1955) The Times, October 20, p. 5.

[2] [1956] P. 373; [1956] 2 W.L.R. 469; [1956] 1 All E.R. 291.

for the purposes of her contribution to the said civil aid certificate. From this decision the present respondents, the National Assistance Board and the Law Society, appealed to the Court of Appeal, and that court, setting aside the learned President's order, held that the National Assistance Board, whom I will call the board, had rightly taken into account the alimony pendente lite to which she was entitled. Hence this appeal.

The relevant facts appear to be these: On March 10, 1955, the husband of the appellant presented a petition for divorce against her on the ground of cruelty. She thereupon applied to the appropriate committee of the Law Society for an emergency civil aid certificate under the Legal Aid and Advice Act, 1949, to enable her to defend the suit, to cross-petition for divorce on the ground of cruelty, and to apply for alimony pendente lite. Such certificate was granted on May 16, 1955. On May 19 the appellant accordingly issued a notice of application for alimony pendente lite, and on June 27, 1955, an interim order was made in her favour for alimony pendente lite at the rate of £450 per annum less tax so long as she continued to occupy the former matrimonial home, to be increased to the rate of £650 per annum when she vacated it. On June 14, 1955 (13 days before the interim order was made) the appellant made a formal application for a full civil aid certificate to enable her to defend the suit, to cross-petition for divorce and to claim maintenance for herself and the children of the marriage. On July 18, 1955, the board in purported exercise of their duties under section 4 of the said Act assessed the appellant's "disposable income" at the sum of £410 per annum. For reasons immaterial to this appeal this sum was afterwards reduced to £370 per annum. It is common ground that the greater and the lesser sum alike were based on the inclusion in her resources of the alimony ordered to be paid to her pendente lite.

The question is whether this sum was rightly included. The appellant contends that it was not, and relies on section 4 (3) of the Act, which provides that the regulations to be made thereunder shall include provision for securing that "the resources of "a person seeking and receiving legal aid shall be treated as not "including the subject matter of the dispute," and on regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, which is in these terms: "In computing the rate of income or "the amount of capital of the person concerned there shall be "excluded the value of the subject-matter of the dispute in "respect of which application has been made for a certificate."

This section and regulation must be interpreted in their context and I think that it may first be recalled that the Act is "an Act to make legal aid and advice in England and Wales . . . "more readily available for persons of small or moderate "means. . . ." Who are "persons of small or moderate "means"? Section 2 (1) enacts that, subject to that part of

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the Act, legal aid shall be available for any person whose disposable income does not exceed £420 a year, with a provision as to capital which can be ignored, and further enacts by subsection (2) (*c*) that a person receiving legal aid in connexion with any proceedings may be required to make a contribution to the legal aid fund in respect of the sums payable thereout on his account, and (*d*) that any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the legal proceedings shall be paid to the legal aid fund. Section 3 limits the contributions to be made by the legally assisted person, and by subsection (4) provides that, except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings. Then comes section 4, to subsection (3) of which I have already referred: the earlier subsections define a person's disposable income by reference to the rate of his income after making certain prescribed deductions and allowances, and provide for the making of regulations as to the manner in which the rate of a person's income is to be computed.

I need not, at this stage, refer to any other sections of the Act nor to the general regulations made thereunder, but it is necessary to look at certain of the Legal Aid (Assessment of Resources) Regulations, 1950, which were made pursuant to section 4 of the Act. By regulation 1 (2) "the period of computation" is defined to mean the period of 12 months next ensuing from the date of the application for a certificate or such other period of 12 months as in the particular circumstances of any case the board may consider to be appropriate. Regulation 2 provides that in computing the rate of income of the person concerned there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate: to this I have already referred. Regulation 7 provides for the determination of a person's disposable income in accordance with the schedules to those regulations and regulation 10 for the redetermination of such income if the circumstances of the person concerned have altered.

Applying these regulations, the board made the assessment and re-assessment of the appellant's disposable income, to which I have already referred, and there is no doubt that they have acted correctly and directed her to make the proper contribution to the legal aid fund if the alimony pendente lite which was payable to her was rightly included in her resources. This is the single question in issue.

The proceedings have taken an unusual course. The learned President had shortly before the present case was heard by him

presided in a Divisional Court in an unreported case of *Thorogood* v. *Thorogood*.[1] That case (I take the facts as he has stated them) was an appeal by the husband from the decision of certain justices on his complaint to reduce the amount of an order in favour of his wife from the maximum amount of £5 a week, with the addition of the maximum sum of 30s. in respect of a child of whom she had been given the custody. The ground of the complaint was that since the date of the order the husband's means had decreased. The magistrates had decided that there was no sufficient change to justify a revision of the order. The wife had been granted a civil aid certificate to resist the appeal and her disposable income had been computed at £83 per annum. It was clear that this figure could not have been arrived at without taking into account the amount of the order, and upon this the learned President is reported as saying[2]: " I am sure, and I have " verified my references, that legal aid committees are doing that " which the Act of Parliament expressly forbids them to do, " namely, taking into account in assessing the income the actual " subject of the litigation, namely, the amount of the order: and " that is utterly wrong."

In the present case learned counsel for the first respondents assured the learned President that they accepted the correctness of his decision in *Thorogood*.[3] They did so upon the footing that in that case the single matter in dispute was whether the amount of the order should be reduced. But their concession appeared to involve also the general admission that the question of alimony could be part of the " subject-matter of the dispute " within the meaning of the relevant section and regulation. It was accordingly left to the President to decide only upon the validity of a further argument which was presented to him to the effect that, the order for alimony pendente lite having been made before the assessment of the appellant's disposable income, the question of such alimony had at the date of assessment ceased to be part of the subject-matter of dispute and, accordingly, the value thereof could properly be taken into account in the computation. The learned President rejected this argument and made the declaration to which I have already referred.

When the matter came before the Court of Appeal the concession thus made was by leave of the court withdrawn, and counsel for the respondents urged as their primary argument that alimony could not, any more than damages claimed in an action, be " the " subject-matter of the dispute." They maintained also the argument in regard to this particular case which had been rejected by the learned President. The Court of Appeal were unanimous in upholding the respondents' primary argument and I think, though it is not very clear, that they accepted the alternative argument also.

[1] (1955) The Times, October 20, p. 5.

[2] [1956] P. 470, 496; [1956] 3 W.L.R. 290; [1956] 2 All E.R. 455.

[3] (1955) The Times, October 20, p 5.

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My Lords, I have found great difficulty in this case. It has been said, no doubt justly, by counsel for the appellant, who presented her case with great ability, that any conclusion to which we may come will lead to anomalies. But I must take leave to doubt whether any result could operate more unfairly than that a sum paid by a husband to his wife under a separation agreement or even by way of voluntary allowance should not, but that a sum paid to her as alimony pendente lite should, be excluded from the computation of her resources. And such a result may be thought to be not only unfair but absurd in its incidence, when it is remembered that the very same alimony would undoubtedly have to be included if she sought a certificate to enable her to defend a claim brought against her by a tradesman. In the present case, we are dealing with a modest sum which may well be thought to leave little margin for a contribution to legal expenses, but that is a consideration which would have equal weight whatever the action the wife sought to prosecute or defend. The inescapable fact is that so long as she is in receipt of alimony of £450 per annum, even if she has no other income, she has resources which remove her from the class of persons from whom under the Act no contribution is exigible.

These are considerations which cannot prevail if no other interpretation is permissible than that either a claim for alimony pendente lite or such alimony itself is, at the relevant date, part of the subject-matter of the dispute. But they must be given due weight if an alternative interpretation is open to the court.

My Lords, I have used the words " at the relevant date " and pointed to the alternative " a claim for alimony " or " such " alimony itself " for this reason. The Act, as I have already stated, requires that the regulations to be made under it shall secure that the resources of a person seeking legal aid shall be treated as not including the subject-matter of the dispute: the regulation which is intended to give effect to this requisition provides that in computing the rate of income of the person concerned there shall be excluded the *value* of the subject-matter in respect of which application has been made for a certificate. The regulation by its reference to value emphasizes what is in any event clear, that only that can be either included or excluded to which a value can be attributed, and it appears to me impossible to regard a claim for alimony pendente lite as a resource upon which a value can be put. But at the date of the application, if that is the relevant date for determining what is the subject-matter of the dispute, there is nothing but a claim. There is nothing therefore to be excluded from the computation. Equally, no doubt, at the same date there is nothing to be included in the resources. So far I agree with the Court of Appeal. But whether or not the subject-matter of the dispute is finally determined at the date of the application, there is no finality about the determination of disposable income. For regulation 10, to which I have referred, provides for reassessment

when circumstances alter. It therefore becomes necessary to ask when an interim order for alimony has been made, what are then the resources and disposable income of the person concerned. The answer to this question must be that they include the sum payable as alimony, and it must be added that this sum is not, and never has been, the subject-matter of dispute: there is, therefore, no ground for excluding it.

I come, therefore, to the same conclusion as the Court of Appeal in the present case, though I cannot wholly agree with their reasons. In particular, I think it right to say that, in my opinion, the case is clearly distinguishable from *Thorogood's* case.[3] There the single matter of dispute in the proceedings was whether the amount of maintenance under an order already operative should be reduced, and I think that the learned President was right in saying that it must be excluded. Here at the relevant date, that is, the date of assessment or reassessment, the appellant was indisputably entitled to her alimony pendente lite, and I see no reason either in the language of the Act and relevant regulations, still less upon a broad consideration of their purpose, why it should not be taken into consideration by the board in determining what contribution she ought to make.

I must allude to one further argument. It is provided by general regulation 16 that, subject to the provisions of paragraph 8 thereof, all moneys payable to an assisted person (inter alia) by virtue of any agreement or order made in connexion with the action, cause or matter to which his certificate relates, whether such agreement be made before or after proceedings are actually begun, shall be paid to the solicitor of the assisted person and dealt with by him as therein provided, but paragraph 8 provides that the regulation shall not apply to (inter alia) payments made under certain sections of the Matrimonial Causes Act, 1950. The result of this is, that in the present case the moneys payable to the appellant by way of alimony would be payable not to her solicitor but to her, and would not be subject to the provisions of the regulation. But paragraph 8 was not in the original regulation: it was introduced at a later date. It was urged, therefore, that the conclusion to which I have come would, but for its introduction, have led to the result that the same sum of alimony would have been both subject to the provisions of regulation 16 and liable to be included in her resources for the determination of her contribution, a result, it was said, which should be avoided, if a different interpretation could avoid it. My Lords, I conceded at an early stage of this opinion that any interpretation might lead to anomalies, and it is possible that, if the regulation had not been amended, this might have been such an anomaly. But the possibility of an anomaly which has been removed cannot alter the clear conclusion to which I have come. Any other conclusion would, in my opinion, lead to far greater ones.

[3] (1955) The Times, October 20, p. 5.

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The appeal should, in my opinion, be dismissed, and I move your Lordships accordingly.

LORD MORTON OF HENRYTON. My Lords, section 12 (1) of the Legal Aid and Advice Act, 1949, provides that: "The Lord "Chancellor may make such regulations as appear to him neces- "sary or desirable for giving effect to this Part of this Act or for "preventing abuses thereof." Section 4 (3) of the same Act provides that: "The regulations shall include provision for "securing that the resources of a person seeking or receiving "legal aid shall be treated as not including the subject matter "of the dispute." The provision made by regulation to secure this result is regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, hereafter referred to as "the "resources regulations," and is as follows: "In computing the "rate of income or the amount of capital of the person concerned "there shall be excluded the value of the subject matter of the "dispute in respect of which application has been made for a "certificate."

The facts giving rise to this appeal have already been stated, and I need only refer again to paragraph 8 of the appellant's application for a civil aid certificate on June 14, 1955. Thereby she applied for a civil aid certificate to defend the proceedings for divorce brought against her by her husband and (inter alia) "to claim maintenance from my husband for myself and my "children."

Before the appellant made this application she had applied for and obtained an emergency civil aid certificate, and had applied for alimony pending suit; and shortly after the date of the application, on June 27, 1955, Mr. Registrar Forbes made an interim order against the husband for alimony at the rate of £450 per annum less tax so long as the appellant occupied the matrimonial home, and thereafter at the rate of £650 per annum less tax. After that order had been made the National Assistance Board embarked on the task of computing "the rate of income" of the appellant (who had no capital) under regulation 2 of the resources regulations, and the question for determination on this appeal is whether, in carrying out this computation, the board should have excluded the value of the alimony ordered on June 27, 1955, on the ground that this alimony was "the subject- "matter of the dispute in which application has been made for a "certificate." I say "this alimony" and not "the *claim* for "alimony," because it was only the alimony which was a "resource" of the appellant within section 4 (3) of the Act, and it was only the alimony which could possibly come into the computation of the appellant's rate of income. Whether or not a mere claim for alimony can ever form part of the "resources" with which the Act is concerned, it certainly cannot be a part of the "income" of the person claiming it.

My Lords, in my view it would be incorrect to say that the

alimony, which was, in substance, the only "resource" of the appellant, had at any time been the subject of a dispute, and the National Assistance Board rightly refused to exclude its value in computing the rate of income of the appellant. Your Lordships have been informed by counsel that the husband had opposed the application for interim alimony, but the income now in question did not come into existence until that dispute had been determined by the order of the Registrar. A dispute, the subject-matter whereof was the alimony of £450 per annum less tax, could only come into existence after the alimony was in existence, and no such dispute has ever arisen, so far as the evidence goes. Certainly no such dispute had arisen at the time when the board computed the rate of income of the appellant.

At this point, my Lords, it is convenient to contrast with the present case the case of *Thorogood* v. *Thorogood*,[3] upon which counsel for the appellant strongly relied. That case was not reported, but the learned President referred to it in his judgment in the present case, and I quote his words[4]: "Before proceeding "further I must mention one other matter. It appears that the "only authority dealing with the construction of the words "'subject-matter of the dispute' is *Thorogood* v. *Thorogood*,[5] a "case in a Divisional Court of this Division (consisting of "Collingwood J. and myself), heard on October 19, 1955. This "was an appeal by a husband from the decision of the justices "of the North Aylesford Petty Sessional Division of Kent, sitting "at Chatham, on his complaint to reduce the amount of an order "in favour of his wife from the maximum amount of £5 a week, "with the addition of the maximum sum of 30s. in respect of a "child, of whom she had been given the custody. The order had "in 1954 been increased to those figures from the original "amounts of £2 and 10s. respectively (which were the maximum "amounts prevailing at the time when the order was first made "in 1943). The ground of the complaint was that, since the 1954 "order, the husband's means had decreased. The justices had "decided that there was no sufficient change to justify a revision "of the order. The wife had been granted a civil aid certificate "to resist the appeal, and her disposable income had been com-"puted at £83. It was quite plain, from the figures under "discussion, that the amount computed as the disposable income "of the wife could not have been arrived at without taking into "account the amount of the order, and I am reported as having "said: 'I am sure, and I have verified my references, that legal "'aid committees are doing that which the Act of Parliament "'expressly forbids them to do, namely, taking into account in "'assessing the income the actual subject of the litigation, "'namely, the amount of the order; and that is utterly wrong.'" The President continued: "If those observations were ill-founded

[3] (1955) The Times, October 20, p. 5.
[4] [1956] P. 470, 495–496.
[5] (1955) The Times, October 20, p. 5.

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" and govern the present case, I ought not to deal with this " application, and I made it clear that I should decline to do so " in those circumstances. However, I was assured categorically, " both by Mr. Winn and Mr. Latey, that my observations were " perfectly correct in connexion with that particular case. " Seeing that the sole question was whether the amount of the " order should be reduced, it is difficult to see how that amount " could well be anything else than ' the subject-matter of the " ' dispute.' It was conceded by both counsel that this was " manifestly so, and that one of the issues in this application " was to establish a distinction between the two cases."

In the Court of Appeal, Denning L.J. did not accept the view expressed by the learned President in *Thorogood* v. *Thorogood*,[5] and I think it is plain from the judgments of Hodson and Ormerod L.JJ. that they too were unable to accept the President's view, though they did not say so in terms. For my part, I am satisfied that the view expressed by the learned President in *Thorogood* v. *Thorogood*[5] was entirely correct, but, in my opinion, the last-mentioned case is distinguishable from the present case. I feel no doubt that in a case where an order for alimony or maintenance of a wife is actually in operation, and the husband takes proceedings to reduce the sum payable, or to discharge the order, the income which the wife is receiving by way of alimony or maintenance is the " subject-matter of the " dispute." The only dispute is whether or not the wife is to retain that income or is to lose it wholly or in part. The test suggested by counsel for the respondents, as I understood it, was: " Does the ownership of the ' resource ' in question depend " on the result of the proceedings? " I would accept this test, but would insert the words " wholly or in part " after the word " depend," and if the test is applied to the case of *Thorogood* v. *Thorogood*[5] it entirely confirms the view of the President.

On the other hand, if this test is applied to the alimony ordered in the present case, it is, in my view, fatal to the argument for the appellant, because the ownership of that alimony was not being attacked in any proceedings at the time when the rate of income of the appellant was being computed by the board.

Counsel for the appellant relied strongly upon the fact that in regulation 2 " the dispute " is defined as being " the dispute in " respect of which application has been made for a certificate." I have already stated that the appellant, in her application, asked for a civil aid certificate " to claim maintenance," but, in my opinion, that fact does not assist the appellant in this appeal. At the date of the application there could be no " dispute " whereof this income of the appellant was the subject-matter, for the simple reason that this income was not then in existence. Thus, the appellant at that time did not, and could not, apply for a certificate for legal aid in a dispute whereof the subject-matter was this income.

[5] (1955) The Times, October 20, p. 5.

Counsel on each side suggested that anomalous results would follow from a decision in favour of the other side. These arguments fairly balance each other, in my opinion, and do not lead me to alter the opinion which I have formed on the construction and effect of the Act and the regulations.

For the reasons already stated, which are not the same in every respect as the reasons which moved the Court of Appeal to the same result, I would dismiss the appeal.

LORD TUCKER. My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friends.

LORD COHEN. My Lords, I have had the opportunity of reading the speech which has been delivered by my noble and learned friend, Viscount Simonds. I agree with his conclusion and the reasons he gives for that conclusion.

Had it not been that in the Court of Appeal Denning L.J. expressed the opinion that *Thorogood* v. *Thorogood* [5] was wrongly decided, I should have been content to say no more; but, in view of that expression of opinion, I desire to add that for the reasons given by my noble and learned friend, Lord Morton of Henryton, I think the opinion expressed by the learned President in *Thorogood's* case was correct.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, I concur.

Appeal dismissed.

Solicitors: *Kenneth Brown Baker, Baker; Solicitor to the National Assistance Board; Hempsons.*

F. C.

[5] (1955) The Times, October 20, p. 5.

[COURT OF APPEAL.]

DAVIE *v.* NEW MERTON BOARD MILLS LTD. AND ANOTHER.

[1954 D. 1495.]

Negligence—Safe system of work—Plant and equipment—Latent defect—Injury to workman's eye caused by tool with latent defect—Tool supplied by reputable supplier—Tool made by reputable makers—Tool negligently made—Employers' liability—Makers' liability.

The plaintiff, a maintenance fitter, was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided

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for the plaintiff's use by his employers, although apparently in good condition, was of excessive hardness, and was, in the circumstances, a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers, whose system of maintenance and inspection was not at fault.

The plaintiff claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool, and against the makers on the ground that, as the manufacturers of the drift, they were under a duty to those who they contemplated might use it.

Ashworth J. gave judgment for the plaintiff against both defendants, but made an order that the makers should wholly indemnify the employers with regard to damages.

On appeal by the employers:—

Held (Jenkins L.J. dissenting), that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.

Wilsons & Clyde Coal Co. Ltd. v. *English* [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628 and *Thomson* v. *Cremin* [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185 distinguished.

Donnelly v. *Glasgow Corporation*, 1953 S.L.T. 161 not followed.

Per Jenkins L.J., dissenting. The law does not, as I understand it, accept reliance on the care and skill of others as a performance of the [employers'] duty. It would, as I think, be an irrational and intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of an employer and tools bought by the employer ready made.

Per Parker L.J. The plaintiff can only hold the defendants liable if the true duty of a master is not merely to take care to provide a reasonably safe tool, but to provide a tool which has been manufactured with reasonable skill and care even where the manufacturer is in no contractual relationship with the master. Unless constrained to do so by authority I would be loth to hold that there was any such duty. Having considered the authorities I have come to the conclusion that a judgment in favour of the plaintiff involves an extension of the duty owed at common law by a master to his servant. Now that the doctrine of common employment is abolished, and now that the workman can recover direct from the negligent manufacturer, I can see no justification for extending the duty to exercise reasonable care as enunciated by Lord Herschell in *Smith* v. *Baker* [1891] A.C. at p. 362; 7 T.L.R. 679.

Decision of Ashworth J. [1957] 2 Q.B. 368; [1957] 2 W.L.R. 247; [1957] 2 All E.R. 38 reversed.

APPEAL from Ashworth J.

The plaintiff, James Gibson Davie, was at all material times employed by the first defendants, the New Merton Board Mills Ltd., as a maintenance fitter. On March 8, 1953, in the course of his employment, the plaintiff was using a drift provided by his employers for use by their fitters, to knock out a metal key which he was trying to fit into a coupling. He struck the head of the drift with a hammer, and at the second blow, which was not unreasonably hard, a piece of metal flew off the head of the drift into the plaintiff's eye and caused injury. The drift had been purchased by the first defendants at a reasonable price from a

reputable supplier, C. A. Baldwin & Co., who in turn had bought it from the manufacturers, the second defendants, Frank Guylee & Son Ltd., both transactions taking place in 1946.

The plaintiff claimed damages for negligence against the first defendants on the ground that they had provided for his use a defective tool; and against the second defendants alleging that they, as manufacturers, were under a duty to those whom they contemplated would use the drift. At the trial of the action Ashworth J. found that the hardness of the drift was greatly in excess of the hardness which should have existed having regard to the fact that it was intended and designed to be struck on its head with a hammer, and that this condition would not have occurred if proper care had been taken by the second defendants in the manufacture; further, that in the circumstances the drift was dangerous in that chips or particles might fly off it when struck. But the drift was apparently in good condition and no allegation was or could be made that the employers' system of maintenance or inspection was at fault.

Ashworth J. gave judgment for the plaintiff against both defendants, but directed that the employers should have a full indemnity against the manufacturers in respect of damages. The employers did, but the makers did not, appeal on the issue of liability. All the parties made appeals and cross-appeals on contingent issues as to costs.

R. Marven Everett Q.C. and *H. Tudor Evans* for the employers.

Martin Jukes Q.C. and *Malcolm Morris* for the plaintiff.

Michael Hoare for the makers.

Cases cited in argument not referred to in the judgments: *Cole* v. *de Trafford (No. 2)* [1]; *Haseldine* v. *Daw (C. A.) & Son Ltd.*[2]; *Pinnock Bros.* v. *Lewis & Peat Ltd.*[3]; *Cassidy* v. *Ministry of Health* [4]; *Mowbray* v. *Merryweather* [5]; *Paris* v. *Stepney Borough Council.*[6]

Cases referred to in the judgments not cited in argument: *Read* v. *J. Lyons & Co. Ltd.*[7]; *Biddle* v. *Hart* [8]; *Toronto Power Co. Ltd.* v. *Paskwan* [9]; *Weems* v. *Mathieson.*[10]

Cur. adv. vult.

November 26. The following judgments were read.

JENKINS L.J. This is an appeal by the first defendants, the New Merton Board Mills Ltd., from a judgment of Ashworth J.

[1] [1918] 2 K.B. 523.
[2] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.
[3] [1923] 1 K.B. 690; 39 T.L.R. 212.
[4] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.
[5] [1895] 1 Q.B. 857.
[6] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[7] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471.
[8] [1907] 1 K.B. 649; 23 T.L.R. 262.
[9] [1915] A.C. 734.
[10] (1861) 4 Macq. 215.

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dated March 14, 1957, which awarded the plaintiff, James Gibson Davie, against the first defendants and the second defendants, Frank Guylee & Son Ltd., the sum of £2,030 damages, with costs, in respect of the loss of the sight of his left eye through the breaking of a tool called a "drift," manufactured by the second defendants and provided for his use by the first defendants, by whom he was employed as a maintenance fitter at their factory at Merton.

The judgment further dealt with the question of contribution between the defendants by directing that the first defendants should have against the second defendants a full indemnity in respect of the damages, and an indemnity in respect of the plaintiff's costs limited to two-fifths thereof.

There is no appeal by the second defendants in respect of their liability to indemnify the first defendants against the full amount of the damages awarded; but the first defendants' appeal includes a claim to the effect that even if they fail to secure the reversal of the judge's decision as regards their liability to the plaintiff, they should not be ordered to pay any part of the plaintiff's costs. The second defendants have accordingly served a notice of their intention to support the judge's order as to costs, and if necessary to raise various alternative contentions in that regard. The plaintiff, on his part, has served a notice of his intention to raise various contentions as to the incidence of costs in the event of the first defendants succeeding in their appeal on the issue of liability.

The accident happened on March 8, 1953. On that day the plaintiff, in the ordinary course of his employment, was working on a machine and had occasion to separate certain parts which were fitted together too tightly for separation by hand. The appropriate tool for this purpose was a drift, which may be described as a tapered bar or strip of metal say 12 inches long. The proper method of using a drift is to hold the pointed end against the point of junction between the parts to be separated and to beat the thick end with a hammer so as to force them apart. The plaintiff went to a cupboard where drifts provided by the first defendants for the use of their employees were kept, took one which appeared to be nearly new, and proceeded to work with it in the way I have described; but unfortunately, at the second stroke of the hammer, the drift broke and a piece flew off, striking, and destroying the sight of, his left eye.

The history of the defective drift can be shortly stated. It was made by the second defendants, who are tool makers carrying on business at Sheffield, in the year 1946, and on a date prior to July in that year it was sold by the second defendants to a company called Baldwin & Co. Ltd., who are suppliers of tools of this kind. In July, 1946, the first defendants ordered a supply of drifts from Baldwin & Co. Ltd., and the drifts delivered to them by Baldwin & Co. Ltd. in response to this order included the defective drift with which we are now concerned. Nearly

seven years later this drift, which had in the meantime apparently been seldom if ever used, was put into use by the plaintiff with this disastrous result I have mentioned. The drift was defective in that the steel of which it was made was excessively hard and consequently liable to fracture when subjected to blows of the force to which a drift in ordinary use would be subjected. This was a defect which ought to have been discovered by a manufacturer using reasonable skill and care in the making of drifts.

There is no dispute as to the facts, but it is right to refer specifically to the following findings of the judge. He said: "On the evidence I am satisfied in regard to the drift used by "the plaintiff (a) that it was made of silico-manganese steel; "(b) that the hardness of its head was 622 according to the "Vickers Pyramid hardness scale; (c) that this hardness was "greatly in excess of the hardness which should have existed, "having regard to the fact that the drift was intended and "designed to be struck on the head with a hammer; (d) that in "the circumstances the drift was dangerous, in that chips or "particles might fly off it when struck." He later said: "As "already indicated, I am satisfied that the drift P.2 was of "excessive hardness, a condition which would not have occurred "if proper care had been taken during the heat treatment "process." He continued [1]: "The problem of liability must "be considered on the basis that the employers provided for "their employee, the plaintiff, a dangerous tool which had been "negligently made by the second defendants. I consider first "the question whether in these circumstances the employers "are liable. In the first place, it is clear that no negligence can "be attributed to any of the employers' own servants or agents. "The drift P.2 was apparently in good condition and no allegation "was or could be made that the employers' system of mainten-"ance or inspection was at fault. Moreover, the employers "bought the drift from a reputable supplier and paid a reasonable "price for it."

The judge then proceeded to state the question of law arising on his findings of fact in these succinct terms: "The problem "arises in naked simplicity: Are they"—that is, the first defendants—"responsible to the plaintiff because the drift was "negligently manufactured by the second defendants?"

One may take as a starting point in the discussion of this question the well-known case in the House of Lords of *Wilsons & Clyde Coal Co. Ltd.* v. *English*.[2] By that case it was clearly established that an employer's duty to take reasonable care for the safety of his employees is a duty personal to him, of which he cannot divest himself by entrusting the performance of it to a servant or agent however competent. It follows that if in the present case the first defendants had employed some competent

[1] [1957] 2 Q.B. 368, 373; [1957] 2 W.L.R. 747; [1957] 2 All E.R. 38, 384n.

[2] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

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person as their servant or agent to make drifts for the use of their fitters, and the person so employed had negligently made the defective drift which broke and injured the plaintiff, the first defendants would clearly have been liable to the plaintiff for breach of their common law duty to take reasonable care to provide sound tools, and the fact that they had employed a competent servant or agent to perform that duty would have afforded no defence.

I think it must also be regarded as settled that the same result would have ensued if the defective drift had been made by the second defendants to the order of the first defendants, the second defendants being in the position of independent contractors, as distinct from servants or (in the strict sense) agents of the first defendants.

It is true that the speeches in the *Wilsons & Clyde Coal Co.'s* case [3] do not in terms refer to independent contractors, for the very good reason that the case then before the House was one in which the employers claimed to have delegated their statutory duty of providing a reasonably safe system of work to an agent in the strict sense, and to have thereby performed it, with the result that any negligence on the part of the agent would as between the agent and any employee injured thereby be negligence on the part of a fellow employee to which (as the law then stood) the doctrine of common employment afforded the employers a complete defence. But I think the same ratio decidendi must be taken to apply where the performance of the employer's duty has been entrusted to an independent contractor. This seems to me to be implicit in the passage from *Bain* v. *Fife Coal Co.*,[4] cited with approval by Lord Thankerton and also expressly commended by Lords Atkin, Macmillan and Maugham.[5] From the complete citation I need take only this concluding passage: "The duty may not be absolute, and may be only a duty to "exercise due care, but, if, in fact, the master entrusts the duty "to someone else instead of performing it himself, he is liable "for injury caused through the want of care of that someone else, "as being, in the eye of the law, his own negligence."

I should add the following citations from the speeches in the *Wilsons & Clyde Coal Co.'s* case.[6] Lord Macmillan said: "Now "I take it to be settled law that the provision of a safe system "of working in a colliery is an obligation of the owner of the "colliery. He cannot divest himself of this duty, though he "may—and, if it involves a technical management and he is not "himself technically qualified, must—perform it through the "agency of an employee. It remains the owner's obligation, "and the agent whom the owner appoints to perform it performs "it on the owner's behalf. The owner remains vicariously "responsible for the negligence of the person whom he has "appointed to perform his obligation for him, and cannot escape

[3] [1938] A.C. 57.
[4] 1935 S.C. 681, 693.
[5] [1938] A.C. 62, 73, 76, 87.
[6] Ibid. 75.

" liability by merely proving that he has appointed a competent " agent. If the owner's duty has not been performed, no matter " how competent the agent selected by the owner to perform it " for him, the owner is responsible."

Lord Wright said [7]: " In *Rudd's* case [8] the Court of Appeal, " applying their general views which I have just stated, held that " the employers could escape liability by showing that they had " appointed competent servants to see that the duty was fulfilled. " This House held that, on the contrary, the statutory duty was " personal to the employer, in this sense that he was bound to " perform it by himself or by his servants. The same principle, " in my opinion, applies to those fundamental obligations of a " contract of employment which lie outside the doctrine of " common employment, and for the performance of which " employers are absolutely responsible. When I use the word " absolutely, I do not mean that employers warrant the adequacy " of the plant, or the competence of fellow-employees, or the " propriety of the system of work. The obligation is fulfilled by " the exercise of due care and skill." And later [9]: " If I may " take an analogy or instance of a similar personal obligation, I " note that the Carriage of Goods by Sea Act, 1924, requires a " shipowner to exercise due diligence or to take reasonable care " to provide a seaworthy ship. The shipowner is almost certainly " not an expert naval architect, engineer, or stevedore. So far " as I know it has never been claimed that this obligation is " fulfilled by the shipowner taking reasonable care to appoint a " competent expert; the shipowner is absolutely held to the " fulfilment of the obligation. It is the obligation which is " personal to him, and not the performance."

Lord Maugham said [10] " We now come to the real point in " the present case, which may be stated thus: Admitting that " the employer was liable to provide a reasonably safe system of " working the colliery, was not this a liability which he could " delegate to skilled persons with the consequence that his " personal liability would be discharged? It must, I think, be " admitted that in England the early authorities on this point " were not very clear. In Scotland it was not so. The admirable " opinions of the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.*,[11] " and of the Lord President in the present case, establish in my " view that there has been a long and uniform practice in " Scotland, repeatedly approved in this House, to the effect that " an employer cannot divest himself of responsibility in regard " to the three matters which are in his peculiar province." Also on the same page he said: " It has already been pointed out that " the employers' liability is discharged by the exercise of due " care and skill; and I may be allowed to point out that it is this " circumstance which has led on occasion to a misapprehension

[7] [1938] A.C. 57, 78.
[8] [1933] 1 K.B. 566; 49 T.L.R. 202.
[9] [1938] A.C. 57, 80.
[10] Ibid. 87.
[11] 1935 S.C. 681.

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"of the true position. An illustration will demonstrate the "mistake. Suppose some new machinery is necessary in a "factory, and the employer is absent or completely unskilled in "such things. He necessarily leaves the matter to a manager, "let us suppose a highly skilled person, who, however, is "negligent in this case. An accident follows, due to a defect "in the machine. If the liability of the employer is stated as "being an obligation to use his best endeavours to supply and "instal good machinery, it may well be said on his behalf that "he left the matter to a highly skilled man, and it may be asked "with force, what more could he do? I should reply, nothing; "but I should add that the premise is incorrect. The possessive "pronoun 'his' is that which leads to the error. The proposition "would be more correctly stated to be that his duty is to supply "and instal proper machinery so far as care and skill can secure "this result. He can, and often he must, perform this duty by "the employment of an agent who acts on his behalf; but he "then remains liable to the employees unless the agent has "himself used due care and skill in carrying out the employer's "duty. This has sometimes been expressed by saying that the "duty is personal to the employer; but the adjective if unex-"plained is apt to mislead, like the word 'absolute' and the "word 'delegate.' The employer can, of course, and frequently "must delegate the performance of any of his duties to skilled "agents; but it would need an altogether new implied term in "the contract between employer and employee before a court "could properly hold that this delegation has the result of freeing "the employer from his liability. This becomes apparent if we "imagine the contract between employer and workman to be "written out in full with all the implied clauses. There would "be, for the reasons given by the Lord Justice-Clerk in *Bain* v. "*Fife Coal Co.*,[12] and by your Lordships, no clause to the effect "that the employer was to be freed from his special obligations "to the workmen if he delegated them to an agent; and in the "absence of such a clause the employer would plainly remain "liable if the agent was guilty of not using proper care and skill, "since in the contract law of Scotland as in England it is impos-"sible to get rid of a liability towards the other party to the "contract without the consent of that party."

I think these citations taken together point strongly to the conclusion that their Lordships would have drawn no distinction for the present purpose between a servant or agent (in the strict sense) of the employer and an independent contractor engaged by the employer. But the matter does not rest there. In *Thomson* v. *Cremin*[13] the House had to consider the position of an invitor who had entrusted to an independent contractor the performance of certain work, the proper performance of which was essential to the safety of the premises (in this

[12] 1935 S.C. 681.

[13] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

instance the hold of a ship) which the invitee had to enter in the course of his work. The duty of the invitor was taken as being a duty to take reasonable care for the safety of the invitee; and Lord Simon said [14]: "The shipowner's responsibility for "the safety of the structure is not, indeed, absolute, but, on the "principle of *Indermaur* v. *Dames*,[15] he owes to the invitee a "duty of adequate care. If adequate care was not exercised in "fitting and securing the shore, it would be no answer (as the "appellant's counsel candidly admitted) to say that the ship-"owner employed an independent contractor at Fremantle to do "the work. For this last proposition, reference may usefully be "made to a recent decision of the Court of Appeal in *Wilkinson* "v. *Rea Ltd.*,[16] and especially to the observations of Luxmoore "L.J. I can see no ground for drawing a distinction between "the permanent structure of the ship and the temporary erections "put up in her holds for the purpose of the special cargo she was "carrying."

Lord Wright said [17]: "That the first respondent was working "on the appellant's premises, the steamship *Sithonia*, as an "invitee and not as a mere licensee has not been questioned. "Thus the case fell within the general rule enunciated in "*Indermaur* v. *Dames*.[18] The rule there laid down as to the "duty of the invitor to the invitee has been affirmed in several "decisions of this House, whether the particular case was held "to fall within or without the rule. In the present appeal, "however, the failure to exercise due care for the safety of the "invitee which has been found was due, not to the negligence "of the appellant or his servants, but to that of independent "contractors, the Australian shipwrights who constructed the "shifting-boards before the grain was loaded. I agree with the "Lord Chancellor in his approval of the decision of the Court "of Appeal in *Wilkinson* v. *Rea Ltd.*,[19] where it was held by "Luxmoore L.J., with whom MacKinnon L.J. concurred, that "the invitor was not excused for a failure to perform his duty "to the invitee merely because he had entrusted performance to "another. Luxmoore L.J. adopted the view of Williams J. in "*Pickard* v. *Smith*.[20] The duty of the invitor towards the "invitee is, in my opinion, a duty personal to the former, in "the sense that he does not get rid of the obligation by "entrusting its performance to independent contractors. It is "true that the invitor is not an insurer: he warrants, however, "that due care and skill to make the premises reasonably safe "for the invitee have been exercised, whether by himself, his "servants, or agents or by independent contractors whom he "employs to perform his duty. He does not fulfil the warranty "merely by leaving the work to contractors, however reputable

[14] [1956] 1 W.L.R. 103n., 106.
[15] (1866) L.R. 1 C.P. 224; affirmed (1867) L.R. 2 C.P. 311.
[16] [1941] 1 K.B. 688, 700-702; [1941] 2 All E.R. 50.
[17] [1956] 1 W.L.R. 103n., 109.
[18] L.R. 1 C.P. 274; affirmed L.R. 2 C.P. 311.
[19] [1941] 1 K.B. 658.
[20] (1861) 10 C.B.N.S. 470.

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" or generally competent. His warranty is broken if they fail to " exercise the proper care and skill. This is only an instance of " the general rule which was stated by Lord Blackburn in another " connexion in *Dalton* v. *Henry Angus & Co.*,[21] where he " distinguished the case of what has been called the collateral " negligence of a sub-contractor from their negligence in failing " to perform a duty resting on the principal himself ' who cannot " ' escape from the responsibility attaching to him of seeing that " ' duty performed by delegating it to a contractor.' Lord " Blackburn again enunciated the same principle in *Hughes* v. " *Percival*.[22] More recently this House, again in a different " context of fact, applied this rule in *Wilsons & Clyde Coal Co.* " *Ltd.* v. *English*.[23] It is always a question of the extent of the " duty incurred. In the present case, the invitee is not concerned " with the course which the invitor adopts by way of discharging " the duty. He is entitled when he comes on the invitor's " premises, to rely on the warranty that the invitor's duty to him " has been performed and to complain if he is injured because " the duty has not been properly performed."

I would respectfully adopt this comment[24] made by Ashworth J. on *Thomson* v. *Cremin*.[25]: " It is true that Lord Wright is " there dealing with the position of an invitor, but the duty of an " employer to his workmen is certainly no less. Indeed, in " *London Graving Dock Co. Ltd.* v. *Horton*[26] Lord Porter said " ' admittedly the duty of a master to his servant is higher than " ' that of an invitor to his invitee.' "

As was recognized in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[27] (itself a Scottish case) the Scottish law on this question is the same as English law. In addition to the passage from *Bain* v. *Fife Coal Co.*[28] cited above, we were referred to a number of Scotch decisions, including *Macdonald* v. *Wyllie*.[29] In that case a firm of builders having a contract to take down certain high walls contracted with a firm of joiners for the erection of a scaffold, which after it had been taken over by the builders collapsed. It was admitted that the fall of the scaffold was due to a defect which might have been discovered by any skilled person inspecting it. A workman in the employment of the builders was injured by the fall of the scaffold, and brought an action for damages against the builders.

The action was tried with a jury, and the Lord Justice-Clerk directed the jury as follows[30]: " That if the jury are satisfied " that the defender, not having the knowledge and skill to erect " the scaffolding in question, selected a tradesman having skill " and experience of such work, and contracted with him to " provide such a scaffold, he would not be liable as for fault if

[21] (1880) 6 App.Cas. 740, 829.
[22] (1883) 8 App.Cas. 443, 446.
[23] [1938] A.C. 57.
[24] [1957] 2 Q.B. 368, 378.
[25] [1956] 1 W.L.R. 103n.
[26] [1951] A.C. 737, 746; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[27] [1938] A.C. 57.
[28] 1935 S.C. 681.
[29] (1898) 1 Fraser 339.
[30] Ibid. 340.

" the scaffolding fell in consequence of its being erected in an " unskilful manner through the fault of the skilled person who " contracted to erect it."

On a Bill of Exceptions, it was held that this direction was erroneous in law. Lord Young said [31]: " This bill of exceptions " comes before us on the footing that the scaffolding was defec- " tive and dangerous. It is admitted that for the purposes of " this discussion that must be conceded, and it is stated by the " learned judge who tried the case that it was upon that " supposition that the ruling now in question was given by him, " and also that it was given upon the further supposition that the " defect was not a latent defect, but one which could have been " discovered by a proper inspection by a reasonably skilled person. " Therefore the question of latent defect does not arise here. " The ruling was asked and given on the footing that the " scaffolding was defective and dangerous, and that the defect " was not latent. Accordingly, the learned judge who tried the " case, in accordance with the defence put forward by the " defenders, gave this direction [his Lordship read the Lord " Justice-Clerk's direction]. This ruling was given on the " assumption that the joiner employed by the defenders was a " properly skilled person. The direction given practically " amounts to this, that the defenders discharged their whole duty " to the pursuer by entrusting the erection of the scaffolding to a " properly skilled joiner, and that, however unskilfully that " joiner might erect the scaffolding, the defenders would not be " liable in consequence to the pursuers. We have now to deter- " mine whether this ruling is in accordance with the law of " Scotland. I am of opinion that it is not."

He further said [32]: " The basis of the workman's claim against " his master is that there is a responsibility on the part of his " employer for the scaffolding being in a reasonably safe condition " to enable the workman to perform the work which he has been " engaged to do. It is no answer to him for the master to say, " ' I am not a joiner and I employed a skilled joiner to do the " ' work for me.' It is no more an answer for him to say so to " his workman, than it would be an answer for a person who had " erected a scaffolding for people to see a procession, to one of " the persons who had engaged a seat upon it, and who had been " injured through a defect in it, to say to that person that he " himself was not a competent joiner, that he had employed a " fit joiner to erect the scaffolding, and that he was not " responsible for the joiner's fault."

Lord Trayner said [33]: " If a master buys a machine, let us " say, necessary for the execution of his work, and gives it to his " workman, it is the master's machine, not the workman's or " manufacturer's. If the machine turns out to be faulty, defec- " tive, or otherwise insufficient, the master must answer for it.

[31] 1 Fraser 339, 343.
[32] Ibid. 344.
[33] Ibid. 345.

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" He may have his relief against the maker or manufacturer, " but the injured workman has no claim against the maker of " the machine; there was no contractual or other relation " between them; the maker of the machine had no duty towards " the workman. When the scaffolding or the machine passes " out of the hands of the man who erected or made it, it becomes " the scaffolding or the machine of the man who ordered it and " gave it to his workman. It is the master's scaffolding or " machine, although erected or made per alium, and he is directly " responsible for its insufficiency.

" The rule that a person is not responsible for damage done " through the neglect or fault of an independent contractor does " not apply to a case like this. It applies in cases where there " is no relation between the person injured and the person who " employs or engages with the contractor. But ' the case is " ' wholly different where a distinct duty is imposed upon the " ' person sued towards the person injured, and where the duty " ' has not been performed '—(*per* Lord Justice-Clerk Moncreiff " in *Stephen's* case [34]). That correctly represents the case now " before use.

" It was argued by the defenders that they were not respon- " sible for defects in their appliances which were latent, and " that their duty was limited to supplying the workman with " appliances which were reasonably sufficient. I am not pre- " pared to admit the soundness of this argument to the extent " to which it was carried by the defenders. But it is not a point " raised for decision by the exception before us. The charge " excepted to is absolute, and neither states nor suggests any " limitation in the direction to which the defenders' argument " points. I therefore give no opinion upon the question so " raised."

Lord Moncreiff said [35]: " So viewed, I am of the opinion that " the direction is not exhaustive, and that therefore, it is defec- " tive. As it stands the jury may have supposed that the " defenders sufficiently discharged their duty to their servants by " entrusting the construction of the scaffold to a competent " joiner. In order to make the direction complete I think his " Lordship should have added the words ' unless by the exercise " ' of reasonable care the defenders could have discovered the " ' insufficiency of the scaffold,' or words to that effect.

" A master is bound to supply safe and sufficient plant for the " use of his workmen, but he is not bound to warrant the " sufficiency of the plant. He is not personally bound to make it " or to keep it in repair. He is only bound in a question with his " servant to take reasonable care that it is sufficient; and in " order to render him liable there must be proof of fault or " negligence on his part or those for whom he is responsible.

" In judging whether an employer has or has not used " reasonable care regard must be had to the whole circumstances

[34] 3 Rettie 535, 540. [35] 1 Fraser 339, 346.

" of each case. The fact that he has entrusted the manufacture " or construction of the plant to a skilled tradesman under an " independent contract will go far to establish that he had " taken reasonable care. But of itself it is not necessarily " sufficient, because if he could on inspection have discovered the " defect he will not be freed from liability. It is for the jury to " decide in each case what is reasonable care and what defects are " to be considered latent in a question with the employer."

Finally, the Lord Justice-Clerk, who had given the direction under consideration, said this[36]: " But having now heard a full " debate and citation of authorities upon the point I have come " to be of opinion that the direction which I gave to the jury " was erroneous in respect that it was incomplete. I think it " was right as far as it went, but that I should have added " some words to the same effect as the addition suggested by " Lord Moncreiff in his opinion. In this connexion, questions of " latent defect often present considerable difficulty. A defect " might be latent to one person and not latent to another who " was highly skilled."

The case is important in that the firm who provided the faulty scaffolding were undoubtedly independent contractors.

The members of the court were not entirely at one, but I think it can fairly be said that none of them regarded the fact that the employers had entrusted the erection of the scaffolding to skilled independent contractors as sufficient in itself to discharge the employers' duty to their workmen. Lords Young and Trayner seem to have been clearly of opinion that employers cannot be held to have discharged their duty to a workman by the employment of skilled independent contractors if the contractors do their work negligently and damage to the workman results, with a possible exception in favour of the employers where the defect which does the damage is latent. Lord Moncreiff and the Lord Justice-Clerk on the other hand thought that the employer's duty would be discharged by the employment of skilled independent contractors, unless by the exercise of reasonable care the employers could have discovered the insufficiency of the scaffold. Lord Moncreiff regarded the question whether an employer has or has not used reasonable care as depending on the circumstances of each case, but thought that the fact that an employer had entrusted the relevant work to a skilled independent contractor would go far to establish that he had used reasonable care, but was not necessarily of itself sufficient to do so, because if he could on inspection have discovered the defect he would not be free from liability. Lord Moncreiff and the Lord Justice-Clerk appear, in effect, not only to have admitted an exception in favour of the employer in respect of latent defects in the independent contractor's work, but to have regarded a latent defect as a defect not discoverable *by the employer* on reasonable inspection. That is, of course, a view far more

[36] 1 Fraser 339, 346, 347.

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favourable to the employer than the alternative conception of a latent defect as a defect not discoverable by the use of reasonable skill and care on the part of the independent contractor. I will later return to this important aspect of the matter. But so far as the effect of the employment of an independent contractor is concerned, I do not think *Macdonald* v. *Wyllie* [37] can be regarded as authority for the proposition that the entrusting of the relevant work to a skilled independent contractor in itself discharges an employer's duty of care to his workmen.

To revert to English cases, in *Naismith* v. *London Film Productions Ltd.*,[38] Lord Maugham's definition of an employer's duty to his employee was expressly adopted by Sir Wilfrid Greene M.R. in this court. The Master of the Rolls said [39]: "The law "on this point has recently been laid down by the House of "Lords in the case of *Wilsons & Clyde Coal Co. Ltd.* v. "*English*,[40] and for present purposes I can take the very concise "statement of Lord Maugham [41]: 'The proposition would be "'more correctly stated to be that his duty is to supply and "'instal proper machinery so far as care and skill can secure "'this result.'" MacKinnon L.J. said [42]: "Such standard of "duty is explained by *Wilsons & Clyde Coal Co. Ltd.* v. *English* "to which Sir Wilfrid Greene M.R. has referred." Goddard L.J. referred [43] to the *Wilsons & Clyde Coal Co.'s* case as having "done so much to clarify the law on that point," and continued: "The relationship of the parties was not that of invitor and "invitee, but that of employer and employee, and it follows that "the jury should have been directed that the defendants' duty "was not merely to warn against unusual dangers known to "them, and not to the plaintiff, but also to make the place of "employment, and the plant and material used, as safe as the "exercise of reasonable skill and care would permit." I think that MacKinnon and Goddard L.JJ. must be taken to have had in mind the particular passage from the speech of Lord Maugham which the Master of the Rolls had just cited.

In *Paine* v. *Colne Valley Electricity Supply Ltd.*[44] Goddard L.J., sitting as a judge of first instance, said: "It follows, in "my opinion, not only that there had been a breach of the "Factory and Workshop Act, 1901, but that the first defen- "dants had failed to provide a safe place for their workmen "and had therefore committed a breach of their common law "duty as recently laid down in *Wilsons & Clyde Coal Co. Ltd.* v. "*English*.[45] This is a duty which cannot be avoided by delega- "tion. It is no answer to say, as counsel for the first defendants "submitted: 'We employed competent contractors to provide "'a safe place or plant.' The class of cases in which the

[37] 1 Fraser 347.
[38] [1939] W.N. 86; [1939] 1 All E.R. 794.
[39] [1939] 1 All E.R. 794, 796.
[40] [1938] A.C. 57.
[41] Ibid. 88.
[42] [1939] 1 All E.R. 794, 797.
[43] Ibid.
[44] (1938) 55 T.L.R. 181, 183; [1938] 4 All E.R. 803.
[45] [1938] A.C. 57.

" employment of a competent contractor affords a defence belongs " to a wholly different category in the law of negligence. I have " no hesitation in holding that the first defendants have no " defence whatever to the plaintiff's claim."

It is right to note that on the facts of that case it seems reasonably plain that the defect in the electrical apparatus which brought about the death of the employee could have been discovered by the employers on reasonable inspection. But Goddard L.J. was clearly of opinion that the fact that the employers had entrusted the provision of the plant in question to reputable independent contractors afforded the employers no defence to a claim based on breach of their duty of reasonable care, and in the present state of the authorities I think this must be taken to be the law.

But, it is said, that is not this case. Here the first defendants did not cause the defective drift to be made to their order by the second defendants. They bought it ready made from the suppliers, against whom no negligence is alleged. Here at least, it is claimed, a line should be drawn; and the first defendants should not be saddled with responsibility for a defect in the drift which they could not reasonably have been expected to detect, and which was due to negligence on the part of manufacturers, the second defendants, with whom the first defendants were never in contractual privity, and whom the first defendants had never in any sense entrusted with the performance of their duty to take reasonable care to provide their employees with safe tools.

I cannot accept this argument. The first defendants, when they set about the provision of drifts, must be taken to have been alive to their duty to take reasonable care to provide sound drifts. If they were alive to that duty they must, in purchasing the drifts of which the defective drift was one, be taken to have assumed that reputable suppliers such as Baldwin & Co. Ltd., from whom they purchased the drifts, would have obtained them from reputable manufacturers who could be relied on as having exercised due skill and care in their manufacture. In other words, the first defendants must be taken to have relied on the reputation of Baldwin & Co. Ltd. as a sufficient assurance that in providing their employees with drifts purchased from Baldwin & Co. Ltd. they would be providing them with drifts made with reasonable care and skill, and thus performing their duty of taking reasonable care to provide their employees with sound drifts.

But if the duty is as Lord Wright said in the *Wilsons & Clyde Coal Co.'s* case [46] a duty " personal to the employer and one to be " performed by the employer per se or per alios," or if the duty is, as Lord Maugham termed it in the same case,[47] a duty " to supply " sound tools " so far as care and skill can secure " this result," I do not see how reliance on Baldwin & Co. Ltd.,

[46] [1938] A.C. 57, 80. [47] Ibid. 88.

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or on their manufacturers for the soundness of the drifts could amount to performance of the duty, if the manufacturers actually concerned, namely the second defendants, had in fact failed to use reasonable care and skill in the making of them.

If the law was, as it might quite reasonably be, that an employer discharged his duty of taking reasonable care to provide sound tools by having them made by a reputable manufacturer or buying them ready made from reputable suppliers, the first defendants here could no doubt repel the charge of negligence now brought against them by showing that they bought the drift which turned out defective from reputable suppliers, and that the defect was not one which they could have discovered by reasonable inspection.

But the law as it is does not, as I understand it, accept reliance on the care and skill of others as a performance of the duty. Therefore (to apply Lord Wright's language), the first defendants did not, in buying the drift from Baldwin & Co. Ltd., perform the duty per se; nor did they perform it per alios, since the second defendants unfortunately failed to take reasonable care in the making of the drift. Nor (to apply Lord Maugham's language) did the first defendants provide, in the shape of the defective drift, a sound drift so far as care and skill could secure this result; for due care and skill were not in fact exercised in the manufacture of this drift.

The argument for the first defendants is based on the broad propositions that there should be no responsibility without fault, and that an employer's duty to his workmen is not an absolute duty, but only a duty to take reasonable care. It is said that the judge's decision in favour of the plaintiff can only be justified either (a) on the ground that the first defendants were vicariously responsible for the second defendants' negligence, or (b) on the ground that the plaintiff's contract with the first defendants included a warranty by the first defendants to the effect that the tools provided for him by the first defendants would be sound tools. As to the former ground, it is pointed out that this can only be appropriate where an employer has entrusted the performance of his duty to a servant or agent, and that servant or agent has negligently failed to perform it. Even if "agent" for this purpose can properly be regarded as including an independent contractor, it cannot possibly be retrospectively extended to a manufacturer making for the market tools which ultimately find their way into the hands of an employer through some supplier with whom he may happen to deal. As to the latter ground, the warranty imputed to the first defendants could only be a warranty that reasonable care had been taken by the first defendants, their servants or agents. But there was no lack of reasonable care on the part of the first defendants themselves, or on the part of Baldwin & Co. Ltd., if they can properly be termed the first defendants' agents. As to the second defendants, who were admittedly negligent, they were never in any sense the first

defendants' agents, and accordingly the warranty could not extend to their acts or defaults. The argument goes on to point out the inconsistency between the view that an employer is to be responsible on the basis of warranty for the failure of persons over whom he has no control to take reasonable care in the manufacture of goods which he buys in the market, and the authorities to the effect that an employer is not in general responsible to his workmen for the safety of premises of third parties, which proceed on the ground that the employer has no control over those premises. In this connexion reference was made to *Taylor* v. *Sims & Sims* [48] and *Cilia* v. *James & Sons*,[49] and also to *Hodgson* v. *British Arc Welding Co. Ltd.*,[50] where employers (specialist sub-contractors) were held not to be liable at common law for injuries to their workmen through a defect in scaffolding provided, maintained and controlled by the head contractors for the repair of a ship.

An authority directly in the first defendants' favour is to be found in *Mason* v. *Williams & Williams Ltd.*,[51] where in circumstances closely comparable to those of the present case Finnemore J. held that certain employers were not liable to their workman for an injury to his eye caused by the breaking of a defective chisel. Ashworth J. found himself unable to follow that case in view of the other authorities, but the first defendants claim that he ought to have followed it as containing a correct statement of the law.

As to *Wilsons & Clyde Coal Co.* v. *English*,[52] it is said on the first defendants' side that in so far as the speeches contain language capable of carrying the implication that an employer cannot divest himself of his duty by entrusting its performance to an independent contractor, and in particular in so far as the speech of Lord Maugham contains language capable of being construed as supporting the view that an employer who buys tools from a reputable supplier is answerable for defects in them due to the negligence of the manufacturer by whom they may turn out to have been made, albeit a complete stranger to the employer, they go far beyond what was necessary for the decision of the actual case in hand, and accordingly should not be regarded as providing binding authority for the extreme proposition contended for by the plaintiff.

As to this last point, I think it was necessary for the decision of the matter in question in *Wilsons & Clyde Coal Co. Ltd.* v. *English* [52] for their Lordships to examine the character and incidents of an employer's duty of care to his workmen, and in particular the question whether it could be discharged by entrusting its performance to others, and I think what was said by them on that question must be regarded as authoritative.

[48] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.
[49] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.
[50] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.
[51] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.
[52] [1938] A.C. 57.

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As to the alleged inconsistency of the plaintiff's proposition with the cases concerning work on the premises of third parties, I doubt if it would ever be possible to reconcile all the cases which have been decided on an employer's duty to his workmen at common law, and each case depends to a great extent on its own facts. But I do not think this particular charge of inconsistency is well founded. Where a workman is put by his employer to work on premises belonging to third parties the employer in no sense provides or selects or controls the premises. In cases such as the present case the employer decides what tools he will buy and from whom he will buy them.

As to the impossibility of imputing to the first defendants vicarious liability for the negligence of the second defendants, who were neither their servants nor their agents nor their independent contractors, to this, as a general proposition, I agree. But I do not think that the principle upon which an employer is held not to have performed his duty of care, where he has entrusted its performance to somebody else who has in fact failed to perform it, is confined in its application to cases in which the employer is vicariously liable for that other person's negligence in the sense in which a principal may be held liable for the negligence of his agent. Nor in my view can there be any valid distinction for this purpose between an employer who has tools made for him by a manufacturer thereby entrusting to the manufacturer the performance of his duty to take reasonable care to provide sound tools, and an employer who buys tools ready made on the assumption that they have been made with that degree of skill and care which the performance of his duty demands.

As to the terms of any implied warranty, a verbal point can no doubt be made. But I think the case really turns on the nature of the first defendants' duty of reasonable care and the manner in which it is capable of being discharged. As I understand the *Wilsons & Clyde Coal Co.'s* case, it is an absolute duty to take reasonable care which can be discharged only by showing that all reasonable care has in fact been taken to ensure the soundness of the tools provided, and not by showing that the employer entrusted to somebody else the taking of all reasonable care, or assumed that somebody else had taken all reasonable care, to ensure the soundness of those tools. If the duty must be expressed as a warranty, I think the warranty would be that (to paraphrase Lord Maugham's language in the *Wilsons & Clyde Coal Co.'s* case) the tools were as sound as reasonable care could make them.

I have left to the last the question of latent defect. The first defendants' duty being to take reasonable care, they clearly could not be held liable if the defect could not have been detected either by the first defendants themselves on such inspection as they could reasonably be expected to make or by the second defendants using reasonable skill and care in the manufacture of

the tool. But the judge, while holding that the first defendants could not have been reasonably expected to discover the defect, found that the second defendants could by the exercise of reasonable skill and care have discovered it, and were negligent in failing to do so. The defect may thus be said to have been latent quoad the first defendants, but it was clearly not latent quoad the second defendants, the manufacturers of the tool. Therefore reasonable care was not in fact taken by the second defendants in the manufacture of the tool, and it follows that the first defendants' duty of care, as I have endeavoured to define it above, was in fact not performed, and it is immaterial that the defect may be said to have been latent quoad the first defendants themselves.

My conclusion as to the law on this point, and indeed on the whole case, is strongly borne out by the Scottish case of *Donnelly* v. *Glasgow Corporation*.[53] In that case the plaintiffs were employed by the defendant corporation as driver and conductor of an omnibus, and they claimed damages from the corporation in respect of personal injuries which they had sustained due to a defect in the chassis of the omnibus. The case came before the court on an application by the plaintiffs in which they attacked the relevance of certain defences raised by the corporation. The Lord Justice-Clerk (Lord Thomson) said this[54]: "The main "defence put forward by the corporation is that this defect was "a defect of design for the non-discovery of which they cannot "be blamed as they relied and were entitled to rely first on the "manufacturers of the chassis, and second on the circumstances "that they had been issued with a certificate of fitness under "section 68 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, "c. 43), applicable to this omnibus. So far as the driver's and "conductor's cases are concerned, they both being servants of "the corporation, I have no doubt that the defences are "irrelevant. It is admitted by the corporation that the "omnibus was defective and they aver that their suppliers were "responsible for the defective condition. But on this branch of "the law a master cannot escape liability to his servant for "defective plant by blaming his agents. The personal responsi-"bility which the law lays on the master in respect of plant "covers the activities of any person whom the master employs "to provide that plant. The supplier and the master are as one. "If then the supplier erred, the master is saddled with the results "of that error. It may be that the master is able to have "recourse against the supplier on account of his error, but that "is no concern of the injured servant and, indeed, one of the "reasons behind the development of this branch of the law is to "give the workman the advantage of being able to go directly "against his master. Of course, the master does not warrant "the plant and he is not liable in the case when the defect is "latent in the sense that it was not discoverable by the exercise

[53] 1953 S.C. 107; 1953 S.L.T. 161. [54] 1953 S.L.T. 161, 168.

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" of reasonable care. If the position in the present case had been " that the corporation had been able to say that neither they, " nor their suppliers, could have discovered the defect by means " of any reasonable inspection, the defence would be relevant. " But, as I have already said, the corporation agree that the " defect was patent to their suppliers and that in this branch of " the law means that it was patent to them."

Those observations, while not binding upon us, are of great persuasive force, and they substantially accord with what I take to be the law on this subject as deducible from the English authorities.

It may be said with some force that the conclusion to which I think we should come places upon the employer a heavier burden than the broad principle of reasonable care enunciated by Lord Herschell in *Smith* v. *Baker*[55] would appear to involve according to the ordinary meaning of the language used. But I think it is a conclusion which this court is constrained on the authorities to adopt. I would, moreover, observe that it does not entail the substitution of an absolute duty to ensure safety for the duty of reasonable care enunciated in *Smith* v. *Baker*,[56] and accepted passim by the House of Lords in the *Wilsons & Clyde Coal Co.'s* case.[57] The duty remains a duty of reasonable care, but the obligation to take that degree of care per se or per alios is an absolute obligation.

As to the merits of this conclusion, while it may be said to bear somewhat hardly on the employer, on the other hand an employee has to use the tools provided by the employer and has no voice in the selection of the tools or as to the manufacturer or supplier from whom they are obtained. If he is injured through a defect in one of the tools provided by his employer, it is surely not unreasonable that the employer should be held liable if the defect was due to the negligent manufacture of the tool, whether by the employer himself or by somebody else. Otherwise the employee might well be without remedy. He would not know and might not be able to find out who the manufacturer was. If he could find out who the manufacturer was, he might have a good claim on the *Donoghue* v. *Stevenson*[58] principle. But claims of that kind are not always easy to make out, though in the present case the plaintiff did in fact succeed against the second defendants on that principle, as well as succeeding against the first defendants for breach of their common law duty as his employers.

At all events, it would, as I think, be an irrational and intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of the employer and tools bought by the employer ready made.

For the reasons I have endeavoured to state, I agree with the

[55] [1891] A.C. 325, 362; 7 T.L.R. 679.
[56] [1891] A.C. 325, 362.
[57] [1938] A.C. 57.
[58] [1932] A.C. 562; 48 T.L.R. 494.

conclusion reached by the judge and would, for my part, dismiss this appeal.

PARKER L.J. With reluctance and diffidence I feel constrained to take a different view to that which my Lord has expressed and I would allow this appeal.

The duty owed by a master to his servant at common law can be stated in general terms as a duty to take reasonable care for the safety of his servants. It is as Lord Herschell said in *Smith* v. *Baker*[59]: " . . . the duty of taking reasonable care to provide " proper appliances, and to maintain them in a proper condition, " and so to carry on his operations as not to subject those " employed by him to unnecessary risk." Even before the Employers' Liability Act, 1880, it was regarded as a personal duty in this sense that if the master delegates, as he often must, the performance of that duty to another he remains liable for the failure of that other to exercise reasonable care. In *Bain* v. *Fife Coal Co.*,[60] the Lord Justice-Clerk, after referring to the decision of this court in *Fanton* v. *Denville*,[61] said this: " It " ignores what has always been regarded as a fundamental " doctrine of the law of master and servant, viz., that there are " certain duties owed by a master to his servant so imperative " and vital to safety that the master cannot divest himself of " responsibility by entrusting their performance to others, so as " to avoid liability in the event of injury arising to the servant " through neglect of any of these duties. The master's liability " as for breach of these paramount duties is unaffected by the " doctrine of fellow-servant, for in the eye of the law they are " duties that cannot be delegated. If, in fact, they are entrusted " by the master to others, the maxim applies qui facit per alium " facit per se. The duty may not be absolute, and may be only " a duty to exercise due care, but, if, in fact, the master entrusts " the duty to someone else instead of performing it himself, he is " liable for injury caused through the want of care of that some- " one else, as being, in the eye of the law, his own negligence." I have quoted that statement since it was expressly approved by all their Lordships in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[62] as representing the law of England as well as of Scotland. See also the principle as enunciated in that case by Lord Thankerton, Lord MacMillan, Lord Wright and Lord Maugham.[63]

Further, it is, I think, clear that this principle holds good whether the person employed by the master is a servant, a full-time agent or an independent contractor. It is true that in *Wilsons'* case the person under consideration was a manager employed by the owner of a mine, but all that was said there is equally applicable to the case of an independent contractor.

[59] [1891] A.C. 325, 362.
[60] 1935 S.C. 681, 693.
[61] [1932] 2 K.B. 309; 48 T.L.R. 433.
[62] [1938] A.C. 57.
[63] Ibid. 70, 75, 80, 83–84, 88.

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Indeed, Lord Wright [64] gave as an illustration the case of a shipowner who employed an expert naval architect, engineer or stevedore to make his ship seaworthy—persons who in general would be independent contractors.

Further, in *Paine* v. *Colne Valley Electricity Supply Co. Ltd.*,[65] Goddard L.J., sitting as an additional judge of the King's Bench Division, expressly included independent contractors as within the principle.

Again, in *Thomson* v. *Cremin*,[66] the defendant was held liable for the negligence of independent contractors employed to perform the duty. It is true that that was a case of invitor and invitee, but the duty of a master to his servant is certainly no less than that of an invitor to his invitee.

The principle is, I think, clear, but difficulties at once arise when it is sought to apply it in the present case. Is it to be said that in ordering a standard tool from Baldwin Ltd., wholesale suppliers, they were delegating a duty owed to the plaintiff or were employing Baldwins to perform their duty, or were appointing Baldwins their agents in that regard, to employ phrases often used in the cases? I cannot believe that the matter can be looked at in this way when there is nothing more than the purchase and sale of a standard article, and this whether the seller is a distributor or the manufacturer. Of course, if the defendants purchased the tool from suppliers or manufacturers whom they had reason to believe were unreliable, or if the defect was patent to the defendants or one which they ought to have suspected, the position might be different. It would then be a question of fact whether in all the circumstances they had failed to exercise reasonable care. No consideration of this kind, however, arises here.

But even if Baldwin Ltd. fell in some way to be considered as the defendants' agents, there is no suggestion that they were negligent. They, in turn, bought from reputable manufacturers, and had no reason to suspect any defect in the tool.

In these circumstances it seems to me that the plaintiff can only hold the defendants liable if the true duty of a master is not merely to take reasonable care to provide a reasonably safe tool, but to provide a tool which has been manufactured with reasonable skill and care, even when the manufacturer is in no contractual relationship with the master. Unless constrained to do so by authority I would be loth to hold that there was any such duty. Subject only to a defect latent to the manufacturer, and ordinarily this will not arise by reason of his expert knowledge, such a duty would amount to a warranty that the tool was safe. Indeed, such a duty would be one incapable of performance in that the master would have no control over the processes of the ultimate manufacturer. Viewed as a matter of contract I find it difficult to imply any such term. Viewed as a matter of

[64] [1938] A.C. 57, 80.
[65] 55 T.L.R. 181.
[66] [1956] 1 W.L.R. 103n.

tort it would be a retrograde step towards the theory of liability without negligence: cf. *Read* v. *J. Lyons & Co. Ltd.*[67] (*per* Lord MacMillan and *per* Lord Simonds).

What then is the position on the authorities? Oddly enough the question until recently has never fallen to be decided in England. In the recent case of *Mason* v. *Williams & Williams Ltd.*,[68] Finnemore J. decided that an employer who buys tools from reputable makers is entitled to assume that they are such as will be proper for their intended purpose. Apparently, however, no cases were referred to in argument.

Much reliance in the present case was put on two passages, one in the speech of Lord Maugham in *Wilsons'* case, and one in the speech of Lord Wright in *Thomson* v. *Cremin*.[69] In *Wilsons'* case Lord Maugham said[70]: "Suppose some new "machinery is necessary in a factory, and the employer is absent "or completely unskilled in such things. He necessarily leaves "the matter to a manager, let us suppose a highly skilled person, "who, however, is negligent in this case. An accident follows, "due to a defect in the machine. If the liability of the employer "is stated as being an obligation to use his best endeavours to "supply and instal good machinery, it may well be said on his "behalf that he left the matter to a highly skilled man, and it "may be asked with force, what more could he do? I should "reply, nothing; but I should add that the premise is incorrect. "The possessive noun 'his' is that which leads to the error. "The proposition would be more correctly stated to be that his "duty is to supply and instal proper machinery so far as care "and skill can secure this result." Taken out of their context these words are no doubt wide enough to embrace the higher duty contended for, but I cannot bring myself to believe that Lord Maugham was intending to lay down such a duty. *Wilsons'* case concerned the manager of a mine; it decided that though an employer can, and often should, delegate his duty to servants, agents and even independent contractors, he remains liable for their negligence. The House was not considering the question which arises here, which is not a case of delegation. That Lord Maugham had no such question in mind is, I think, made clear by the words which follow the passage cited above. Lord Maugham goes on[71]: "He can, and often must, perform this "duty by the employment of an agent who acts on his behalf; "but he then remains liable to the employees unless the agent "has himself used due care and skill in carrying out the "employer's duty. This has sometimes been expressed by "saying that the duty is personal to the employer; but the "adjective if unexplained is apt to mislead, like the word "'absolute' and the word 'delegate.' The employer can, of

[67] [1947] A.C. 156, 170, 180; 62 T.L.R. 646; [1946] 2 All E.R. 471.
[68] [1955] 1 W.L.R. 549.
[69] [1956] 1 W.L.R. 103n.
[70] [1938] A.C. 57, 87.
[71] Ibid. 88.

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" course, and frequently must delegate the performance of any " of his duties to skilled agents."

In *Naismith* v. *London Film Production Ltd.*[72] Lord Maugham's statement was cited and followed, and Goddard L.J. expressed the duty as one " to make the place of employment, " and the plant and material used, as safe as the exercise of " reasonable skill and care would permit." In that case also, however, the court were not concerned with the point which arises in the present case.

The second passage, in particular relied upon, is that of Lord Wright in *Thomson* v. *Cremin*[73]: " The duty of the invitor " towards the invitee is, in my opinion, a duty personal to the " former, in the sense that he does not get rid of the obligation " by entrusting its performance to independent contractors. It is " true that the invitor is not an insurer: he warrants, however, " that due care and skill to make the premises reasonably safe " for the invitee have been exercised, whether by himself, his " servants, or agents, or by independent contractors whom he " employs to perform his duty. He does not fulfil the warranty " merely by leaving the work to contractors however reputable or " generally competent. His warranty is broken if they fail to " exercise the proper care and skill." The warranty there referred to, however, does not extend to the care and skill of persons not in any contractual relationship with the defendant but only to the care and skill of those " whom he employs to " perform his duty."

I would also refer to *Biddle* v. *Hart*,[74] a decision of this court. In that case a stevedore's workman was injured as a result of a defect in tackle gratuitously provided by the ship as was customary. The Divisional Court had held, affirming the county court judge, that in such circumstances the master was under no duty in regard to the tackle. The Court of Appeal, however, ordered a new trial, holding that the defendant was under a duty and that it was for the jury to consider whether the duty had been performed. It is true that the claim was made under the Employers' Liability Act, 1880, but under that Act the plaintiff to succeed had to prove negligence, and the court clearly did not consider that the stevedore's duty was such that he was responsible for the defect in the shipowner's tackle. Thus Farwell L.J. said[75]: " The Act of 1880 was a mode of depriving the employer " of particular defences which were open to him at common law, " such as common employment and the like. That is pointed " out by A. L. Smith J. in *Howe* v. *Mark Finch & Co.*[76] The " case must therefore be considered as if this plaintiff were an " ordinary person employed to use the tackle by the defendant " for the purposes and for the profit of the defendant. In such " a case the defendant has to take reasonable care that the

[72] [1939] 1 All E.R. 794, 798.
[73] [1956] 1 W.L.R. 103, 110.
[74] [1907] 1 K.B. 649.
[75] Ibid. 654.
[76] (1886) 17 Q.B.D. 187.

" tackle, whether his own, or hired, or lent, is reasonably fit for " the purpose for which he employed the plaintiff to use it." And Sir Gorell Barnes said [77]: " It may be that in a case of this " character, although he had that duty, yet, if he had dealt with " these shipowners before and had never had any cause for " complaint, the jury might think that he had reasonably dis- " charged that duty. On the other hand, when you have " evidence that the plant was old and had been in use for a long " time, the jury might say they were not satisfied that reasonable " care had been taken to see that it was in a proper condition. " Once establish the duty the question is, What would the jury " consider a discharge of that duty? "

Finally, as far as the English authorities are concerned, reference has been made to the position when premises, upon which the servant is required to work, are not in the occupation or control of the master: cf. *Taylor* v. *Sims & Sims*,[78] *Cilia* v. *H. M. James & Sons*.[79] In both those cases it was held that the master owed no duty to see that the premises were safe, but that if there were any duty it had been performed. These cases were, of course, relied upon by the defendants. Though it is unnecessary for the purposes of the present case to come to a final conclusion, I am inclined to the view that these decisions, in so far as they decided that there was no duty, cannot stand with the decision in *Biddle* v. *Hart*.[80] The duty, as it seems to me, is always there, and it is a question for the jury whether that duty has been performed, bearing in mind that the premises are not in the occupation or under the control of the master. That, as I understand his judgment, was the approach of Hilbery J. in *Hodgson* v. *British Arc Welding Co. Ltd.*[81]

Turning to the Scottish authorities, these were strongly relied upon by the plaintiff. Thus, in *Macdonald* v. *Wyllie*,[82] a workman was injured by the fall of a scaffold due to the negligence of a firm of joiners whom his employers, builders, had employed to erect. At the trial the Lord Justice-Clerk had directed the jury that if they were satisfied that the defenders, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work and contracted with him to provide such a scaffold, he would not be liable.

Upon a bill of exceptions it was held that there must be a new trial. Lord Young said [83]: " The basis of the workman's claim " against his master is that there is a responsibility on the part " of his employer for the scaffolding being in a reasonably safe " condition to enable the workman to perform the work which " he has been engaged to do.

" According to the law of Scotland in the contract of master

[77] [1907] 1 K.B. 649, 653.
[78] 58 T.L.R. 339.
[79] [1954] 1 W.L.R. 721.
[80] [1907] 1 K.B. 649.
[81] [1946] K.B. 302.
[82] 1 Fraser 339.
[83] Ibid. 344.

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"and servant, apart from special stipulation to the contrary, it "is implied that the employer is responsible to his workmen for "the condition of the scaffolding which he has provided for them "to work upon, and that without any reference to the mode "employed by him to erect it." Further, Lord Trayner said [84]: "If a master buys a machine, let us say, necessary for the "execution of his work, and gives it to his workman, it is the "master's machine, not the workman's or manufacturer's. If "the machine turns out to be faulty, defective, or otherwise "insufficient, the master must answer for it."

The words used in these passages read apart from their context strongly support the plaintiff's contentions. But in their context I think they do no more than emphasize that the master's duty is personal in the sense referred to in *Wilsons'* case.[85] The basis of the case was that the master had employed the joiners to erect the scaffold. It is also to be observed that Lord Moncrieff and the Lord Justice-Clerk took a different view, and only granted a new trial on the ground that the direction was incomplete in that the question whether the defect could have been discovered by the master had not been left to the jury.

In *Wilson* v. *Merry and Cunningham*,[86] a case where the defence of common employment was raised, Lord President Inglis said this: "I think that wherever the master of a coal-pit or of "any other work, has occasion to purchase and provide a machine "or apparatus to be used by his workpeople, or for the protection "of his workpeople, he is liable for the insufficiency of that "machine or apparatus if it should turn out to be insufficient." These again are wide words, but again the Lord President was not considering a case where the insufficiency arose as a result of the negligence of a person with whom the master was in no contractual relationship. The next case is *McKillop* v. *The North British Railway Co.*,[87] but this is authority for no more than this, that a railway company is not relieved by the appointment of competent engineers and managers from responsibility for injury arising to a servant from a defect in the construction of the works. Nor can I find anything in the Lord Justice-Clerk's judgment in *Bain* v. *Fife Coal Co. Ltd.*[88] which supports the duty contended for by the plaintiff.

The last case is *Donnelly* v. *Glasgow Corporation.*[89] The driver and conductor of a bus were injured as a result of a defect in the chassis of a bus belonging to their employers. The employers averred that the defect was one of design, the fault of the manufacturers from whom they had bought the bus. It was held that the employers could not escape liability for damages arising from the provision of defective plant by blaming the manufacturers, and that the defences, so far as imputing fault

[84] 1 Fraser 339, 345.
[85] [1938] A.C. 57.
[86] (1867) 5 Macpherson 807, 811.
[87] (1896) 23 Rettie 768.
[88] 1935 S.C. 681.
[89] 1953 S.L.T. 161.

against the manufacturers, were irrelevant. The Lord Justice-Clerk, with whom Lord Mackay and Lord Patrick concurred, said [90]: "So far as the driver's and conductor's cases are concerned, they both being servants of the corporation, I have no doubt that the defences are irrelevant. It is admitted by the corporation that the omnibus was defective and they aver that their suppliers were responsible for the defective condition. But on this branch of the law a master cannot escape liability to his servant for defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant covers the activities of any person whom the master employs to provide that plant. The supplier and the master are as one. If then the supplier erred, the master is saddled with the results of that error."

While not binding on this court that decision is, of course, most persuasive authority. Once more, however, the decision appears to be based on agency, but in so far as it treats the manufacturer as the employer's agent I crave leave to doubt its correctness. As I understand the facts there was no suggestion that the chassis had been made to the employer's requirements. It was a standard chassis. Moreover there was no averment that the master could not with reasonable care have discovered the defect. But in any event that decision, as I read it, is no authority for the duty contended for in the present case, since the employers here were in no contractual relationship with the negligent manufacturers.

Having considered the authorities, I have come to the conclusion that a judgment in favour of the plaintiff involves an extension of the duty owed at common law by a master to his servant. Now that the doctrine of common employment is abolished, and now that the workman can recover direct from the negligent manufacturer, I can see no justification for extending the duty to exercise reasonable care as enunciated by Lord Herschell in *Smith* v. *Baker*.[91]

Accordingly, I would allow this appeal.

PEARCE L.J. I, too, feel reluctance and diffidence at taking a different view from that expressed by Jenkins L.J.

We have to decide what is the legal responsibility of an employer in respect of a tool bought by him without negligence from a reputable supplier who, without negligence, had bought it from a reputable manufacturer, who *was* guilty of negligence in its manufacture. It is clear from the judge's findings that no one save the manufacturer has been at fault.

It is important to consider the exact extent of the employer's duty. If the duty is to exercise care in supplying plant, then one would think at first sight that he must be discharged from liability if he or those to whom he has entrusted the duty have with due care bought a standard tool from a reputable middleman

[90] 1953 S.L.T. 161, 168. [91] [1891] A.C. 325, 362.

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who has bought it from a reputable manufacturer. To hold him liable in such circumstances seems to me tantamount to saying that his duty is to make and that the manufacturer must be regarded notionally as having had that task entrusted to him by the employer.

The duty of an employer in respect of the provision of plant has been put in various phases, all based on a duty to take reasonable care—e.g., he has "the duty of taking reasonable care "to provide proper appliances" (*per* Lord Herschell in *Smith* v. *Baker*[91]); "a duty to furnish [workman] with adequate "materials and resources for the work" (*per* Lord Cairns in *Wilson* v. *Merry & Cunningham*[92]); "a duty of providing good "and sufficient apparatus" (*per* Lord Wensleydale in *Weems* v. *Mathieson*[93]); and of "providing proper plant" (*Toronto Power Co. Ltd.* v. *Paskwan*[94]). Nowhere does one find it described as a duty to make.

In the latter case it was said[95]: "It is true that the master "does not warrant the plant and if there is a latent defect which "could not be detected by reasonable examination or if in the "course of working the plant becomes defective and the defect "is not brought to the master's knowledge and could not by "reasonable diligence have been discovered by him the master "is not liable and further a master is not bound at once to adopt "all the latest improvements and appliances. It is a question "of fact in each case, was it in the circumstances a want of "reasonable care not to have adopted them." Lord Thankerton, in *Wilsons & Clyde Coal Co.* v. *English*,[96] accepted that passage as adequately expressing the law.

In the same case Lord Wright said[97]: "The same principle, "in my opinion, applies to those fundamental obligations of a "contract of employment which lie outside the doctrine of "common employment, and for the performance of which "employers are absolutely responsible. When I use the word "absolutely, I do not mean that employers warrant the adequacy "of the plant, or the competence of fellow-employees, or the "propriety of the system of work. The obligation is fulfilled by "the exercise of due care and skill." And Lord Maugham said[98]: "In such employments it was held that there was a "duty on the employer to take reasonable care and to use "reasonable skill first to provide and maintain proper machinery, "plant, appliances and works." And later[99]: "It has already "been pointed out that the employer's liability is discharged by "the exercise of due care and skill."

It is clear, therefore, that the duty is merely to use reasonable care and skill in providing adequate plant. This duty, as was pointed out in that case, is one of which the employer cannot

[91] [1891] A.C. 325, 362.
[92] (1868) L.R. 1 H.L.(Sc.) 332.
[93] (1861) 4 Macq. 215.
[94] [1915] A.C. 734, 738.
[95] Ibid. 738.
[96] [1938] A.C. 57, 72.
[97] Ibid. 78.
[98] Ibid. 86.
[99] Ibid. 87.

rid himself. "But in truth the employer's obligation," said Lord Wright,[100] "as it has been defined by this House, is personal to "the employer, and one to be performed by the employer per se "or per alios. If I may take an analogy or instance of a similar "personal obligation, I note that the Carriage of Goods by Sea "Act, 1924, requires a shipowner to exercise due diligence or to "take reasonable care to provide a seaworthy ship. The ship-"owner is almost certainly not an expert naval architect, "engineer, or stevedore. So far as I know it has never been "claimed that this obligation is fulfilled by the shipowner "taking reasonable care to appoint a competent expert; the "shipowner is absolutely held to the fulfilment of the obligation. "It is the obligation which is personal to him, and not the "performance."

Lord Maugham put the proposition in these words[101]: "It "has already been pointed out that the employers' liability is "discharged by the exercise of due care and skill; and I may "be allowed to point out that it is this circumstance which "has led on occasion to a misapprehension of the true position. "An illustration will demonstrate the mistake. Suppose some "new machinery is necessary in a factory, and the employer is "absent or completely unskilled in such things. He necessarily "leaves the matter to a manager, let us suppose a highly "skilled person, who, however, is negligent in this case. An "accident follows, due to a defect in the machine. If the "liability of the employer is stated as being an obligation to "use his best endeavours to supply and instal good machinery, "it may well be said on his behalf that he left the matter to "a highly skilled man, and it may be asked with force, what "more could he do? I should reply, nothing; but I should "add that the premise is incorrect. The possessive pronoun "'his' is that which leads to the error. The proposition would "be more correctly stated to be that his duy is to supply and "instal proper machinery so far as care and skill can secure "this result. He can, and often he must, perform this duty "by the employment of an agent who acts on his behalf; but "he then remains liable to the employees unless the agent has "himself used due care and skill in carrying out the employer's "duty."

Four years after *Wilsons & Clyde Coal Co.* v. *English* in *Thomson* v. *Cremin*,[102] Lord Wright again defined the rule which he said the House had in a different context applied in *Wilsons & Clyde Coal Co.* v. *English*. "The duty of the invitor towards "the invitee is, in my opinion, a duty personal to the former, "in the sense that he does not get rid of the obligation by "entrusting its performance to independent contractors. It is "true that the invitor is not an insurer: he warrants, however, "that due care and skill to make the premises reasonably safe

[100] [1938] A.C. 57, 80.
[101] Ibid. 87.
[102] [1956] 1 W.L.R. 103n., 110.

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"for the invitee have been exercised, whether by himself, his "servants, or agents or by independent contractors whom he "employs to perform his duty. He does not fulfil the warranty "merely by leaving the work to contractors, however reputable "or generally competent. His warranty is broken if they fail "to exercise the proper care and skill."

As long as the employer's liability is based on want of care it is a difficult concept to regard him as vicariously liable for the negligence of a manufacturer whom he did not employ, who never had any business relations with him, and who (if they are both companies) may even have ceased to exist before the employer came into existence. The employer can hardly be said in such a case to have made the tool per se or per alios. Yet, here, it was only in the making that there was negligence. Such a concept would presumably make an employer liable if he bought a factory which through the negligence of the original builder years before had a defect (undiscoverable by reasonable examination when once the building was completed) which subsequently harmed his employee.

To call this a vicarious liability would be to use the words in quite a different sense from any in which, as far as I can see, they have hitherto been used. If the liability were based on a breach of a warranty of the fitness of the plant, the concept would be a neat and easy one. But such a warranty has always been expressly disclaimed by the courts. One is bound, therefore, to inquire closely whether the words in the opinions on which the respondent chiefly relies fairly compel one to the conclusion reached by the judge.

It strikes me as strange that, if Lord Wright and Lord Maugham were intending their words to cover such a case as this, they made no mention of it. Defects in machinery or tools that have been bought from suppliers or manufacturers must have been a possibility present to their minds. Indeed, Lord Maugham gives a specific illustration dealing with a defect in new machinery in the passage I have read. In speaking of "a defect in the machine" he is referring, as I understand it, to a defect which would have been discovered by a careful manager, and he bases the liability of the employer on the manager's negligence. If the respondent's argument is correct, the employer would have been liable in any event (since ex hypothesi the defect was discoverable) and the managers' negligence would have been irrelevant.

Again it is noticeable that Lord Wright in the passage which I have read refers to the naval architect, the engineer, the stevedores, as people for whose neglect the shipowner will find himself vicariously liable. He does not refer to the shipbuilder. It seems to me unlikely that he was intending to express a principle by which every subsequent purchaser of the ship will be liable to his employee for some undiscoverable defect due to the original negligence of the shipbuilder. By undiscoverable

defect I mean a defect that though patent to the shipbuilder during the construction was not discoverable by subsequent purchasers using reasonable care.

It seems to me that the opinions read fairly in their contexts are dealing only with the negligence of persons to whom the employer has "entrusted" the provision of plant and are concerned to make the point that although they be independent contractors, yet anything that they do is the act of the employer acting per alios. If those opinions were intending to define a rule of such far reaching consequence that it would make the employer responsible for defects due to the negligence of the manufacturer and undiscoverable by a purchaser even in respect of small standard articles that he buys, I would think it probable that they would have said so in express terms.

When Lord Maugham in the passage which I have read expressly eliminates the word "his," and says that "the pro-"position would be more correctly stated to be that his duty "is to supply and instal proper machinery so far as care and "skill can secure this result," he follows it with the sentence, "He can, and often he must, perform this duty by the employ-"ment of an agent who acts on his behalf; but he then remains "liable to the employees unless the agent has himself used due "care and skill in carrying out the employers' duty." I think that, in the context, he is removing the limitation of the pronoun "his" in order to widen the principle only to the extent of substituting (by implication) the words "the care "and skill of any persons whether agents or independent con-"tractors who have been entrusted by the employer with the "fulfilment of his duty."

I would therefore regard the respondent's contention in this case as extending the words of Lord Wright and Lord Maugham beyond their true intention. To regard the tool in question on the facts of this case as having been manufactured by the employer per alios seems to me unreal and artificial and I venture to think it cannot be right in principle.

I see the force of the argument that the view of the matter which I have expressed may seem to draw a capricious line between the employer who buys a standard article of plant from a middleman and the employer who makes it himself or the employer who has the article specially made for him by a manufacturer to his special requirements (as in *Paine* v. *Colne Valley Electricity Supply Co. Ltd.*[103]). But every line is liable to have anomalies along its borders and I do not think that is a sound argument for not drawing a line at all if principle seems to demand that it should be drawn.

I agree with Parker L.J. in his observations on the Scottish cases and I have nothing to add to them.

[103] 55 T.L.R. 181.

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For the reasons I have given and those more clearly and cogently set out by Parker L.J. I would allow the appeal.

Appeal allowed.
Leave to appeal.

Solicitors: *E. P. Rugg & Co.; W. H. Thompson; Doyle, Devonshire & Co. for Kershaw, Tudor & Co., Sheffield.*

F. R. D.

[PRIVY COUNCIL.]

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KOFI FORFIE, ODIKRO OF MARBAN . . APPELLANT;

AND

BARIMA KWABENA SEIFAH, KENYASE-HENE . . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Gold Coast)—Jurisdiction—Chief Commissioner's Court—Commissioner's appointment rescinded—Judgment delivered without jurisdiction—Nullity—Subsequent appointment—Review—Second judgment in identical terms—Not a nullity—"Judgment"—Inherent power to set aside judgment delivered without jurisdiction—Courts Ordinance (Laws of the Gold Coast, 1936, c. 4), s. 63; Sched. III, Ord. 41, rr. 1, 2.

Practice—Order—Recall—Order without jurisdiction—Inherent power of court which made order to set it aside.

By Ord. 41, r. 1, of the "Rules and Orders of Court" contained in the Third Schedule to the Courts Ordinance of the Gold Coast: "Any Judge, Magistrate, or other judicial officer, may, upon such "grounds as he shall consider sufficient, review any judgment or "decision given by him (except where either party shall have "obtained leave to appeal . . .), and upon such review it shall be "lawful for him . . . to reverse, vary, or confirm his previous "judgment . . ." And by r. 2: "Any application for review of "judgment must be made not later than 14 days after such "judgment . . .":—

Held, that "judgment" in Ord. 41 means nothing more than an adjudication by a judge upon rights of parties. If made without jurisdiction it would be ineffectual, but the effectiveness or otherwise of the judgment is not relevant to the question whether it is a judgment. Consequently a judge may under Ord. 41 review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time the second judgment is delivered the judge had jurisdiction then that second judgment is not a nullity.

Accordingly, where a commissioner validly appointed to preside over the Chief Commissioner's Court reviewed under Ord. 41, r. 1, a judgment of his which was a nullity, having been delivered by

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* *Present*: LORD REID, LORD SOMERVELL OF HARROW and THE RT. HON. L. M. D. DE SILVA.

him on a date when admittedly he had no jurisdiction to act, and on the review delivered a judgment identical in terms with his original judgment, the second judgment was not a nullity.

A further ground for holding that such second judgment was not a nullity is that the court has inherent power to set aside a judgment which it has delivered without jurisdiction. Assuming that the commissioner had no power to review his earlier judgment, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment.

Dictum of Lord Greene M.R. in *Craig* v. *Kanssen* [1943] K.B. 256 at 263; [1943] 1 All E.R. 108 applied.

A judge can act of his own motion under Ord. 41, r. 1, without the necessity of an application by a party under rule 2. The latter rule places parties under a limitation as to time without imposing a similar limitation on a judge.

The words "shall have obtained leave to appeal" in Ord. 41, r. 1, relate to the point of time at which final—not conditional—leave is formally granted by the court.

Under section 63 of the Courts Ordinance, which provides that "The Governor may at any time . . . appoint a fit and proper "person to preside over the Chief Commissioner's Court . . .," more than one commissioner can be appointed to function at the same time. Under the relevant law the singular includes the plural, and the word "preside" does not stand in the way of that interpretation—two persons appointed will not sit in the same court at the same time.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 32 of 1952) from a judgment of the West African Court of Appeal (June 28, 1951), which set aside as nullities two judgments given by Mr. A. C. Spooner in the Chief Commissioner's Court of Ashanti on May 10, 1949, and June 29, 1949, respectively.

The following facts are taken from the judgment of the Judicial Committee. The original parties to this action were the predecessors in title of the present appellant and the present respondent. No question arose from the substitution of parties. The terms "appellant" and "respondent" in this report refer to the original parties as well as to the parties who appeared on this appeal.

The respondent instituted this action against the appellant on October 6, 1936, in Divisional Native Court B of Kumasi to recover a tract of land. That court found in favour of the appellant and dismissed the respondent's claim. On appeal to the Asantehene's Court A2 the judgment was reversed and the respondent succeeded. The appellant thereupon lodged an appeal to the Chief Commissioner's Court. Mr. A. C. Spooner, the president of the court at the time, heard the case and delivered judgment in favour of the appellant on May 10, 1949.

There was an appeal from that judgment to the West African Court of Appeal. Two dates relating to that appeal were relevant. The respondent on May 27, 1949, obtained conditional leave to appeal, and final leave to appeal was granted on July 15, had had on May 10, 1949, no power to exercise judicial functions

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as, on that day, his appointment to preside over the Chief Commissioner's Court stood rescinded. It appeared from the record that he had also been of that opinion and that, as a result, certain steps were taken which it is convenient to examine at this stage.

It was common ground that appointments to preside over the Chief Commissioner's Court could be and were made by orders signed by the Colonial Secretary and published in the Gazette. When Mr. Spooner heard the case he held office under Order No. 84 of 1948. By Order No. 32 of 1949, signed on May 10, 1949, by the Acting Colonial Secretary, one Mr. Allen was appointed to preside over the Chief Commissioner's Court and Order No. 84 of 1948 was rescinded. By a further Order, No. 42 of 1949, of June 21, 1949, Mr. Spooner was appointed commissioner for the period June 23, 1949, to June 30, 1949. On June 29, 1949, acting under a power to review a judgment conferred by Ord. 41, r. 1, contained in Schedule III of Chapter 4 of the Laws of the Gold Coast, 1936, Mr. Spooner reviewed his judgment of May 10, 1949. He said that he had had no jurisdiction on May 10, 1949, to deliver that judgment and, stating that he was acting under his power to review, he delivered a judgment identical in terms with his original judgment. There was an appeal from that judgment also to the West African Court of Appeal.

The Court of Appeal (Verity Ag.P., Lewey J.A. and Morgan J.) held that the judgment delivered on review on June 29, 1949, must be held to be also a nullity as the judgment of May 10, 1949, was a nullity.

By Ord. 41, in the Third Schedule to the Courts Ordinance:—

"ORDER 41

"REVIEW

"1. Any judge, magistrate, or other judicial officer, may, "upon such grounds as he shall consider sufficient, review any "judgment or decision given by him (except where either party "shall have obtained leave to appeal, or a reference shall have "been made upon a special case, and such appeal or reference is "not withdrawn), and upon such review it shall be lawful for "him to open and re-hear the case wholly or in part, and to take "fresh evidence, and to reverse, vary, or confirm his previous "judgment or decision, or to order a non-suit.

"2. Any application for review of judgment must be made "not later than fourteen days after such judgment. After the "expiration of fourteen days an application for review shall not "be admitted, except by special leave of the court, on such terms "as seem just."

October 29, 30. *Hector Hughes Q.C.* and *J. T. Woodhouse* for the appellant.

J. G. Le Quesne for the respondent.

The following cases were cited in argument: *Bhugwandeen Doobey* v. *Myna Baee* [1]; *Craig* v. *Kanssen* [2]; *Hatton* v. *Harris* [3] and *Chief Kwame Asante* v. *Chief Kwame Tawia.* [4]

December 9. The judgment of their Lordships was delivered by THE RT. HON. L. M. D. DE SILVA, who stated the facts set out above and continued: It appears from the judgment of the Court of Appeal that the appellant at the hearing of the appeal conceded that the judgment of May 10, 1949, was a nullity. An endeavour was made by counsel for the appellant to argue that upon this point the Court of Appeal had misunderstood counsel. No indication of such an argument is to be found in the "Case" for the appellant." Six years have now passed since the Court of Appeal gave judgment, and their Lordships did not think that this was a case in which such an argument should be permitted. Nor did they find it possible, in the exercise of their discretion, to allow counsel, despite the concession, to argue that the judgment of May 10, 1949, was not a nullity.

Their Lordships are unable to agree with the Court of Appeal that the judgment delivered on review on June 29, 1949, must be held to be also a nullity as the judgment on May 10, 1949, was a nullity. They have reached the conclusion that the judgment of June 29, 1949, was not a nullity upon two separate and independent grounds.

The power to review a judgment is to be found in Ord. 41, contained in the Third Schedule to the Courts Ordinance, which is to the following effect: [His Lordship stated the terms of Ord. 41, rr. 1 and 2, and continued:] This is an extremely wide power and its object is to enable a court, which is of opinion that a judgment or decision given by it is erroneous, to correct the error. If, as argued by the respondent, the term "judgment" must be limited to judgments made with jurisdiction, it follows that the Order enables a court to correct all errors made by it except the error that it has given a judgment which it had no jurisdiction to give. Such a result would be curious. Their Lordships cannot accept the argument. To say that a judgment is a nullity is not to say that the judgment is not a judgment for any purpose, and, in particular, that it is not a judgment within the meaning of the term in Ord. 41. Their Lordships are of opinion that the term in Ord. 41 means nothing more than an adjudication by a judge upon rights of parties. If made without jurisdiction it would be ineffectual, but the effectiveness or otherwise of the judgment is not relevant to the question whether it is a judgment. Consequently a judge may under the Order review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time the second judgment is delivered the judge had jurisdiction

[1] (1868) 11 Moo.I.A. 487, 499.
[2] [1943] K.B. 256; [1943] 1 All E.R. 108.
[3] [1892] A.C. 547, 560.
[4] [1949] W.N. 40.

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then that second judgment is not a nullity. That is the position in the present case.

Certain other submissions were made with regard to Ord. 41. It was said that a judge cannot act under rule 1 unless a party applies under rule 2. Their Lordships cannot accept this argument. There is no reason why a judge, acting under Ord. 41, should be precluded, after hearing parties, from correcting an error which he has noticed. What the legislature has done is by rule 2 to place parties under limitation as to time without imposing a similar limitation on a judge. It was argued before the Court of Appeal that where it was intended that a judge should have the right to act of his motion the legislature has expressly said so. Thus, in Ord. 26 the words " either of his " own motion or on the application of either party " occur. Their Lordships are of opinion that, though this argument cannot be said to be without some force, it is not strong enough to defeat the view expressed above.

It was also argued that the words " except where either party " shall have obtained leave to appeal " in rule 1 were applicable because the respondent had at the time of the review obtained conditional leave to appeal and fulfilled the conditions although the court had not granted final leave to appeal. Their Lordships cannot agree. They think " shall have obtained leave to appeal " relates to the point of time at which final leave is formally granted by the court.

It was further argued that the power to review was not exercisable by an appellate tribunal. If this were correct the term " judicial officer " in Ord. 41 would not include judicial officers exercising appellate jurisdiction. Their Lordships can see no reason for taking this view.

It was said that Order No. 42 of 1949, of June 21, 1949, which appointed Mr. Spooner for the period June 23, 1949, to June 30, 1949, was ineffective as Mr. Allen's appointment had not been rescinded. Their Lordships are of the opinion that more than one person can be appointed to function at the same time. Section 63 of the Courts Ordinance is to the following effect: " The Governor may at any time by order under " his hand appoint a fit and proper person to preside over the " Chief Commissioner's Court and such person shall have and " may exercise during the period of such appointment and subject " to the terms thereof all the judicial powers and jurisdiction for " the time being vested in the Chief Commissioner." It is conceded that under the relevant law the singular includes the plural, and consequently " a fit and proper person " includes " fit and " proper persons." Their Lordships do not think that the word " preside " stands in the way of this interpretation. Two persons can be appointed, but as they will not both sit in the same court at the same time no difficulty can arise. Moreover, if only one person can be appointed, the later appointment of Mr. Spooner will prevail over the earlier appointment of Mr. Allen.

Their Lordships will now proceed to the second ground upon which they have come to the conclusion that the judgment of June 29, 1949, was not a nullity. A court has inherent power to set aside a judgment which it has delivered without jurisdiction. Lord Greene M.R. in *Craig* v. *Kanssen*,[1] after referring to several decisions, said: "Those cases appear to me to establish that "a person who is affected by an order which can properly be "described as a nullity is entitled ex debito justitiae to have it "set aside. So far as procedure is concerned, it seems to me "that the court in its inherent jurisdiction can set aside its own "order, and that it is not necessary to appeal from it."

Their Lordships are of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This in fact he did, and the only criticism of the proceedings of June 29 that could be made is that on a question of procedure he attributed the authority to do the thing he did to a source from which it did not flow. But although the source named was, on the assumption made, incorrect, he undoubtedly had power to do the thing he did. No other error can be said to have been committed. Such an error does not, in their Lordships' opinion, vitiate the act done. It follows that the judgment of June 29, 1949, was not a nullity.

Morgan J., who delivered the judgment of the West African Court of Appeal, with which the others concurred, said: "The "appeal against the reviewed judgment of June 29, 1949, has "not yet come before this court"; but he has pronounced upon the question whether or not the judgment of June 29, 1949, is a nullity. He said "the reviewed judgment must also in my "view be declared a nullity." And under the heading "Court "Notes of Judgment" the formal order made is: "Appeal "allowed. Judgment of C.C.A. set aside as a nullity. Reviewed "judgment also declared a nullity. No order as to costs." That view and that order stand in the way of the appeal from the judgment of June 29, 1949, being proceeded with. Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed and the case sent back to the Court of Appeal of Ghana to deal with such other points as arise on the appeal from the judgment of June 29, 1949, on the basis that that judgment is not a nullity although the judgment of May 10, 1949, is a nullity. The respondent must pay the appellant's costs of this appeal and of the hearing before the West African Court of Appeal.

Solicitors: *A. L. Bryden & Williams; Waterhouse & Co.*

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[1] [1943] K.B. 256, 262.

[COURT OF APPEAL.]

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Nov. 29.

Hodson and Morris L.JJ.

GORULNICK *v.* GORULNICK.

Husband and Wife—Property—Matrimonial home—Divorce—Injunction—Petition pending—Matrimonial home owned by wife—Wife's application for injunction restraining husband from remaining in house—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 12.

Husband and Wife—Divorce—Injunction.

A wife who had filed and served on her husband a petition for divorce on the ground of alleged cruelty, which the husband by his answer denied, applied for an injunction restraining the husband from living in or remaining with her in the matrimonial home, which was her property. The parties had been living together under the same roof, the husband was disputing the wife's allegations. Wallington J. refused the application. On appeal:—

Held, (1) that section 12 of the Married Women's Property Act, 1882,[1] did not entitle a wife as of right to exclude her husband from her property.

Symonds v. *Hallett* (1883) 24 Ch.D. 346 considered.

(2) That although, where the circumstances justified it, the judge might exercise his discretion by granting an injunction, there were no circumstances in the present case which would warrant the court interfering with Wallington J.'s exercise of his discretion.

Decision of Wallington J. affirmed.

APPEAL from Wallington J.

On September 4, 1957, the wife, Sonja Gorulnick, filed and served on her husband a petition for divorce on the ground of his cruelty. The husband, Sidney Gorulnick, in his answer, denied the allegation. On October 9, while the hearing of the petition was still pending, the wife applied to Wallington J. for an injunction restraining the husband from living in or remaining with her in the matrimonial home, 7, Wren Avenue, London, N.W., a house owned by her. The application was refused and she now appealed. Counsel on her behalf said that she was afraid of her husband and also desired to protect herself from a possible allegation of condonation, which in the case of a woman living alone with her husband in a house would be very difficult to meet.

Gerald Gardiner Q.C. and *Eric Myers* for the wife.

K. Bruce Campbell, for the husband, was not called on.

[1] Married Women's Property Act, 1882, s. 12: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. . . ."

The following cases, in addition to those cited in the judgments, were referred to: *Weldon* v. *de Bathe* [2]; *Larner* v. *Larner* [3] and *Boyt* v. *Boyt*.[4]

HODSON L.J. This is an appeal from an order of Wallington J. dated October 9, 1957. The application was by the wife, who had presented a petition for divorce on the ground of cruelty, for an injunction restraining her husband from living in or remaining with her in the house, 7 Wren Avenue, which belonged to the wife. The petition is dated September 4, 1957, and an answer has been put in by the husband denying that he has been cruel to his wife. Affidavits have been sworn both by the wife and the husband and also a doctor, who has sworn that what the wife says in her affidavit and in her petition is consistent with the condition of health which she, the doctor, found and might fairly be attributed to the husband's conduct. But the issue of cruelty has yet to be decided, and it is not contended that this court can arrive on this interlocutory application at any conclusion as to the merits of the case. Mr. Gardiner, on behalf of the wife, has not shrunk from contending that as a matter of law, the house being the wife's house and not the husband's, she is entitled to come to the court and ask for an order restraining the husband from entering it.

The first case to which we were referred is a decision of the Court of Appeal—*Symonds* v. *Hallett*.[1] In that case the husband and wife had been physically apart for some time. The husband, having had proceedings instituted against him for divorce or judicial separation, claimed the right to go into and to use the wife's house when and as he thought fit, not for the purpose of consorting with his wife but for his own purposes; and an interim injunction having been granted by Chitty J., there was an appeal to the Court of Appeal by the husband. Cotton L.J. by his judgment showed that the problem was regarded by him as a troublesome one and that he was very reluctant to be taken as saying that the husband, in circumstances such as those, was in the position of a stranger and as such could be excluded from the wife's house.

He said [2]: "Expressions have been used that she is entitled "to be there in all respects as a feme sole and to be protected "against her husband's acts as if he were a stranger. That is "very true as regards the property. But is the husband to be "considered a stranger because the property is vested in her for "her separate use? That is a point which those who assert that "the husband is to be considered a stranger must prove." On the facts of that case he was of the opinion that the husband could not be considered as desiring to use or to enter the house

[2] (1884) 14 Q.B.D. 339; 1 T.L.R. 171.
[3] [1905] 2 K.B. 539; 21 T.L.R. 637.
[4] [1948] 2 All E.R. 436.
[1] (1883) 24 Ch.D. 346.
[2] Ibid. 351.

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as a husband, to enjoy the society of his wife or to consort with his wife, and therefore he held that an injunction could stand.

Bowen L.J.—who was of the same opinion—said in those particular circumstances he thought the injunction could stand: "For this reason: the husband is not really asking for the benefit "of the wife's society; he has no wish for that. The true effect "of the affidavit, if you look at it, is this, that he complains of "not being allowed the proprietary use of the house."[3] Therefore the Lord Justice thought it was more convenient in those circumstances, the wife being clearly entitled to the house, that the injunction should stand.

A later decision of the Court of Appeal, which is often referred to in this class of case, was *Shipman* v. *Shipman*.[4] In that case there was no petition for divorce or judicial separation pending. The wife, who owned the house and was anxious to make a living out of it by taking in lodgers, and who said she had been ill-treated by her husband, succeeded before Russell J. in obtaining an interim injunction restraining her husband from entering the house or interfering with her possession. There, again, the same problem arose. *Symonds* v. *Hallett*[5] was referred to, and without reading the judgments it is clear, to my mind, that the members of the court were of opinion that on the true construction of section 12 of the Married Women's Property Act, 1882, the husband could not be properly treated, notwithstanding the wide language of the Act, as if he had been a stranger, having regard to the special relationship which exists between husband and wife in that they have a duty to live together. Nevertheless all the members of the court were agreed that the injunction should stand. Atkin L.J. and also Sir Ernest Pollock M.R. referred to the fact that substantial acts of cruelty were established, even although only by affidavit, against the husband because of the admissions that he had made, and therefore they were not disposed to accept the argument, which is always addressed to the court in these cases, that to accede to such an application is tantamount to pronouncing a decree of separation between the parties for the time being. On the facts of the case it was held that the judge had exercised his discretion rightly. Sargant L.J. pointed out that the remedy was a special remedy, a discretionary remedy[6]: "The husband's conduct has been such that he has "apparently lost the right to the matrimonial consortium, and "therefore he is in no better position than a stranger, and it "follows that the injunction was rightly granted." Atkin L.J. referred to the strength of the case against the husband from the point of view of admitted violence and did not emphasize the need for protection of the wife's business, a business which she proposed to carry on of taking in lodgers and had carried on previously for some years in the house which she owned.

[3] (1883) 24 Ch.D. 346, 353.
[4] [1924] 2 Ch. 140; 40 T.L.R. 483.
[5] 24 Ch.D. 346.
[6] [1924] 2 Ch. 147.

I am satisfied that nothing in section 12 enables the wife as of right to exclude her husband from her property; nor is the position different when she has presented a petition. The petition not having been heard, but pending, must for the purpose of this appeal be regarded as a bona fide petition in which the wife is claiming the relief of the court on the ground which she states. The court has also to take into account the fact that the petition is being disputed by the husband, who is denying the allegations, and there is a conflict of evidence which cannot now be resolved. The fact is that now and at all material times the parties have been living together under the same roof, the roof being the wife's roof, and the husband has refused to go. In such a situation it cannot be doubted that the court has a discretion to intervene and has often done so in the past, notwithstanding the fact that it cannot arrive at any conclusion upon the issue of cruelty.

Many instances can be given where the court would naturally intervene; if, for instance, there was difficulty in the way of the sale of the house; and illustrations can be found in the reported cases which Mr. Gardiner referred to, cases where a successful application has been made by one spouse to exclude the other spouse from the matrimonial home, where the court has thought that the status quo should be maintained; cases, for example, where the husband has left the home before the proceedings were instituted and has come back to the home which was the matrimonial home and belonged to the wife, perhaps as a tactical move with a view to defeating the wife's claim, or to place himself, he thought, in a more advantageous position as opposed to her. But that is not this case. This is a case where the parties have continued to live under the same roof; there has been on the facts as established no absence for any substantial length of time at all from the house by the husband; no question of the husband having gone away and lived somewhere else and having attempted to come back to the house in order to put himself in a position in which he is or may be thought to be wrongly disturbing the status quo.

The circumstances which I have stated were considered by the judge, who, in the exercise of his discretion, decided that it was not a case in which he ought to intervene by injunction; it is not contended here that he took into account matters which he ought not to have taken into account in exercising his discretion or left out of account matters which he ought to have taken into account, such, for example, as the prospect of reconciliation or the likelihood that there would never be a reconciliation. The wife, on the one hand, has contended throughout that she is in all circumstances determined never to live with her husband again. The husband takes the contrary view. The argument has been put forward on the part of the wife that unless her application is granted the effect will be to force her to live in the house while her petition is pending or to leave; it is said if she is not to obtain relief by way of injunction she will have to leave, and that by

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resisting the application or requesting to live in the house the husband is putting pressure upon her to leave the house. I do not myself think it right to arrive at that conclusion.

There have been two decisions of Pearce J.—*Silverstone* v. *Silverstone* [7] and *Teakle* v. *Teakle* [8]—where the husband had been away from home in circumstances which are not altogether clear from the statement of facts and had returned home at or about the time when proceedings were instituted, and the judge took the view, on the facts of those cases, that there was, in effect, pressure exercised by the husband on the wife to leave the matrimonial home. *Silverstone* v. *Silverstone* [9] was an extreme case because the home was actually the flat of the husband and the wife had no proprietary interest in the property at all. But without in any way seeking to cut down the discretion of the court to make an appropriate order in the right case which may involve one spouse ceasing to live under the same roof as the other, I do not see any circumstances in the present case which would warrant this court in interfering with the exercise of the discretion by the judge who refused to make such an order.

I think the appeal fails and should be dismissed.

MORRIS L.J. I agree. Mr. Gardiner does not put the case of the wife as being based entirely upon her ownership of the house. What he says is that the wife is desirous of having an injunction for two reasons: first, because she is afraid of her husband, and, secondly, to protect her from the risk of its being said in the proceedings that there had been condonation. Mr. Gardiner points to a conflict of fact shown by the two affidavits. The husband says that intercourse took place at the end of August, 1957; the wife says that intercourse last took place in August, 1956. So it is submitted that the wife would be gravely embarrassed for those two reasons if she were under the same roof as her husband. It seems to me, therefore, that this case is not based upon the wife's proprietary rights.

A wife's proprietary rights must clearly in some cases be protected. In *Symonds* v. *Hallett* [10] a leasehold house was settled upon the usual trusts for the wife for life and for her separate use, and certain articles such as furniture and plate were also held upon trust for her. The husband and wife lived in the house together for some time. They then ceased to cohabit. The wife began proceedings for divorce. Then the wife commenced an action in the Chancery Division claiming administration of the trusts of the settlement, and she claimed an injunction. An interim injunction was granted by Chitty J. on the motion of the wife to restrain her husband from entering upon or taking or continuing in possession of the leasehold house and from removing articles

[7] [1953] P. 174; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556.
[8] [1950] W.N. 452; 66 T.L.R. (Pt. 2) 558.
[9] [1953] P. 174.
[10] 24 Ch.D. 346.

of furniture or plate from it. The wife deposed that the husband had for about 12 months ceased to reside at the house but went there usually on Thursdays and Fridays and slept one night a week; and she said that he had already taken away some of the settled plate, furniture, chattels and effects. When Cotton L.J. agreed in dismissing the husband's appeal against the interim injunction he said [11]: "I concur in the view that this injunction "ought not to be discharged, on this ground, that, looking at the "circumstances of the case and at the facts which we have before "us, and the affidavit of the husband, he cannot be considered "as desiring to use or to enter this house as a husband, to enjoy "the society of his wife, or to consort with her as his wife. "Therefore although I must not, by concurring in the view that "this injunction shall stand, be considered as in any way favour-"ing the view of it which has been urged in the argument, yet "I think that under the circumstances the best course till the "hearing of the case, when the matter can be decided, is not to "discharge the injunction which has been granted." It seems to me there was a clear separation there between the wife's proprietary rights and the matrimonial position: it was said the husband had voluntarily for some time abandoned his privilege of consorting with his wife.

Approaching the matter on the basis on which Mr. Gardiner has made his submissions, it seems to me this case does not therefore depend on the fact that the wife is the owner of the house. I agree entirely that the court has wide powers, pending the hearing of a petition, to make orders that seem right, sometimes to preserve the interim position, and sometimes to make orders which will have the effect of restraining the right of one spouse to live under the same roof as the other. But in the present case it does not seem to me that the judge would have been warranted in granting an injunction.

It would be sufficient to dispose of this appeal to say it is not shown that the judge in any way erred in the exercise of his discretion. But I think, further, that here is a case in which the husband has not in fact left the matrimonial home (which was a feature which existed in so many of the cases to which we have been referred), but here is a case in which the husband denies the allegations against him and a case in which it is not possible, I think, for the court to form any view until the matters in dispute can be heard and determined. It does not seem to me that this is a case in which the court would have been warranted in granting an injunction which would force the husband to leave what has been the matrimonial home.

Appeal dismissed.

Solicitors: *Howard Kennedy & Co.; Franks, Charlesly & Leighton.*

A. W. G.

[11] 24 Ch.D. 346, 351.

[COURT OF APPEAL.]

C. A.

1957
Dec. 9.

Lord Denning, Hodson and Morris L.JJ.

RIDING *v.* RIDING.

[1953 D. No. 1138.]

Husband and Wife — Maintenance — High Court — Committal order— Indorsement—Suspension on terms—Further default by judgment debtor—Committal order to issue indorsed for amount of original debt only—Matrimonial Causes (Judgment Summons) Rules, 1952 (*S.I.* 1952, *No.* 2209/*L.*21), *r.* 6 (3).

A divorced husband defaulted on payments under a maintenance order for £1 a week made against him in a district registry, and his former wife as judgment creditor obtained, under the Matrimonial Causes (Judgment Summons) Rules, 1952,[1] an order of commitment to prison for six weeks unless he sooner paid the arrears of maintenance and the costs of the summons, amounting in all to £62 6s., but it was directed that the order should be suspended under rule 6 (3) of the Rules of 1952 if the debtor paid by regular instalments 5s. a week off the amount indorsed on the order of commitment in addition to the £1 a week under the maintenance order. The debtor again defaulted on the payments and when further arrears of £56 15s. 6d. had accrued, the judgment creditor applied to the court for the issue of the order of commitment, to be indorsed for the amount of the original debt and also the subsequent accumulated arrears of maintenance—a total of £119 1s. 6d.:—

Held, that if the judgment debtor was committed to prison, he could be released on payment of the sum indorsed on the order of commitment only, for on its true construction rule 6 (3) applied only to the period during which the order of commitment was suspended.

APPLICATION, ex parte, from Judge George Maddocks, sitting as a special commissioner in divorce at Bolton County Court.

On January 14, 1955, Margaret Mary Riding, who had in 1954 obtained a decree for the dissolution of her marriage with Frank Riding, obtained an order against him in the Manchester District Registry for maintenance of the child of the marriage payable by instalments of £1 weekly. Default was made on these payments and the wife as judgment creditor took out a summons under rule 8 of the Matrimonial Causes (Judgment Summons) Rules, 1952,[1] for the payment of £56 arrears then due. At the hearing of the summons before the special commissioner on

[1] Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6: "(2) If "an order of commitment is made, "the judge may direct execution of "the order to be suspended on terms "that the debtor pays the amount "due, together with the costs of the "judgment summons, either at a "specified time or by instalments, in "addition to any sums from time to "time accruing due under the judg- "ment. (3) If an order of commit- "ment is suspended on such terms as "are mentioned in the last foregoing "paragraph, all payments thereafter "made under the order shall be "deemed to be made, first, in or "towards the discharge of any sums "from time to time accruing due "under the judgment, and secondly, "in or towards the discharge of the "debt in respect of which the judg- "ment summons was issued and the "costs of the summons."

April 24, 1956, at Preston, it was proved to the satisfaction of the court that the judgment debtor had means to pay the sum and it was ordered that he be committed to prison for 42 days "unless he shall sooner pay the sums in payment of which he "has so made default"—namely, the £56—together with the prescribed costs of £6 6s., a total of £62 6s.; but it was further directed that the order should lie in the Preston District Registry and not issue if the debtor paid, in addition to any sums from time to time accruing due under the order of January 14, 1955, the sum of 2s. 6d. each week, the first payment to be on April 30, 1956, until the arrears of £56 were fully paid, and in addition a further sum of 2s. 6d. each week, the first payment to be on August 1, 1956, in respect of the costs until they were fully paid.

Between the date of that judgment and October 9, 1957, the judgment debtor paid only £29 4s. 6d., and the judgment creditor accordingly applied for leave to issue an order of commitment of the judgment debtor, asking that the order should specify that he should be discharged only on payment of the £62 6s. due under the judgment summons of April 24, 1956, plus the unpaid arrears of current maintenance, which amounted to £56 15s. 6d., a total of £119 1s. 6d. That sum was claimed on the ground that the judgment debtor was precluded by the operation of rule 6 (3) of the Rules of 1952 [1] from making payment of the amounts due under the judgment summons until he had satisfied in full the arrears of current maintenance.

The District Registrar rejected the figure of £119 1s. 6d., holding that the committal order should lie only in respect of the amount claimed and still outstanding under the judgment summons itself, namely, £62 6s., since the unpaid arrears of current maintenance were not the subject-matter of the judgment summons on which the committal was founded and in respect of which a warrant had been issued; and he refused to indorse the order of commitment for the amount prayed for. The judgment creditor appealed to the special commissioner in chambers against that decision. The commissioner adjourned his judgment into open court, and held that rule 6 (3) was for transient operation only, during the period of the suspension of the order of commitment, and that the warrant to be issued should be limited to the two sums—£56 and £6 6s. costs—for the default on which the judgment summons had originally been issued. He gave leave to appeal from that decision.

The judgment creditor appealed ex parte.
John Corcoran for the judgment creditor.

LORD DENNING stated the facts set out above, and continued: The committal order was directed to issue, but the question is: how was it to be indorsed? On what terms could the husband get out of prison when he was put there?

[1] For footnote 1 see p. 64.

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It is said, and has been argued before us today, that once he was in prison, he could not get out before the end of six weeks unless he paid £119 1s. 6d., that is, the original £62 6s. plus the £56 15s. 6d. that had become due since. Counsel for the applicant argued that the order ought to have been indorsed accordingly, whereas the registrar and the judge said that he should be released from prison at once if he paid the original debt of £62 6s.

The legal position depends on the true construction of rule 6 (3), which says: "If an order of commitment is suspended on "such terms as are mentioned in the last foregoing paragraph, "all payments thereafter made under the order shall be deemed "to be made, first, in or towards the discharge of any sums from "time to time accruing due under the judgment and secondly, "in or towards the discharge of the debt in respect of which the "judgment summons was issued and the costs of the summons."

It seems to me that that rule deals with payments which are made while the order of commitment is suspended. So long as it is suspended, all payments made by the debtor go first in discharge of the current maintenance, before they go against the original debt at all. But that is applicable only so long as the order of commitment is suspended. When it ceases to be suspended and he is actually committed to prison, then it is quite plain that he is committed to prison because of the original default in respect of the sum of £62 6s. That being the sum for which he was committed to prison, it is the sum which he has to pay in order to be released from prison before the end of the six weeks. I would dismiss the appeal accordingly.

HODSON L.J. I agree.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *Anthony Uwins, Law Society Divorce Department, Manchester.*

M. M. H.

[COURT OF APPEAL.]

C. A.
1957
Nov. 20, 21; *Dec.* 19.
Lord Evershed M.R., Romer and Ormerod L.JJ.

In re TACON. PUBLIC TRUSTEE *v.* TACON.

[1954 T. No. 858.]

Charity—Practicability—Bequest—Intervening tenancy for life—Vested reversion liable to be divested—Whether bequest practicable—Form of inquiry.

A testator, who died in 1922, by his will and codicils settled his residuary estate on his daughter for life, with remainder to her children, and, in the event of her having none, he directed his

trustees to apply one-sixth part of his ultimate residuary estate in purchasing, adapting and furnishing and equipping suitable premises at Ipswich, Felixstowe or Lowestoft or any or either of those places as a convalescent hospital for nurses or patients or both. His daughter died a spinster in 1952. At the date of the testator's death the one-sixth share amounted to £16,500, a sum which would then have been adequate to enable his trustees to comply with the testator's directions to purchase and equip a convalescent hospital. If the reversionary interest had then been sold, having regard to the daughter's expectation of life and to the possibility that she might have children, it would have fetched £2,400, a sum admittedly inadequate for the purpose. At the daughter's death the one-sixth share fell into possession; it was then worth £10,000, an insufficient sum to carry out the testator's purpose. Harman J. directed an inquiry, in the form adopted in *In re White's Will Trusts* [1955] Ch. 188; [1954] 3 W.L.R. 314; [1954] 2 All E.R. 620, whether it was practicable to carry into execution the trust. In answer to that inquiry, he held that it was not practicable at the testator's death, nor was there at that date any reasonable prospect that it would be practicable to do so at some future time:—

Held, (1) that in the case of a gift for some admittedly charitable purpose, where there was no general charitable intention, the gift failed if, at the date of the testator's death, it was shown to be impracticable to give effect to the testator's purpose, but that, in the case of a gift of a vested remainder liable to be defeated, the question was not merely whether at the testator's death it was immediately practicable, but also whether it could at that date be said that it would be practicable to give effect to such purpose at some future time.

(2) That at the testator's death it was not practicable to give effect to the trust to purchase and equip a convalescent hospital, because his daughter was then alive and the then value of the reversionary interest was inadequate for the purpose; but that, at that time, since the one-sixth share of the estate was then worth an amount sufficient to give effect to the trust, and since there was then admittedly no reason to anticipate the subsequent increase in estate duty and fall in the value of money, there was at the testator's death a reasonable prospect that it would be practicable to give effect to the trust, and, accordingly, the trust took effect.

In re Slevin [1891] 2 Ch. 236; 7 T.L.R. 394; *In re Moon* (1948) 64 T.L.R. 123; [1948] 1 All E.R. 300; *In re Wright* [1954] Ch. 347; [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98; affirming [1954] 1 All E.R. 864; *In re White's Will Trusts* [1955] Ch. 188; [1954] 3 W.L.R. 314; [1954] 2 All E.R. 620 considered.

Per curiam. The inquiry as to practicability should proceed, where the gift to charity, although future, is vested but defeasible, on the footing that the gift will not be defeated but will, at some future time, take effect in possession.

Decision of Harman J. reversed.

APPEAL from Harman J.

By his will dated January 27, 1919, Sir Thomas Henry Tacon gave his residuary estate to his trustees upon common form trusts for conversion and investment and to hold the trust fund so constituted upon trust for his daughter Maude Mary Tacon during her life and, from and after her decease, upon trust for such of her issue as she should appoint, and in default of appointment "In trust for all or any of the children or child of my said

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" daughter who being sons attain the age of 21 or being daughters " attain that age or marry and if more than one in equal shares: " . . . and if there shall be no child or other issue of my said " daughter living at her death I empower her to appoint by will " such sum or sums (not exceeding in the aggregate £20,000) " out of the trust fund " as she should think proper. The will continued: " And in the event of the failure or determination of " all the trusts hereinbefore declared and contained as to the " whole or any part of the trust fund then the following provisions " shall take effect (namely) ": there followed pecuniary legacies for charitable and other purposes, and finally: " And my trustees " shall stand possessed of the residue of the trust fund the trusts " whereof have so failed or determined or of so much thereof " as shall not become absolutely vested," in trust for the testator's nephews as therein stated. That last-mentioned trust was revoked by the third codicil, dated January 16, 1920, to the will, which provided: " Whereas under my said will my trustees " are to stand possessed of the residue of the trust fund the trusts " whereof have failed or determined as therein mentioned or of " so much thereof as shall not have become absolutely vested or " be applied or disposed of under the trusts or powers therein " contained or by law vested in my trustees In trust for my " nephews the sons of my brother in equal shares as therein men- " tioned Now I hereby revoke such last mentioned provisions " and declare that my trustees shall stand possessed of such " residue or of so much thereof as shall not become vested . . . " " As to Five equal sixth parts thereof " for nephews as therein mentioned; " And as to the remaining one equal sixth part In " trust to apply the same in purchasing adapting and furnishing " and equipping suitable premises at Ipswich Felixstowe or " Lowestoft or any or either of those places as a Convalescent " Hospital for Nurses or Patients or both preference being given " to persons from Eye or adjoining Parishes or members or staff " of the East Suffolk County Council and the Hospital to be " managed and carried on by the Board of Management of The " East Suffolk and Ipswich Hospital if they are willing to under- " take it such Hospital to be called ' Sir Thomas Henry Tacon's " ' Hospital.' " Provisions followed for the management of the hospital should the board decline to undertake it.

The testator died on February 19, 1922, and his daughter Maude, who was then aged 39 years and a spinster, survived him. She died, never having been married, on October 22, 1952. At the date of the testator's death, one-sixth part of residue, after allowing for the £20,000 appointed by the daughter, was stated to be worth approximately £16,500, a sum sufficient to purchase and equip a convalescent hospital.

The then value of the reversionary interest was estimated to be £2,400 after allowing for the daughter's life interest and the possibility that she might have children. At her death the share was worth £10,000, a sum insufficient for the testator's purpose.

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The Public Trustee, as trustee of the testator's will and codicil, took out a summons asking (inter alia) whether the trust declared by the third codicil to the testator's will for the application of one-sixth of his residuary estate in purchasing and equipping a convalescent hospital was a valid charitable trust or failed by reason of the trust being impracticable. The summons also asked for an inquiry whether at the date of the testator's death it was practicable to carry into execution the trust for the purchase and equipment of such a convalescent hospital or whether at that date there was any reasonable prospect that it would be practicable to do so at some future time. The defendants to the summons included William Harold Scarfe, personal representative of the testator's widow, one of his statutory next-of-kin and the Attorney-General.

Harman J. held, in answer to the inquiry, that it was not at the date of the testator's death practicable to carry into execution the trusts in respect of a convalescent hospital and that at that date there was no reasonable prospect that it would be practicable to do so at some future time. He further held that there was an intestacy as to such one equal sixth part of the testator's residuary estate.

The Attorney-General appealed.

Denys Buckley for the Attorney-General.

Harold Lightman Q.C. and *A. C. Sparrow* for William Harold Scarfe.

P. S. A. Rossdale for the Public Trustee.

The following cases were cited in argument and are not referred to in the judgments: *Attorney-General* v. *Bishop of Chester* *; *Chamberlayne* v. *Brockett* †; *Fisk* v. *Attorney-General* ‡; *In re Rymer.* §

Cur. adv. vult.

December 19. The following judgments were read.

LORD EVERSHED M.R. It is well established that in the case of a gift to a charity (that is, to some body of persons or organization admittedly charitable) where no general charitable intention is present, then (1) if the charity has ceased to exist before the will comes into operation the gift lapses; but (2) if the charity is still in existence at the date mentioned, it is effective as a gift to the extent that the interests of the next-of-kin (or of whoever else take in default of the charitable interest taking effect) are for ever excluded notwithstanding the later dissolution or disappearance of the charity: see *In re Slevin.*[1] In these respects the "charity" is assimilated to an ordinary individual legatee.

* (1785) 1 Bro.C.C. 444.
† (1872) 8 Ch. 206.
‡ (1867) L.R. 4 Eq. 521.
§ [1895] 1 Ch.App. 19.
[1] [1891] 2 Ch. 236; 7 T.L.R. 394.

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The same principles apply to a gift, not to a named charity, but for some (admittedly) charitable purpose where (again) there is no general charitable intention. Such a gift will wholly fail if the purpose is either so vague or uncertain or so impracticable that the court cannot execute it. But the test of vagueness or uncertainty or impracticability is to be applied at the date of the testator's death; if at that date the disposition is shown to be impracticable (confining myself henceforth to that case)—that is, incapable for any reason of being practically initiated or administered—then the gift fails altogether and the next-of-kin (or whoever else are entitled in default) take. Per contra, if the charitable gift is not then shown to be "impracticable," the next-of-kin or other interests are for ever excluded even though later supervening events defeat the precise purpose contemplated by the testator. In such case the gift will be administered cy-près. And in my opinion the onus will (prima facie, at any rate) be upon those seeking to invalidate the charitable gift.

In the case of a charitable gift expressed to take effect immediately on the testator's death, no great difficulty arises. The difficulty has arisen in the present case because the gift for the purpose of establishing the particular convalescent home envisaged by the testator is, on any view, expressed to take effect upon the happening of a future—and, indeed, a relatively distant—event.

[His Lordship read the relevant portions of the testator's will, stated the facts, and continued:] The principles which I have stated (apart from the matter of onus) were not contested by Mr. Lightman, who also conceded that the gift for the charitable purpose with which we are concerned is in form an absolute or "vested" remainder liable to be defeated upon the happening of a specific event, namely, the coming into existence of issue to Maude capable of taking. What follows is limited to such a form of gift. Different considerations may, to some extent at any rate, be applicable to the case of a strictly contingent gift.

In the present case, upon the principles already stated, the effect of the disposition will be to exclude the next-of-kin unless "impracticability" is shown at the death of testator. But since the charitable gift was not an immediate gift, the question is not merely whether at the testator's death it was immediately practicable, but also whether it could at that date be said that it would at any relevant date be practicable: see *In re Moon*[2] and *In re Wright*.[3] In the latter case the form of inquiry thought to be appropriate was as follows[4]: "(1) an inquiry whether it is "now or will at any future time be possible to carry into "execution the trusts declared by the will. . . ." That inquiry

[2] (1948) 64 T.L.R. 123; [1948] 1 All E.R. 300.

[3] [1954] Ch. 347; [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98; affirming [1954] 1 All E.R. 864.

[4] [1954] Ch. 347, 350.

(perhaps for obvious reasons) the master had thought unanswerable. To meet the difficulty caused by such form of inquiry, Upjohn J. had, in *In re White's Will Trusts*,[5] suggested a variation in form which has been used in the present case, where the inquiry directed is: "An inquiry whether at the date of the "death of the testator it was practicable to carry into execution "the trust for the purchase and equipment and management of "suitable premises in Ipswich, Felixstowe or Lowestoft, or any "of those places as a convalescent hospital for nurses or patients "or both, or whether at the said date there was any reasonable "prospect that it would be practicable to do so at some future "time."

If by the first half of the inquiry the question intended is whether it was, on the testator's death and as things then were, practicable to give effect to the relevant disposition, no doubt the answer is "No": because at that date the testator's daughter, Maude, was alive and aged 39, her expectation of life was over 30 years, and the then present value of the remainder was about £2,400, a sum admittedly and obviously inadequate for the purpose. But the contest before us has been upon the effect of the second half of the inquiry. Mr. Lightman has argued that for the purpose of answering this part of the inquiry financial considerations are no longer relevant. Mr. Lightman has said (and, having regard to the concessions which he has made, it has been, if I have correctly understood him, his main if not his sole point) that the only relevant figure remains £2,400; that you cannot take account of the actual sum that would be, or would be expected to be, received in the event of the gift taking effect. In other words (according to the argument) you are, so far as financial considerations are concerned, limited to or by the figure of £2,400, being the actual value of the interest at the testator's death—increased, at least, by such interest as it might have earned during the expected duration of Maude's life. I have been unable to agree. I think the words of the inquiry mean what they say: namely, whether, at the date of the testator's death, there was any reasonable prospect (according to the ordinary beliefs and knowledge of mankind in 1922) that at some future date this scheme would be "practicable." In my judgment, since the relevant proportion of the estate was then worth £16,500 or upwards, an amount at the testator's death admittedly sufficient and amply sufficient for the intended gift, and since there was then no reason (again admittedly) to anticipate the subsequent increase in duty and fall in the value of money, the answer is clearly "Yes." Mr. Lightman, indeed, so concedes, if (contrary to his view) you can take these financial considerations into acount.

But the question also arose in argument whether, on this form of inquiry, you should also take into account the chances of the disposition taking effect at all—since if it did not, then

[5] [1955] Ch. 188; [1954] 3 W.L.R. 314; [1954] 2 All E.R. 620.

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nothing at all would be available. The answer to the question depends upon whether the word "practicable" ought to be treated as meaning "capable, for financial or other reasons, of "being carried out," but confined to that meaning: in other words, whether practicability is to be judged on the assumption that the disposition does at some time take effect, or whether, on the other hand, remoteness is to be taken into account as affecting practicability: so that in the case, for example, of a gift taking effect only upon an extremely remote and improbable event, it would be said that the chances of it being effective were so small that in common sense its "practicability" should be rejected.

Mr. Buckley was disposed to concede that the form of inquiry in the present case did bring remoteness into the estimate of practicability. In my judgment, upon the facts of this case, it does not in the end matter one way or the other whether that view is right or wrong. For if it is legitimate or necessary to take into account the possibilities of the disposition taking effect at all, the result is not affected. Maude at the relevant date was 39 years old and was still unmarried. According to the evidence she was attractive, and it was regarded by those who knew her as surprising that she had not married. A photograph, taken in the pattern of her age, was exhibited, at which we did not look but Mr. Buckley told us that had we done so we might have been disappointed. But this evidence, to my mind, cuts both ways. At least there was obviously a reasonable prospect that she would die childless.

Since the matter has been debated, it may be desirable for me to say that, as a matter of principle, I accept Mr. Buckley's view, that is, that the test, for the purposes of the validity of a charitable gift, of "practicability" is that of workability as the word was used in the argument—that is, whether the disposition is one which the court can, as a matter of practice, for financial or other reasons, administer: and to that test the question of remoteness is irrelevant. That is to say, the question of "practicability" is to be answered upon the footing that the gift does at some date take effect: though the answer must be given as at the testator's death. In other words, the court must, as it were, put on for all purposes 1922 spectacles; must put itself into the position of one forming a judgment of future prospects (of practicability) at the date of the testator's death. I add this so that it may, if necessary, be considered, for the purpose of removing doubts or difficulties, in the framing of similar inquiries in the future.

For the reasons I have given, I think that this appeal should be allowed.

ROMER L.J. I agree. In his argument on behalf of the respondent, William Harold Scarfe (a representative of the testator's next-of-kin), Mr. Lightman, very rightly and properly,

if I may say so, made certain admissions and thus narrowed the issues between the parties. He conceded: (1) that such matters as the change in the value of money, the increased cost of house property, increases in taxation, and the like, which occurred after the death of the testator in 1922, are irrelevant to the inquiry whether the gift which is in question in this case failed for impracticability; (2) that once property has become vested in a charity, or in furtherance of a charitable purpose, it will not become divested in favour of persons entitled in default by reason of the subsequent dissolution of the charity or the subsequent impracticability of the purpose, as the case may be; (3) that, as a matter of construction of the testator's will and codicil, the gift for the purchase and equipment and management of suitable premises in Ipswich, Felixstowe or Lowestoft for the purpose prescribed by the testator was not contingent but was vested, though defeasible; (4) that the only point of time at which the question as to the practicability of the gift fell to be put and answered was the date of the testator's death—in accordance with, or by analogy to, *In re Moon*,[6] *In re Wright*,[7] and *In re White's Will Trusts*[8]; (5) that the value of one-sixth of the testator's residuary estate at his death (£16,500) was sufficient at that time, had it then been available for the purpose, to carry the charitable trust into effect; and (6) that, if it was relevant under the second limb of the inquiry directed by the order of October 26, 1954, to take into account the possibility of the testator's daughter Maude having issue capable of taking, such a possibility would not in itself justify a negative answer to the inquiry.

Accepting as he did these various points, Mr. Lightman's contention was that the second limb of the inquiry was directed solely to the practicability of the testator's charitable project as a project—as to the feasibility, from a mechanical or administrative view only, of carrying the proposed scheme into effect. His submission was that although the question of finance was relevant to the first limb of the inquiry, the prospect or possibility of future financial sufficiency had nothing to do with the second. The only material matter to be taken into consideration from a financial point of view was the reversionary value of the one-sixth of residue, the subject of the charitable bequest; which was, at the testator's death, £2,400. That, said Mr. Lightman, was the "property" of the charity, and as it was wholly insufficient to carry out the bequest it followed, of necessity, that the gift failed for impracticability at the outset. Mr. Lightman admitted that if he was wrong in that submission the appeal must succeed.

In my judgment, it cannot rightly be said that a hypothetical reasonable person, looking forward in 1922 to the future, and assessing the prospect of it becoming practicable at some time

[6] (1948) 64 T.L.R. 123.
[7] [1954] Ch. 347.
[8] [1955] Ch. 188.

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to carry the charitable trust into execution would be precluded from taking into account (inter alia) what money might one day be available for the purpose; for one of the most obvious reasons why a charitable bequest for a particular purpose may be deemed impracticable is that there is, or will be, insufficient money to enable it to be carried out. True it is that in 1922 a purchaser of the charity's reversionary interest would have paid no more than £2,400 for it—which is why the first limb of the inquiry obviously had to be answered in the negative. But by the very terms of the bequest it was not intended by the testator to come into operation until a distant, possibly a far distant, date, videlicet, the death of his daughter without having issue who should attain a vested interest. It is to the future, then, that the reasonable man in 1922 would have directed his mind in considering the practicability of the gift; and if (as was quite possible) the one-sixth share of residue when it fell into possession should be worth more or less the same as it was in 1922 there would be sufficient money to give effect to the testator's charitable purpose. If that view of the matter be right, as in my opinion it is, it disposes of the appeal in the appellant's favour; for, apart from the financial aspect of the matter it has not been suggested that in 1922 there was any ground of impracticability—save for the possibility of Maude having children, upon which, as I have said, Mr. Lightman did not found himself.

I agree with the observations which have fallen from the Master of the Rolls as to the form of inquiry which was directed in this case. In view of Mr. Lightman's concession with regard to the possible issue of Maude, it is unnecessary to decide whether, in 1922, the chance of such issue being born thereafter and attaining vested interests was a relevant consideration under the second limb of the inquiry. There is much to be said for the view that it was, for if it was permissible (as, in my opinion, it clearly was) to take into account the possibility of there being insufficient money to enable the scheme to be carried into effect, it is difficult to see why the possibility of there being no money at all should be excluded. However that may be, I agree that in most, if not all, cases the inquiry as to practicability should proceed, where the gift to charity, although future, is vested but defeasible, on the footing that the gift will not be defeated, but will, at some time in the future, take effect in possession; and that the inquiry should be so framed, in a proper case, as to make that plain.

For the above reasons, and those stated by the Master of the Rolls, I agree that this appeal must be allowed.

ORMEROD L.J. I agree. Mr. Lightman has conceded that the gift in question is a vested remainder liable to be defeated only if the testator's daughter Maude had issue. He has also agreed that the date at which the practicability or otherwise of the gift

has to be considered is the date of the death of the testator. He argues, however, that as at that time the value of the remainder was only £2,400, which admittedly was insufficient to carry out the testator's intention, the answer to the questions in the inquiry must be in the negative in spite of the fact that in 1922, when the testator died, the estimated value of one-sixth of the residue was £16,500. I find it difficult to understand the argument that the value of the remainder at the time of the testator's death is the sum to be taken into consideration when considering the question of practicability. It was certainly not the intention of the testator that the value of the remainder should be realized and a convalescent home built out of the proceeds. On the contrary, his intention was that a home should be built if and when his daughter died childless. At the time of the testator's death his daughter was 39 years of age and was unmarried. She did not in fact marry, although there is evidence that her friends expected that she would. Her expectation of life was put at about 30 years, and in fact she lived for about that length of time. In considering the question whether in February, 1922, there was a reasonable prospect that the gift would be a practicable proposition, I think the first question which would have to be considered would be: Assuming that the gift is not defeated, is the share of the residue sufficient to carry out the testator's intention? If that is the right question to be asked, there can be little doubt that it would be answered in the affirmative. It is true that in the light of subsequent events the money available is not now sufficient for the purpose, but no reasonable person would have been likely in 1922 to expect that the fall in the value of money and increase in death duties would have taken place, at least to the extent to which they have done so.

The further question which has been considered is whether the gift was impracticable in view of the prospect of it being defeated by the testator's daughter marrying and having children. For my part, I doubt whether this should be a relevant consideration, although it would appear to be so having regard to the form of the inquiry directed in this case. I would have thought that the proper approach to the question would be on the basis of the gift not being defeated. However, on the facts of this case, there was at least a reasonable chance that Maude would die without having any children, and that in consequence the gift would not be defeated. It is unnecessary, therefore, in this case, to consider the question of the remoteness of the possibility of the gift taking effect.

I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Treasury Solicitor; Wrinch & Fisher for Block & Cullingham, Ipswich.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

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Dec. 5, 6, 19.

Lord Goddard C.J., Devlin and Pearson JJ.

HILL *v.* BAXTER.

Road Traffic—Dangerous driving—Automatism—Defence of—Relevance of intention—Burden of proof—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 11 (1), 49 (*b*).

Criminal Law—Insanity—Automatism—Dangerous driving—Defence that accident occurred in state of automatism—Defence of insanity not raised—Burden of proof.

Criminal Law—Practice—Medical reports—To be strictly proved.

Burden of Proof—Criminal case—Dangerous driving—Defence of automatism.

The defendant drove a motor-van across a road junction at a fast speed, ignoring an illuminated "Halt" sign, and collided with a motor-car. The van then continued for a short distance and overturned. Later, in hospital, the defendant said that he could not remember what happened. On a charge of dangerous driving contrary to section 11 (1) of the Road Traffic Act, 1930, and failing to conform to a traffic sign contrary to section 49 (*b*) of that Act, the only evidence for the defence was that of the defendant himself, but, the prosecution having no objection, the justices allowed two reports from a doctor, who had examined the defendant, to be put in, these showed no abnormality and it was impossible to say whether the defendant had had a "black out" or not. The defendant contended that he became unconscious as a result of being overcome by a sudden illness. The justices found that the defendant must have exercised skill in driving in order to reach the road junction, but were of opinion that he was not conscious of what he was doing for some little time before reaching the junction and was not capable of forming any intention as to his manner of driving; accordingly, they dismissed the charges:—

Held, that the Act of 1930 contained an absolute prohibition against dangerous driving and the defendant's intention as to the manner of driving was immaterial; that if the onus rested on the defence of proving a state of automatism they had failed to do so, and as the facts showed that the defendant was driving and driving dangerously, the justices had come to a wrong conclusion in law.

Dictum of Humphreys J. in *Kay* v. *Butterworth* (1945) 61 T.L.R. 452, 453 considered.

Per Lord Goddard C.J.: There may be cases where the circumstances are such that the accused could not really be said to be driving at all; for example, if he had a stroke or an epileptic fit.

Per Devlin and Pearson JJ.: Even in a case in which liability depended on full proof of mens rea it would not be open to the defence to rely on automatism without providing some evidence of it.

Per Pearson J.: In any ordinary case when once it has been proved that the accused was in the driving seat of a moving car, there is, prima facie, an obvious and irresistible inference that he was driving it. No doubt on that point will arise unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car.

Per curiam: Agreed medical reports have no place in criminal courts; evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence.

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CASE STATED by Brighton justices.

On May 24, 1957, two informations were preferred by the prosecutor, Thomas Richard Hill, against the defendant, Kenneth Baxter, that he drove a motor-van in a manner which was dangerous to the public, contrary to section 11 (1) of the Road Traffic Act, 1930, and that he failed to conform to a traffic sign, contrary to section 49 (*b*) of the Act.

The justices heard the informations on June 19, 1957, and found the following facts:

At about 10.45 p.m. on April 12, 1957, the defendant was driving a motor-van from east to west in Springfield Road, Brighton, towards the junction of that road and Beaconsfield Road. On the south pavement of Springfield Road and 98 feet east of that road junction there was a "Halt" sign, which at the material time was illuminated. The defendant failed to stop in accordance with the sign and drove straight across the road junction at quite a fast speed until his van came into collision with a motor-car which was being driven northwards in Beaconsfield Road. After the collision the defendant's van carried on for a short distance and then overturned. A police constable arrived at the scene of the accident at 10.50 p.m. and saw the defendant, who was in a dazed condition and suffering from cuts to his head. The defendant was taken to hospital where the police constable saw him about one hour after the accident. The defendant then said: "I remember being in Preston Circus going to Withdean. "I don't remember anything else until I was searching for my "glasses. I don't know what happened." After caution the defendant said: "I cannot remember a thing." The defendant remembered nothing from the time when he was at Preston Circus until the events subsequent to the accident. The defendant intended to go to Withdean from Preston Circus, and he had made a substantial and unnecessary detour by driving into Springfield Road. The defendant must have exercised skill in driving in order to reach Springfield Road from Preston Circus by whatever route he had taken.

It was contended by the prosecutor that the defendant was guilty of the offences.

It was contended by the defendant that he became unconscious as a result of being overcome by a sudden illness while driving at Preston Circus and that he was not therefore liable at criminal law. It was further contended that against the background of the medical reports in evidence and in view of the unlikelihood of retrograde amnesia having resulted from the accident when the defendant was conscious immediately thereafter, the loss of memory could only be attributed to the defendant being overcome by illness without warning of its onset.

The justices were of opinion that the defendant was not conscious of what he was doing after leaving Preston Circus, with the implication that he was not capable of forming any

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intention as to his manner of driving. They believed the defendant was speaking the truth when he said he could not remember what had happened after leaving Preston Circus, and accepted the submission of his counsel that the defendant was "unconscious" at the time of the accident, and, accordingly, they dismissed the informations.

The prosecutor appealed.

Duncan Ranking (*Anthony Harmsworth* with him) for the prosecutor.

John Alliott for the defendant.

The following cases were referred to in argument: *Kay* v. *Butterworth* [1]; *Henderson* v. *Jones* [2]; *Bracegirdle* v. *Oxley* [3]; *Morriss* v. *Marsden*.[4]

Cur. adv. vult.

December 19. The following judgments were read:

LORD GODDARD C.J. This special case stated by justices for the County Borough of Brighton concerns two informations preferred against the respondent, the first for the dangerous driving of a motor-vehicle contrary to section 11 (1) of the Road Traffic Act, 1930, and the second for failing to conform to a "Halt" sign contrary to section 49 (*b*) of the Act. The facts found by the justices are that at 10.45 p.m. on the evening of April 12, 1957, the respondent drove a motor-van along Springfield Road, Brighton, in a westerly direction and where that road crosses Beaconsfield Road he ignored an illuminated "Halt" sign, drove across the road junction at a fast speed and came into collision with a car which was being driven northwards in Beaconsfield Road. The respondent's van then carried on for a short distance and overturned. A police constable arrived and found the respondent in a dazed condition and at the hospital to which he was taken he said: "I remember being in Preston "Circus going to Withdean. I don't remember anything else "until I was searching for my glasses. I don't know what "happened." The justices found that to be in Springfield Road on the way to Withdean from Preston Circus involved a substantial and unnecessary detour, but that the respondent must have exercised skill in driving in order to reach Springfield Road by whatever route he took. The justices apparently accepted the respondent's evidence and found that he remembered nothing from the time when he was at Preston Circus till the accident had happened. They were of opinion that the respondent was not conscious of what he was doing after leaving Preston Circus,

[1] (1945) 61 T.L.R. 452.
[2] (1955) 119 J.P. 304.
[3] [1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126.
[4] [1952] 1 T.L.R. 947; [1952] 1 All E.R. 925.

and to this finding they add the words "with the implication "that he was not capable of forming any intention as to his "manner of driving." They dismissed the informations, accepting a submission that loss of memory could only be attributed to the respondent being overcome by illness without warning.

There was no evidence for the defence other than that of the respondent himself, but it seems that, as the prosecution did not object, the justices allowed two letters from a doctor, who had examined the respondent, to be put in. This was quite irregular; agreed medical reports so often used in civil actions have no place in criminal courts. Evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence, as for instance under section 41 of the Criminal Justice Act, 1948. The justices have referred to these letters in the case so we have looked at them. They are certainly in no way favourable to the respondent; the consultant neurologist who examined the respondent could find no trace of illness or abnormality. He said in his first report he had had an E.E.G.—that is some form of encephalogram—done and was going to examine the respondent again when the report would be through in a fortnight's time. In his further report on May 2 the doctor says the report showed no abnormality, and that from a medical point of view it is impossible to say whether he had "a black out" or not. So there is no medical or scientific evidence of any illness at all.

The first thing to be remembered is that the Road Traffic Act, 1930, contains an absolute prohibition against driving dangerously or ignoring "Halt" signs. No question of mens rea enters into the offence; it is no answer to a charge under those sections to say: "I did not mean to drive dangerously" or "I did not notice "the 'Halt' sign." The justices' finding that the respondent was not capable of forming any intention as to the manner of driving is really immaterial. What they evidently mean is that the respondent was in a state of automation. But he was driving and, as the case finds, exercising some skill, and undoubtedly the onus of proving that he was in a state of automation must be on him. This is not only akin to a defence of insanity, but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it. This no doubt is subject to the qualification that where an onus is on the defendant in a criminal case the burden is not as high as it is on a prosecutor.

The main contention before us on the part of the appellant was that there was no evidence on which the justices could find that the respondent was in a state of automatism or whatever term may be applied to someone performing acts in a state of unconsciousness. There was in fact no evidence except that of the respondent, and while the justices were entitled to believe him, his evidence shows nothing except that after the accident

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he cannot remember what took place after he left Preston Circus. This is quite consistent with being overcome with sleep or at least drowsiness. That drivers do fall asleep is a not uncommon cause of serious road accidents and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop.

The justices, no doubt, were greatly influenced by the dictum, and it is only a dictum, of Humphreys J. in *Kay* v. *Butterworth*.[1] In that case the judge, after emphasising that drowsiness or sleep would be no excuse, said[2] that "he did not mean "to say that a person should be made liable at criminal law who "through no fault of his own became unconscious while driving; "for example if he were struck by a stone or overcome by a "sudden illness; or the car was temporarily out of control by his "being attacked by a swarm of bees." I agree that there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or an attack by a swarm of bees I think introduces some conception akin to novus actus interveniens. In this case, however, I am content to say that the evidence falls far short of what would justify a court holding that this man was in some automatous state. There was no evidence that he was suffering from anything to account for what is so often called a "black out," and which probably if genuine is epileptic in origin. Nor was there any evidence that he had ever had an attack of this description before. As I have said above, his own evidence, and that is all there was, is consistent with having fallen asleep, or having his mind full of other matters and not paying proper attention. There is, in fact, no case so far as I can ascertain in either English or Scottish law where a defence of automatism has been set up or been the subject of judicial decision, and it is obvious that as such a defence is, in effect, saying that the accused did not know or appreciate the nature and quality of his actions it is getting very near a defence of insanity. It may be that in homicide cases attention may have to be given to the matter where diminished responsibility is set up. In the present case I am content to rest my judgment on the ground that there was no evidence which justified the justices finding that he was not fully responsible in law for his actions, and that his intention was immaterial as there was here an absolute prohibition. I would allow the appeal.

I desire to say, in view of some discussion at the hearing, that this is certainly not a case of a perverse finding by the justices, who obviously considered the case with great care and

[1] (1945) 61 T.L.R. 452. [2] Ibid. 453.

anxiety. The question asked by the justices is answered in the negative and the case must go back with a direction to convict. The penalty is a matter for the justices, but we have no doubt they will bear in mind the view of the neurologist as to the fitness of the defendant to drive.

DEVLIN J. I agree that if the onus lies upon the defence to produce some evidence of automatism, they have failed to do so, with the result that the justices came to a wrong conclusion in law. I do not find it necessary, before deciding whether there is such an onus, to determine just what part automatism plays in liability for crime. It is a novel point that would require careful consideration; the answer would certainly depend, among other things, upon the nature of the liability which the prosecution had to establish.

I am satisfied that even in a case in which liability depended upon full proof of mens rea, it would not be open to the defence to rely upon automatism without providing some evidence of it. If it amounted to insanity in the legal sense, it is well established that the burden of proof would start with and remain throughout upon the defence. But there is also recognized in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt. This principle has manifested itself in different forms; most of them relate to the accused's state of mind and put it upon him to give some evidence about it. Thus the fact that an accused is found in possession of property recently stolen does not of itself prove that he knew of the stealing. Nevertheless it is not open to the accused at the end of the prosecution's case to submit that he has no case to answer; he must offer some explanation to account for his possession though he does not have to prove that the explanation is true: *Rex* v. *Aves*.[3] In a charge of murder it is for the prosecution to prove that the killing was intentional and unprovoked, and that burden is never shifted: *Woolmington* v. *Director of Public Prosecutions*.[4] But though the prosecution must in the end prove lack of provocation, the obligation arises only if there is some evidence of provocation fit to go to the jury: *Holmes* v. *Director of Public Prosecutions*.[5] The same rule applies in the case of self-defence: *Reg.* v. *Lobell*.[6] In any crime involving mens rea the prosecution must prove guilty intent, but if the defence suggests drunkenness as negativing intent, they must offer evidence of it, if, indeed, they do not have to prove it: *Director of Public Prosecutions* v. *Beard*.[7] It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had

[3] [1950] 2 All E.R. 330; 34 Cr. App.R. 159.
[4] [1935] A.C. 462; 51 T.L.R. 446.
[5] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.
[6] [1957] 1 Q.B. 547; [1957] 2 W.L.R. 524; [1957] 1 All E.R. 734.
[7] [1920] A.C. 479, 507; 36 T.L.R. 379.

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not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleepwalking or not in a trance or black out. I am satisfied that such matters ought not to be considered at all until the defence has produced at least prima facie evidence. I should wish to reserve for future consideration when necessary the question of where the burden ultimately lies.

As automatism is akin to insanity in law there would be great practical advantage if the burden of proof was the same in both cases. But so far insanity is the only matter of defence in which under the common law the burden of proof has been held to be completely shifted.

In my judgment there is not to be found in the case stated evidence of automatism of a character which would be fit to leave to a jury. It must be remembered that the justices were required to presume that the accused was not suffering from any disease of the mind, since he did not challenge the legal presumption of sanity. Although he was asserting that he did not know the nature and quality of his act and so, inevitably, that he was suffering from a defect of reason or understanding, he was not saying that he was a victim of any disease of the mind. Unless there was evidence which showed that his irrationality was due to some cause other than disease of the mind, the justices were not entitled simply to acquit.

I agree that the conclusion which this court has reached does not mean that the justices have acted in any way perversely. We have been told that the chairman of the justices was a medical man, and it may be that he felt able to draw inferences from the evidence which are not apparent to a layman. But judges of all kinds sit as laymen and not as experts, and verdicts of all kinds must be given according to the evidence. I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.

I have drawn attention to the fact that the accused did not set up a defence of insanity. For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. But if disease is present, the same thing may happen again, and therefore, since 1800,[8] the law has provided that persons acquitted on this ground should be subject to restraint. The acquittal is now given in the illogical and disagreeable form of the verdict "Guilty but insane," and while it seems right that in such a

[8] See Criminal Lunatic Act, 1800.

case some conditions should be imposed, the only restraint known to the law is indefinite detention in what used to be called a criminal lunatic asylum. So it would be very surprising to find this defence raised in answer to charges under the Road Traffic Act, 1930. Whatever the theory of the law may be, mental disease is in practice not available as an excuse for the commission of any of the lesser crimes. I agree with the order proposed.

PEARSON J. I agree with the judgment of the Lord Chief Justice subject to the reservation and explanations which Devlin J. has made with regard to the burden of proof in a case such as this. The prosecution have to prove on the major charge in this case that the accused was driving dangerously. On the facts, if he was driving at all he was unquestionably driving dangerously, and therefore the question at issue was and is whether he was driving the car. In any ordinary case, when once it has been proved that the accused was in the driving seat of a moving car, there is, prima facie, an obvious and irresistible inference that he was driving it. No dispute or doubt will arise on that point unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car. Take the following cases: (1) The man in the driving seat is having an epileptic fit, so that he is unconscious and there are merely spasmodic movements of his arms and legs. (2) By the onset of some disease he has been reduced to a state of coma and is completely unconscious. (3) He is stunned by a blow on the head from a stone which passing traffic has thrown up from the roadway. (4) He is attacked by a swarm of bees so that he is for the time being disabled and prevented from exercising any directional control over the vehicle, and any movements of his arms and legs are solely caused by the action of the bees. In each of these cases it can be said that at the material time he is not driving and, therefore, not driving dangerously. Then suppose that the man in the driving seat falls asleep. After he has fallen asleep he is no longer driving, but there was an earlier time at which he was falling asleep and therefore failing to perform the driver's elementary and essential duty of keeping himself awake and therefore he was driving dangerously. Similarly, in the case of a man who knows that he is liable to have an epileptic fit but, nevertheless, drives a vehicle on the road, there is a question of fact whether driving in these circumstances can properly be considered reckless or dangerous. The answer might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come upon him.

For the purpose of construing the word " drive " in section 11 one can have regard to the language of section 15 of the same Act. The opening words of section 15 before it was amended by the Road Traffic Act, 1956, were: " Any person who when

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"driving or attempting to drive, or when in charge of, a motor "vehicle on a road or other public place is under the influence "of drink or a drug to such an extent as to be incapable of "having proper control of the vehicle, shall be liable . . ." In this case there is a clear finding that the respondent was driving and driving with skill. It is said in the case: "The respondent "intended to go to Withdean from Preston Circus, and he had "made a substantial and unnecessary detour by driving into "Springfield Road. The respondent must have exercised skill "in driving in order to reach Springfield Road from Preston "Circus by whatever route he had taken." The importance of the finding that he was driving with skill is the necessary implication that he was controlling the car and directing its movements. Therefore, he was driving, and his driving was dangerous. The offence was committed and there is no evidence to support the acquittal. If in the material respect the burden of proof was on the prosecution, they discharged it by showing that the respondent was driving, and if the burden of proof was on the defence they failed to prove an extraordinary mischance rendering it impossible for the respondent to control the car and direct its movements. I agree with the proposed order.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for W. O. Dodd, Brighton; Jolly & Co., Brighton.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

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Nov. 10, 11;
Dec. 6.

Barry J.

SHAMIA *v.* JOORY.

[1953 S. No. 4439.]

Contract — Parties — Enforcement by third party — Money had and received—Debtor and creditor—Debtor's promise to pay money to third party as gift from creditor—Failure to pay—Whether action for money had and received will lie at suit of third party—Whether "fund" in hands of or accruing to debtor.

The defendant, an Iraqi merchant, carrying on business in this country, agreed at the request of Y., his agent in Iraq, to pay £500 to the plaintiff (Y.'s brother), in this country out of money owed by the defendant to Y. as remuneration for services rendered. Y. informed the plaintiff of the arrangement and in due course the defendant sent the plaintiff a cheque for £500. Owing to an irregularity the cheque was not met and the plaintiff returned it to the defendant at his request for correction. Notwithstanding the defendant's promise to send the corrected cheque back to the plaintiff, it was never sent and the £500 was never in fact paid to the plaintiff.

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In an action by the plaintiff against the defendant, inter alia, for money had and received by the defendant to the plaintiff's use the defendant admitted his promise to Y. to pay the plaintiff the sum claimed, but contended that in view of certain unauthorised property dealings subsequently carried out by Y. for which Y. had received the money, the defendant was no longer indebted to Y. at the date of the writ and was not indebted to the plaintiff:—

Held, (1) that although the plaintiff was not a creditor of Y., but the recipient of a gift from him, he had a legal right to recover the £500 and could recover it from the defendant provided that there was a "fund" in the defendant's hands at the time he accepted Y.'s instructions and made his promise to the plaintiff.

Principle laid down by Blackburn J. in *Griffin* v. *Weatherby* (1868) L.R. 3 Q.B. 753, 758 applied.

(2) That to establish the existence of a "fund" it was not necessary to show that an identifiable sum of money had been handed to the defendant, and, for a suit for money had and received to lie at the hands of the transferee against the third party, all that the law required was that there must be in the hands of the third party, or accruing to him, either a sum of money, or a monetary liability, over which the transferor had a right of disposal; it was immaterial whence the liability arose, and it could include a debt for money lent or for services rendered, and of a temporary nature, provided that it existed at the date of the transfer and of the debtor's promise to pay the transferee; accordingly, the plaintiff was entitled to recover the £500 from the defendant and his right to do so could not be defeated by any subsequent dealings between the defendant and Y.

Griffin v. *Weatherby* (1868) L.R. 3 Q.B. 753, *Walker* v. *Rostron* (1842) 9 M. & W. 411 and *Hamilton* v. *Spottiswoode* (1849) 4 Ex. 200 considered.

ACTION.

The following statement of facts is summarized from the judgment. The plaintiff, Reuben Ibrahim Shamia, was a citizen of Iraq who, in 1952, was in England studying as a dental student. He had two elder brothers, Haroun and Yousuf, living in Iraq. The defendant, Shaoul Saleh Joory, also a citizen of Iraq, had left Baghdad in 1949 and had since carried on business in Manchester as a textile merchant and importer. In 1951 the defendant appointed the plaintiff's brother, Yousuf, as his representative and agent in Iraq, Yousuf's chief duties being concerned with the collection of rents and the letting of property belonging to the defendant. Yousuf sent the defendant periodical accounts, the last written one being dated May 1, 1952. In June or July, 1952, the defendant paid a visit to Iraq and while there he entered into contracts to sell certain properties. Before leaving for England in November, 1952, he gave Yousuf a power of attorney enabling him to complete sales of property which the defendant had negotiated during the time he was in Baghdad, and he also discussed with Yousuf the remuneration due to him and agreed the state of the account between them. No written account was submitted by Yousuf, but the defendant accepted that he owed Yousuf 1,300 dinars. (At that time the dinar was equivalent to £1 sterling.) At Yousuf's request the defendant agreed to give

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£500 out of the money he owed Yousuf to the plaintiff. According to the defendant, Yousuf gave no explanation of the request and no mention was made of the brother Haroun.

In the latter part of November, 1952, Yousuf wrote three letters to the plaintiff stating that Haroun had sent him a gift by the defendant. All three letters were written in guarded language owing to certain restrictions regarding the export of currency from Iraq but they referred (as the judge found) to the £500. On December 8, 1952, the plaintiff wrote to the defendant informing him that he had heard from Iraq that his brother Haroun had sent him £500 through the defendant and asking the defendant, if that information was correct, to send the money to him. The defendant replied stating that the information was correct and undertaking to send the money at the end of December. At the beginning of January, 1953, the plaintiff received another letter from the defendant enclosing a cheque for £500. There was some difference of opinion between the parties as to the exact translation of the letter, which was in Arabic and which, though incorrectly dated, Barry J. found to have been sent on December 31, 1952. His Lordship also found that there was no material difference between the sense of the two translations, the effect of the letter being the same whether the more correct translation was "Enclosed you will find a "cheque which belongs to you" (as the plaintiff contended) or "Enclosed you will find a cheque for £500 due to you" (as the defendant contended).

The plaintiff deposited the cheque with his bank for collection and at the same time cabled Yousuf in Iraq to inform him that the money, said to have been sent by Haroun, had been safely received. Subsequently, owing to a technical irregularity in the drawing of the cheque, it was not met and the plaintiff's account was debited accordingly. The plaintiff's account of the succeeding events, which was accepted by his Lordship, was that after a telephone conversation with the defendant, and at the defendant's request, he sent the cheque back, the defendant undertaking to correct it and return it to the plaintiff or send the plaintiff a fresh cheque. In spite of a number of subsequent telephone conversations, some with the defendant's son and some with the defendant himself, in one of which he promised to send a cheque, no cheque arrived. The plaintiff eventually drew a sight bill on the defendant but it was not accepted and the £500 remained unpaid.

Meanwhile a serious rift had developed between the defendant and Yousuf over the sale of certain property in Iraq. On January 16, 1953, the defendant cancelled Yousuf's power of attorney and transferred the control of his business in Iraq elsewhere. On January 28 he received a statement of the account between himself and Yousuf which showed the net debt from the defendant as at November, 1952, as 1,383 dinars; then there appeared a number of credit items and the defendant was then

debited with a further sum of 1,400 dinars as Yousuf's charges for services rendered and ultimately the statement showed a small credit of 47 dinars in the defendant's favour. The defendant accepted that account and a settlement between him and Yousuf was eventually reached which was embodied in a formal document dated February 2, 1953.

In this action the plaintiff claimed the sum of £500 as money had and received by the defendant in trust for him and on his behalf and to his use. Alternatively, the like sum under an agreement made between him and the defendant; alternatively, the like sum as damages for breach of contract. He contended that at a date which he could not specify the defendant had received and accepted £500 from Yousuf in Baghdad for the purpose of paying that sum to him (the plaintiff) and that the defendant had since held and still held it in trust for him and on his behalf and to his use. Further, or in the alternative, he claimed that by an agreement made in November, 1952, between Yousuf and the defendant it was agreed that the defendant should pay him, the plaintiff, £500 out of the debt of approximately £1,300 then due and owing by the defendant to Yousuf; that by that agreement the sum of £500 in the hands of the defendant was specifically appropriated for payment to the plaintiff, or alternatively was, with the agreement of the defendant, assigned or charged by Yousuf to or in favour of the plaintiff; that by a letter of December 12, 1952, to the plaintiff the defendant acknowledged to him that he had so received and was so holding the £500.

Further or in the alternative, on December 12, 1952, the defendant agreed with the plaintiff to pay him £500 at the end of that month; that after the irregularly drawn cheque had been sent it was agreed between them that in consideration of the plaintiff returning the cheque to the defendant the defendant would correct it as necessary and return it to the plaintiff duly altered. Pursuant to that agreement, the plaintiff returned the cheque to the defendant upon his promise to send it back duly altered or to send another cheque for £500 properly drawn, but notwithstanding repeated requests so to do the defendant, in breach of the agreement, had failed and neglected to return the cheque to the plaintiff duly altered or to send another cheque properly drawn in its place.

The defendant had wrongfully and in breach of his trust and notwithstanding repeated requests made by the plaintiff failed and refused to pay the £500 or any part thereof to the plaintiff to whom it was still due and owing.

The defendant denied that he was indebted to the plaintiff in the sum of £500 or that he had received that or any sum from Yousuf for the purpose of paying it to the plaintiff. He admitted that he had agreed to Yousuf's request in November 1952, to pay the plaintiff £500 out of £1,300 which was at that time owed by the defendant to Yousuf, and further admitted that he told the

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plaintiff he would send him the money; that he sent an incorrectly drawn cheque; and that the cheque was returned to him for correction. He claimed that following his discovery that Yousuf had sold certain of his property in Iraq without his instructions, thereafter he delayed payment of the money to the plaintiff pending clarification of the financial position as between himself and Yousuf; that the statement of account of January 28, 1953, had not taken into account the £500 which was to have been paid to the plaintiff; further, that by reason of the aforesaid sale of property by Yousuf against his, the defendant's, instructions, for which Yousuf had received the purchase price of £2,300, he, the defendant, was no longer indebted to Yousuf in the sum of £1,300 of which the £500 was a part. In the premises at the date of the issue of the writ no part of the £500 was due and owing from the defendant to the plaintiff.

Mark Littman for the plaintiff.
Peter Boydell for the defendant.

The following cases were cited in argument on the issues relevant to this report: *Morrell* v. *Wootten* [1]; *Griffin* v. *Weatherby* [2]; *Walker* v. *Rostron* [3]; *Lilly* v. *Hays* [4]; *Crawfoot* v. *Gurney* [5]; *Hodgson* v. *Anderson* [6]; *Williams* v. *Everett* [7]; *Moses* v. *Macferlan* [8]; *Transvaal and Delagoa Bay Investment Co. Ltd.* v. *Atkinson.* [9]

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December 6. BARRY J. stated the facts and continued: On these facts Mr. Littman contends that the plaintiff is entitled to recover this sum on a claim for money had and received. As an alternative, he seeks to base his claim to that sum of money upon an equitable assignment; or, as a further alternative, he seeks to recover the sum of £500 as damages for breach of a contract to return the incorrectly drawn cheque to the defendant, the defendant agreeing to send back that cheque properly drawn, or replace it with another cheque properly drawn for the sum of £500. In whatever technical language the claim is garbed, its real essence is a claim for money had and received, and if this claim be unfounded, the plaintiff, in my opinion, should not be entitled to recover.

It is, I think, unnecessary for me to refer to many of the authorities which were cited to me in the course of the argument. There can, I think, be no doubt that the law on this subject was correctly stated by Blackburn J. in *Griffin* v. *Weatherby*,* Blackburn J. used these words †: "Ever since the case of "*Walker* v. *Rostron* ‡ it has been considered as settled law that

[1] (1852) 16 Beav. 197.
[2] (1868) L.R. 3 Q.B. 753.
[3] (1842) 9 M. & W. 411.
[4] (1836) 5 Ad. & Ell. 548.
[5] (1832) 9 Bing. 372.
[6] (1825) 3 B. & C. 842.
[7] (1811) 14 East 582.
[8] ((1760) 2 Burr. 1005.
[9] [1914] 1 All E.R. 579.
* (1868) L.R. 3 Q.B. 753.
† Ibid. 758.
‡ (1842) 9 M. & W. 411.

" where a person transfers to a creditor on account of a debt, " whether due or not, a fund actually existing or accruing in the " hands of a third person, and notifies the transfer to the holder " of the fund, although there is no legal obligation on the holder " to pay the amount of the debt to the transferee, yet the holder " of the fund may, and if he does promise to pay to the transferee, " then that which was merely an equitable right becomes a legal " right in the transferee, founded on the promise; and the money " becomes a fund received or to be received for and payable to " the transferee, and when it has been received an action for " money had and received to the use of the transferee lies at his " suit against the holder."

Mr. Boydell, on the defendant's behalf, does not seek to challenge that statement of the law. The basis of his argument was that in the present case there was not at any material time a " fund " in the hands of the defendant, and in the absence of such a " fund," he contends that no action for money had and received will lie.

Apart from this one point, to which I shall shortly refer, I am satisfied that the evidence establishes a legal right on the part of the plaintiff to recover this sum of £500 or 500 dinars. The plaintiff was not, it is true, a " creditor " of his brother Yousuf, but he was in truth the recipient of a gift from either Yousuf or Haroun. This fact cannot, I think, be material. I can find nothing in principle, or in any of the authorities cited to me, which suggests the need for consideration as between the transferee and the transferor of the fund which the transferee is seeking to recover. It is clear from the evidence that Yousuf desired to transfer this money, and did in fact transfer it to the plaintiff, by his instructions, which were imparted to and accepted by the defendant himself. Subsequent to the receipt and acceptance of these instructions, the defendant, in my judgment, clearly promised to pay that sum of money to the plaintiff. No other construction can, I think, be placed upon his letter dated December 12, 1952, and upon his wrongly dated letter enclosing a cheque for £500, which either " belongs to you " or " is due " to you " (according to which of the two translations be adopted).

In these circumstances, if a " fund " existed in the defendant's hands at the time when he accepted Yousuf's instructions and made this promise to pay the plaintiff, then the plaintiff acquired a legal right to recover from the defendant the money transferred to him by his brother. This right, if it existed, could not be defeated by any subsequent dealing between Yousuf and the defendant.

As I understood Mr. Boydell's argument, he submitted that no debt owing by a third person can constitute a " fund " or become subject to the principle enunciated by Blackburn J. in

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Griffin v. *Weatherby*.§ A fortiori, he suggests that when the debt consists of a mere temporary debit balance in a running account, as was the debt due from the defendant to Yousuf, such a debt cannot possibly be regarded as a fund to which this principle can apply.

Although the argument largely turned upon it, there is, of course, no magic in the word "fund"; nor is it to be regarded as though it were a word used in a statute. It was clearly chosen by Blackburn J.§ not as a term of art but as a word which aptly fitted the facts which were then under consideration.

The problem, therefore, does not concern the meaning of this particular word but the nature of the fundamental requirement which, other conditions being satisfied, will enable the doctrine enunciated by Blackburn J.§ to operate in favour of the transferee.

An identifiable sum of money entrusted to a third party in order that he, the third person, should hand it over to a transferee, or indeed for any other purpose, is, I think, most certainly not required. To take two examples, the so-called "fund" in *Walker* v. *Rostron*¶ consisted of the proceeds of the sale of goods purchased by the transferor from the transferee, which were in the hands of the third person, the transferor's agents, for the purpose of resale.

Again, in *Hamilton* v. *Spottiswoode* ‖ the "fund" was represented by moneys which would become owing to the transferor for goods to be supplied by him in the future to the third person who had been instructed to pay them—or part of them—to the transferee and had promised the transferee that he would do so.

In my judgment, all that the law requires is that there must be in the hands of or accruing to the third person, either a sum of money, or a monetary liability, over which the transferor has a right of disposal. It matters not, I think, from what source the liability arises, and I see no reason why it should not include a debt for money lent, or goods sold, or services rendered, or a debt of any other kind; nor do I think that the situation can be altered if the debt is of a temporary nature, which in the ordinary course of things would shortly be extinguished by items of contra account, provided, of course, that the debt still exists at the date of the transfer and of the debtor's promise of payment made to the transferee.

Mr. Boydell urged upon me the inconvenience and possible injustice which might be involved in treating a temporary debt of this nature as a "fund" which the transferee could recover in an action for money had and received. The short answer to this argument seems to be that the debtor is not bound to accept the transferor's instructions, or, still less, is he bound to make any promise of payment to the transferee. If he does promise, as I see it, he has only himself to blame.

Mr. Boydell also suggested that in the present case it would

§ L.R. 3 Q.B. 753, 758.
¶ 9 M. & W. 411.
‖ (1849) 4 Ex. 200.

be a grave hardship for the defendant if he were now compelled to pay £500 to the plaintiff. Even if this were true, it cannot, of course, affect the law, which must be administered as it is; but naturally the court will scrutinise with particular care any suggested rule of law which appears to result in an injustice. Here I am satisfied that the interpretation of the law which I adopt results in no injustice of any kind. It is said that the defendant would never have entered into the deed of settlement with Yousuf if he had been aware of his liability to the plaintiff. He was, however, fully aware of all the material facts when he made the settlement, and if he misapprehended his legal position I am afraid he has again only himself to blame.

It is suggested by the plaintiff that in the settlement Yousuf has in fact given credit to the defendant for a sum of £500, in that the defendant's real indebtedness to Yousuf in November, 1952, was 1,800 and not 1,300 dinars. There is, however, no evidence of any kind to support that suggestion; but, should it be true, it could be said with equal force that Yousuf would not have made the settlement had he known that the defendant had failed to pay the £500 to his brother. The evidence clearly establishes that by February 2 that information had not been imparted to Yousuf. Incidentally, I am not concerned with subsequent transactions between the defendant and Yousuf. If there be any dispute between Yousuf and the defendant about those subsequent transactions, that dispute must, I think, be settled by Iraqi law.

It is sufficient for me to say that I find the plaintiff is entitled to recover £500 from the defendant as money had and received.

In view of this finding, I need not consider in detail the two other causes of action upon which Mr. Littman relied. However, in deference to the arguments addressed to me, I should perhaps state my views in very general terms. Mr. Littman failed to satisfy me that the plaintiff could recover as an equitable assignee, if only because there was no evidence that notice of the assignment had in fact been given to him. Yousuf's letters certainly give no hint that he, Yousuf, had assigned to the plaintiff any moneys owing to him by the defendant.

I also reject the alternative claim for damages for breach of contract. I do so on the ground that the nature of the arrangement made with regard to the return and alteration of the cheque and the whole surrounding circumstances should lead the court to infer that the parties did not intend to enter into any legal obligation independent of the obligation which gave rise to the sending of the cheque. It is, I think, absurd to suppose that the intention of the parties was that the defendant would be in breach of any contractual obligation if he, for example, had sent the £500 in cash instead of amending and returning the original cheque or sending another cheque to replace it. Other equally astonishing results would follow if an arrangement made under

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circumstances of this kind were to be given the status of an independent and legally enforceable agreement.

I prefer to reject this suggested claim on this ground rather than upon any lack of consideration. If the proper inference was that the parties had intended to create a legal obligation, no doubt Mr. Littman's ingenuity could discover a consideration which in law might be considered sufficient. In the result there must be judgment for the plaintiff for the sum of £500.

Judgment for plaintiff.

Solicitors: *Teff & Teff; Kinch & Richardson for Linder, Myers & Pariser, Manchester.*

E. M. W.

[COURT OF APPEAL.]

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Dec. 17.

CROSS *v.* EDNEY.

[No. of Matter 77A.]

Romer and Ormerod L.JJ.

County Court—Payment into, by order of High Court—Payment out—Discretion of judge—Widow's damages under Fatal Accidents Acts—County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 164 (3).

Fatal Accidents Acts—Damages—Payment into county court—Payment out.

In 1943 the plaintiff's husband was killed in an accident and she was awarded the sum of £890 as damages under the Fatal Accidents Acts. The High Court, who tried the case, ordered that sum to be paid into the county court pursuant to the provisions of section 164 (3) of the County Courts Act, 1934, and it was directed that such sum should be invested and interest at 3¼ per cent. per annum should be paid to the plaintiff. The plaintiff, who was 46 years of age, had had some business experience. Her only child was 19 and earning her own living. The plaintiff applied to the county court judge for payment out to herself of the balance of the fund in court, which amounted to £740, to enable her to buy a freehold house which was then subject to a statutory tenancy, or, alternatively, to enable her to invest that sum at a higher rate of interest. The county court judge refused to direct payment out of the moneys to her:—

Held, (1) that it was impossible for the court to interfere with the way in which the county court judge had exercised his discretion in refusing to sanction the payment out of the fund to the plaintiff, bearing in mind, as he did, that for relevant purposes he was administering the fund in the same way as he would administer it for an infant.

(2) That assuming that there was a right of appeal from the exercise by a county court judge of the discretion vested in him by section 164 of the County Courts Act, 1934, it would need a strong case to justify the Court of Appeal in interfering, since it was the intention of the legislature that money recovered by a widow, which was ordered to be paid into the county court, should be administered by the county court for her benefit as distinct from

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any paid to her for her own use and benefit, and that to hold that a widow, who was free from outside interference and without dependent children, was entitled, as of right, to have her money paid out to her would be to abrogate the discretion which Parliament had vested in the county court judge.

Per curiam that where a High Court judge is exercising the discretion conferred on him by R.S.C., Ord. 22, r. 14 (4) and (9), in respect of damages awarded to a widow under the Fatal Accidents Acts, it would be right to allow a widow to have the damages which she had recovered paid to her where no special circumstances were established which rendered such a course undesirable.

APPEAL from a decision of Judge Paton, sitting at Bridgwater County Court.

The plaintiff, Queenie Mary Cross, a widow, appealed against a refusal of the county court judge pursuant to the powers conferred on him by section 164 of the County Courts Act, 1934,[1] to direct payment out to herself of the sum of £740 lodged in court in 1943 for her benefit and representing damages awarded to her under the Fatal Accidents Acts.

The following statement of facts is taken from the judgment of Romer L.J.: The plaintiff in 1943 brought an action against one Edward James Edney and G. Hooper & Co. Ltd., by reason of a fatal accident to her husband: she sued as his widow, and recovered, by way of damages under the Fatal Accidents Acts, a sum of £890. That action was in the High Court, and the judge who tried it made an order transferring that sum into the Bridgwater County Court. In the same action the plaintiff's infant child, a daughter, was awarded a sum of £249 as damages, and that sum also was transferred into the same county court. With regard to the plaintiff's fund, the direction was that it should be invested and that the interest should be paid half-yearly to the plaintiff until further order. With regard to the infant's sum of £249, it was ordered that that should be invested and the income accumulated.

The funds remained there for some years without any application being made with regard to them. On October 21, 1954, the

[1] County Courts Act, 1935, s. 164: "(1) Where in any cause or matter "in the High Court money is in any "manner recovered by or on behalf "of, or adjudged or ordered to be "paid to or for the benefit of, a "person who is an infant or of "unsound mind, the High Court or "a judge thereof may order the "money or any part thereof to be "paid into or transferred to the "county court of the district in "which that person resides or such "other county court as the High "Court or judge may order. (2) On "the making of any such order, the "money . . . shall be . . . transferred . . . and shall, subject to "any special order or direction of "the High Court or a judge there-"of . . . be invested, applied or "otherwise dealt with for the benefit "of the person to whom the order "relates in such manner as the "county court in its discretion thinks "fit. (3) The provisions of this "section shall apply to money which "in proceedings under the Fatal "Accidents Acts, 1846 to 1908, is "recovered by or adjudged or "ordered to be paid to the widow "of the person killed as they apply "to money recovered by or adjudged "or ordered to be paid to an infant."

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registrar of the Bridgwater County Court made an order for payment out of £30 from the infant's fund for her maintenance; and on September 27, 1956, he made a further order for payment, out of the infant's fund, of £160 for the purchase for her of a small motor-scooter, to enable her to travel to her work. The plaintiff's daughter was at the date of the hearing 19 years of age. On October 21, 1954, the registrar also made an order for the payment to the plaintiff out of her own fund (which then stood at £898) of £150 for her to purchase a small car. Those orders provided both the plaintiff and her daughter with means of transport for their personal use.

On June 18, 1957, the plaintiff applied in person to the registrar for the payment out of the whole of her fund (which stood at £740, together with some interest), in order that she might purchase a house as an investment, subject to an existing tenancy. The registrar (according to his note) suggested that she should instruct a solicitor to appear before him and told her that he would need very full information from the solicitor as to the property—the terms of the existing tenancy and the terms of the proposed contract of purchase. Thereupon the plaintiff instructed a solicitor who, on the adjourned hearing in July, 1957, brought up the matter again before the registrar. The solicitor was not in a position to give any of the information which the registrar required about the house in question, and the registrar was not prepared to make any order. The solicitor (who had so far limited his application to one for payment out for the purpose of buying a house) then suggested that if there was any difficulty about that the registrar should deal with the application simply on the footing that the plaintiff wished to have the whole fund paid out to her, so that she could invest it to better advantage and at a better rate of interest than the 3¼ per cent. that it was earning in court. The registrar refused to make such an order and adjourned the matter to the judge.

It appeared from an affidavit of the solicitor that when the matter came before the judge on September 12, he repeated the arguments which he had placed before the registrar. He informed the judge that the plaintiff was a woman aged approximately 46, that she assisted her mother and did the greater part of the work in the conduct of a licensed house, that what moneys she had earned she had invested in land and in the local building society, and that she was in every way a business woman, fully capable of looking after her own interests to the best advantage. The solicitor then pointed out that the purchase of this particular house (which was a freehold house, No. 39, Kellerton Road, Lewisham) would, in the particular circumstances which existed, be a highly profitable transaction. The reason for that was this: The property was let to one Slade, aged some 63 years, who was an old friend of the plaintiff. He and his wife were the sole occupants of the property and he intended to leave the house and move down to the West Country in two years'

time, when he reached retiring age. It was put by the solicitor to the judge that when that happened (as there was every reason to suppose it would) this house would then be worth some £2,000, because, although it was rent-controlled, it could be sold, on the tenant vacating it, with vacant possession. The judge then (according to his note) wanted to know some more about the house, and the application was adjourned till November 14, 1957, to give opportunity to the plaintiff and her solicitor to supply some further information. On the adjourned hearing (according to the judge's note), the solicitor was unable to furnish any further information about the premises proposed to be purchased; but it appeared that he had misinformed the judge about the rateable value, with the result that the premises would not be decontrolled under the Act of 1957.

The judge having taken the view that he was not proposing to authorize this particular transaction, the solicitor then asked him if he would make an order for the moneys to be invested in gilt-edged stock dated for redemption in a few years' time, and said that the plaintiff would, if necessary, undertake that it would not be dealt with for five years; and he added that the 5 per cent. stock would be a great deal more to the plaintiff's advantage than the $3\frac{1}{4}$ per cent. The solicitor in his affidavit said that when the judge was not inclined to make an order, he asked him if he would adjourn the matter so that he could obtain a special valuation about the house: but that was not in fact obtained by the time the adjourned hearing came before the judge. The judge refused either to make a particular order for the release of this money in order to pay for the house or the more general order releasing the fund to the plaintiff, so that it might be invested at a more profitable rate of interest. It is from that refusal that this appeal was brought. The plaintiff desired to have the control of the fund either for the purpose of buying the house or for the purpose of reinvestment at a more favourable rate of interest.

Roger Gray for the plaintiff.

The following cases were referred to in argument and are not mentioned in the judgments: *Grimshaw* v. *Dunbar*[2]; *Taylor* v. *Cheltenham and Hereford Breweries Ltd.*[3]

ROMER L.J. stated the facts and read the relevant parts of section 164 of the County Courts Act, 1934, and continued: Mr. Gray has put his case before us in two ways. First of all, he says that, in the particular facts of this case, it was a highly profitable transaction which the judge was asked to authorize, and that the judge went wrong in refusing to approve the purchase which the plaintiff desired to effect. The second way he

[2] [1953] 1 Q.B. 408; [1953] 2 W.L.R. 332; [1953] 1 All E.R. 350.

[3] [1952] 2 Q.B. 493; [1952] 1 T.L.R. 1224; [1952] 1 All E.R. 1135.

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puts it, which is a wider way, is this: that a lady such as the plaintiff, who is middle-aged and has some business experience, and whose only child has almost attained her majority, and who is free, so far as can be known, from the domination of any other person, should be entitled, in the absence of special circumstances, to be paid out the money which stands to her credit or which has been paid, for her benefit, into the county court.

So far as the first way of putting the matter is concerned, I think that (subject to the wider question, which I consider later) there is no possible ground for interfering with the way in which the county court judge exercised his discretion. He was not satisfied that he had sufficient information about this property and about the lessor's and lessee's covenants under the tenancy agreement and other material matters to enable him to say whether this was going to be, or likely to be, a sound investment or merely a hopeful speculation. In those circumstances, and especially having regard to the statement in the judge's note that, on the adjourned hearing, the plaintiff's solicitor was unable to furnish any further information about the premises proposed to be purchased, it seems to me impossible for this court to say that he erred in refusing to sanction the payment out of this money for the purpose of purchasing this house, bearing in mind, as he did bear in mind, that for relevant purposes he was administering this fund in the same way as he would administer it for the benefit of an infant; and that no court would direct an investment of an infant's money in the purchase of a house property without knowing a great deal more about the tenancy to which the property was subject than the county court judge knew in the present case. I can see no ground, therefore, for interfering in any way with the judge's refusal so far as the property is concerned. It is true (as Mr. Gray says) that even if the tenant does not go out, as it is hoped that he will, the money invested in the house will still be there as an investment. I cannot believe that the county court judge overlooked that: I think that he regarded this thing as something of a speculation in a property which he did not know enough about.

With regard to the more general way of putting the case, Mr. Gray in effect asked us to say that where a lady of this kind is not shown to be illiterate or unbalanced or under the dominion of some evilly disposed person, she ought to be allowed at any time to have unqualified possession and dominion over money which has been paid into court for her benefit, the object (as he says) of the provisions as to administering such funds contained in section 164 being not to protect a widow against herself but to protect her from the influence of other people. He says that the county court judge in the present case overlooked, or disregarded, the facts that the fund at present is only bringing in 3¼ per cent.; that the daughter is 19 years old and in a job; and that the lady is now 46, is competent to manage her own affairs, and possesses business experience. He says,

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accordingly, that in those circumstances the judge was wrong in refusing to exercise his discretion by directing the payment out of this fund to her.

I am prepared to assume that there is a right of appeal from the exercise by a county court judge of the discretion vested in him by section 164; but it seems to me that it would need a very strong case to justify this court in interfering. Certainly I am by no means disposed to lay down any such general proposition as that for which Mr. Gray contended. It seems to me that such a proposition would be quite inconsistent with the terms in which section 164—which took its origin from the Judicature Act of 1925—is expressed, because subsection (3) applies the section to widows generally and not only to widows with infant children; and it obviously was the intention of the legislature that money recovered by a widow, which was ordered to be paid into court, should be administered by the county court for her benefit as distinct from being paid to her for her own use and benefit; and if we were to say that a lady, who is free from outside interference and who has either no children or no infant children, or only children who have practically attained their majority, ought to be entitled as of right to have her money paid out to her, it seems to me that that in effect would be completely abrogating the discretion which Parliament has vested in the county court judge, and would be going much further than this court has any right to go.

It seems to me that each case must depend on its own particular facts. Here, the registrar saw the plaintiff. I do not know whether the county court judge saw her: she was presumably in court at the hearing before him. Both the registrar and the county court judge came to the conclusion that no proper case had been established to their satisfaction for releasing this fund to the plaintiff for her own use and benefit. It appears to me that we have no material before us on which we can say that they exercised their discretion wrongly; although it may well be (I do not know) that had the matter come before us in the first instance we would have taken a different view of the matter. With regard to that, Mr. Gray drew our attention (as, indeed, he drew the attention of the county court judge) to what Upjohn J. had to say in a somewhat similar matter in a case [1] which he decided when he was sitting as an additional judge of the Queen's Bench Division. Sitting in that court, he awarded £4,826 damages to a Mrs. Smith, aged 45, under the Fatal Accidents Act, in an action which she brought in respect of the death of her husband. Her counsel asked the judge to order payment of some of the damages to her forthwith. Upjohn J. took, and expressed, the view that "A person is perfectly "entitled to take their damages out, and regrettably they are "entitled, if they so desire, to fritter it away"; and added,

[1] Reported in *The Times*, October 25, 1957.

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"Having seen Mrs. Smith, I think she would be the last person "in the world to do this." He then directed that the money should be paid out to Mrs. Smith, less £600 for the two children. He was exercising a discretion (very comparable to that which the county court judge was exercising in this case) conferred by Ord. 22, r. 14 (4) and (9). Other judges have taken a similar view to that expressed by Upjohn J.; but it appears to me that that does not assist in the present case. We are not exercising an original discretion, as he was: we are being asked to interfere with the exercise of the original discretion which is vested in the county court judge, and very different considerations arise. I for my part would only say this: I respectfully agree with what Upjohn J. said, and it does appear to me that where one finds a case such as the present, prima facie it would be right to allow a widow to have the damages which she has recovered, and that normally that would be the wise and sensible course to adopt, where no special circumstances are established which render such a course undesirable—for example, the influence of some third person or the existence of infant children or the like. But my opinion on that is really irrelevant for present purposes, because all we are asked to do is to interfere with and overrule the exercise of the county court judge's discretion in the circumstances of this case as he saw them. In my opinion there is not sufficient material for us so to do; and I would accordingly dismiss the appeal.

ORMEROD L.J. I agree, although I have considerable sympathy with the plaintiff in this appeal. The appeal is one from a county court judge who has made an order in the exercise of his discretion under section 164 of the County Courts Act, 1934. It appears to be clear that in the case of an exercise of a discretion by a county court judge in those circumstances there may be an appeal, but only in exceptional circumstances, where the decision has resulted in an injustice being done. It appears to be quite clear (although I personally might feel disposed to come to a different conclusion on the facts) that it is a matter for the exercise of the discretion of the county court judge vested in him by statute; and, unless there is some circumstance which would enable this court to say that an injustice has been done, because there has clearly been a wrongful exercise by the judge of his discretion, it does not appear to me that this court has any right to interfere.

Mr. Gray, on behalf of the plaintiff, put his case in two ways. In the first place, he referred to the scheme itself for the purchase of this house and submitted that, on any showing, this was a scheme which was for the benefit of the plaintiff—that whatever happened to the house in the future, whether there was vacant possession in two years or not, the house would still have its value and the money would not be lost, and that under those circumstances the proper exercise by the county court judge of

his discretion would have been to allow this money to be spent on this house. That is one way of looking at it. On the other hand, of course, it means this, that if the judge had allowed this money to be paid out for this specific purpose the court would then have lost control of the money completely: the house would be in the possession and ownership of the plaintiff; she would be entitled to realize it at any moment and, of course, would have complete control of the proceeds of sale. It may or may not be that that is a matter which was in the mind of the county court judge at the time he came to his conclusion. Be that as it may, I think it is quite impossible to say here that it was an improper exercise of the discretion of the county court judge for him to decide that this was not, in the circumstances, a suitable way of expending this money on behalf of the widow.

On the other ground which Mr. Gray has put forward, he would have this court find that the discretion vested in the county court judge could really only be exercised in one way in a case of this kind, where the widow has reached the age of 46 years, and where the infant is now almost of age; and that really under no circumstances, unless some exceptional circumstance, such as the domination of an evilly disposed person, could be found, should an application be refused. For my part, I am quite unable to accept that view, and would be a long way from laying it down as a rule that the discretion of the county court judge should be exercised in that way. Apart from anything else, it would be taking away his discretion entirely in a matter of this kind. If may very well be that the modern idea is that a widow should have possession of money to deal with as she thinks best, that in these days women are more experienced than they were in the past in handling their own affairs; and it may be that with increasing frequency a judge in the High Court will order moneys to be paid direct to widows under these circumstances rather than order that they should be transferred to the county court and invested under section 164. But that is entirely a matter for the High Court judge in each particular case, and it is not a matter in which this court can interfere, so far as I am able to see. Although, as I say, if I had been considering these circumstances myself, I might have come to a different conclusion, I find it quite impossible to say that there has been such a wrongful exercise by the county court judge of his discretion that this court should interfere. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co. for Barrington & Sons, Bridgwater.*

B. A. B.

[COURT OF APPEAL.]

C. A.

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Dec. 10.

Jenkins, Sellers and Pearce L.JJ.

HAMZEH MALASS & SONS *v.* BRITISH IMEX INDUSTRIES LTD.

Sale of Goods—C.I.F.—Letter of credit—Right to stop—Contract for delivery by two instalments—Payment by letter of credit for each instalment—First instalment alleged to be defective—Repudiation of contract by plaintiff purchasers—Application for injunction "freezing" second letter of credit—Jurisdiction of court—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 31 (2).
Banking—Letter of credit.
Injunction.

The plaintiffs, a Jordanian firm, contracted to purchase from the defendants, a British firm, a large quantity of reinforced steel rods, to be delivered in two instalments. Payment was to be effected by the opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each instalment. The letters of credit were duly opened and the first was realized by the defendants on the delivery of the first instalment. The plaintiffs complained that that instalment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Donovan J. refused the application. The plaintiffs appealed:—

Held, that although the court had a wide jurisdiction to grant injunctions, this was not a case in which, in the exercise of its discretion, it ought to do so; an elaborate commercial system had been built up on the footing that a confirmed letter of credit constituted a bargain between the banker and the vendor of the goods, which imposed upon the banker an absolute obligation to pay, irrespective of any dispute there might be between the parties whether or not the goods were up to contract.

APPEAL from Donovan J.

The plaintiffs, Hamzeh Malass and Bochir Hamzeh Malass, a Jordanian firm trading as Hamzeh Malass & Sons, contracted to purchase from the defendants, British Imex Industries Ltd., a large quantity of reinforced steel rods. The goods were to be delivered in two instalments and payment was to be effected by means of two confirmed letters of credit with the Midland Bank in London—one in respect of each instalment. The letters of credit were duly opened and the defendants realized the first one and would shortly be in a position to realize the second payment. Further details of the transaction appear from the report of *British Imex Industries Ltd.* v. *Midland Bank Ltd.*, post, p. 103.

On December 9, 1957, the plaintiffs, alleging that the goods of the first instalment were defective, applied ex parte to Donovan J. asking for an injunction to restrain the defendants, their servants, agents or assigns or anyone deriving title under them, from drawing on the second letter of credit for £23,000 or receiving from the Midland Bank any money under the contract. Donovan J. granted the injunction, to run until 2.30 p.m. on the following day, December 10. The defendants had until 3 p.m. on that day

to present the letter of credit to the Midland Bank and to receive payment. On the morning of December 10 the plaintiffs applied to Donovan J. to extend the injunction until the rights of the parties under the contract for the sale of the goods could be ascertained. The judge refused to do so on the ground that he had no jurisdiction. The plaintiffs immediately applied to the Court of Appeal at 12.30 p.m. against that refusal.

Gerald Gardiner Q.C. and *J. Fox-Andrews*, for the plaintiffs, contended that the court had wide powers, in the exercise of its discretion, to grant an injunction to restrain the defendants from dealing with the amount of this letter of credit: see R.S.C., Ord. 50, r. 6. The defendants had already received some £23,000 under the first letter of credit in respect of worthless goods, under a contract which the plaintiffs were entitled to repudiate and had repudiated. The plaintiffs were not seeking to withdraw money from the Midland Bank, but merely to restrain the defendants from realizing the credit, subject to any terms which the court saw fit to impose. The bank would remain under the same liability. [They referred to section 31 (2) of the Sale of Goods Act, 1893, and cited *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembley) Ltd.*[1]]

A. A. Mocatta Q.C. and *Mark Littman* for the defendants, while not admitting the jurisdiction of the court to grant an injunction, contended that if the application were granted the whole procedure by which, in commercial transactions, letters of credit were used would be wrecked. The defendants had a contract with the bank that if they presented the proper documents the bank would pay. That was the whole basis on which the English exporter agreed to sell to overseas purchasers. The bank had no right to refuse payment on presentation of the proper documents. [*Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[2] cited. Davis' Law Relating to Commercial Letters of Credit, 2nd ed., pp. 70 to 76, and Gutteridge's Law of Bankers' Commercial Credits, 2nd ed., pp. 35 to 37 read.]

JENKINS L.J. stated the facts and continued: It appears that when the first consignment of steel rods arrived they were, according to the plaintiffs, by no means up to contract quality and many criticisms were made on that score. That is a matter in issue between the parties. In the meantime the plaintiffs wish to secure themselves in respect of any damages they may be found to be entitled to when this dispute is ultimately tried out, by preventing the defendants from dealing with this outstanding letter of credit. Mr. Gardiner, in effect, treats this as no more than part of the price, a sum earmarked to pay for the goods bought under the contract, which the plaintiffs have become entitled to repudiate; and he says that the defendants ought,

[1] [1934] 1 K.B. 148; 50 T.L.R. 58. [2] [1952] 1 K.B. 285; [1952] 1 All E.R. 89.

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accordingly, to be restrained from dealing with the amount of this letter of credit. He points out that he is not seeking any order against the bank, but merely against the defendants.

We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.

There is this to be remembered, too. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, furthermore, to be observed that vendors are often reselling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice is—and I think it was followed by the defendants in this case—to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have the effect of "freezing," if I may use that expression, the sum in respect of which the letter of credit was opened.

I agree with Mr. Gardiner that this is not a case where it can be said that the court has no jurisdiction to interfere. The court's jurisdiction to grant injunctions is wide, but, in my judgment, this is not a case in which the court ought, in the exercise of its discretion, to grant an injunction. Accordingly, I think this application should be refused.

SELLERS L.J. I agree, but I would repeat what my Lord has said on jurisdiction. I would not like it to be taken that I accept, or that the court accepts, the submission if it was made, as I think it was, that the court has no jurisdiction. There may well be cases where the court would exercise jurisdiction as in a case where there is a fraudulent transaction.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *Simmons & Simmons; Menasse & Tobin.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

BRITISH IMEX INDUSTRIES LTD. *v.* MIDLAND BANK LTD.

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Dec. 19, 20.

Salmon J.

[1957 B. 3705.]

Banking — Letter of credit — Terms of payment — Credit payable on presentation of sight drafts accompanied by shipped bills of lading —Goods shipped under bills of lading containing clause excusing shipowners from correct delivery unless special conditions as to marking of goods complied with—Beneficiaries' right to payment on presentation of "clean" bills of lading.

Sale of Goods—C.I.F.—Letter of credit.

Shipping—Bill of lading—"Clean bill"—Hague Rules—Meaning of "clean bill"—Additional printed clause excusing shipowners from obligation for correct delivery of iron and steel goods unless specified conditions as to securing and marking complied with—Validity—Hague Rules, art. IV, r. 2, paras. (n), (o)—Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 16), *Sch., art. IV, r.* 2 (*n*), (*o*). *Ships' names—Nordstern.*

Commercial Court—Value of—Speed.

An English bank, on receipt of a small commission, confirmed an irrevocable credit for £23,000 opened by a foreign bank in favour of the plaintiffs and undertook to honour all drafts drawn by the plaintiffs if drawn and presented in accordance with the terms of the credit. Under the credit, the money was payable to the plaintiffs on presentation of sight drafts accompanied by invoices and "shipped bills of lading" evidencing shipment by a certain date of a quantity of steel bars from any European port to Aqaba, Jordan. Shipment took place from Antwerp within the time prescribed in the credit under bills of lading which incorporated the Hague Rules and which included, among the printed clauses on the back of the bills, a clause (additional clause B) providing that, in the case of iron and steel cargo, the vessel would not be responsible for correct delivery or for expenses incurred at the port of discharge "consequent upon insufficient securing or marking . . . "unless (a) every piece is distinctly and permanently marked with "oil paint, (b) every bundle is securely fastened, distinctly and "permanently marked with oil paint and metal tagged, so that "each piece or bundle can be distinguished at the port of discharge."

After shipment, the plaintiffs presented sight drafts for £21,468 to the bank, tendering therewith the documents specified in the letter of credit, but the bank refused to pay them on the ground that there was no acknowledgment on the face of the bills of lading that the terms of additional clause B had been complied with. In an action by the plaintiffs for £21,468:—

Held, (1) that a credit, such as the present, which provided for the presentation of "bills of lading" without further qualification, called for "clean" bills of lading, that was to say, bills which contained no reservation by way of endorsement, clausing or otherwise, to suggest that the goods or packing were defective; and therefore, as the bills presented by the plaintiffs were "clean" bills of lading, and there was nothing in the letter of credit which called for an express acknowledgment that the terms of additional clause B had been complied with, the bank had no right to insist on any such acknowledgment before payment.

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Semble that it is not the duty of a confirming bank to concern itself with the clauses printed on the back of the bills of lading or to consider their legal implications, its duty being no more than to satisfy itself that the correct documents had been presented and that no endorsement appeared on the bills of lading which might indicate some defect in the packing or the goods.

Dicta of Scrutton L.J. in *National Bank of Egypt* v. *Hannevig's Bank* (1919) reported in Legal Decisions Affecting Bankers, vol. 3, pp. 213, 214 followed.

(2) That, even if the bank was under a duty to examine the clauses on the back of the bills of lading and to consider their legal effect, no express acknowledgment such as that contended for by the bank was required by the terms of additional clause B in so far as it complied with article IV, rule 2, paras. (*n*) and (*o*), of the Hague Rules,[1] which compulsorily applied, as under the rules no such acknowledgment was required; and in so far as the clause, on its true construction, relieved the carrier from liability for delivery of the goods if they were not marked in accordance with its terms, even if adequately marked by other means, it lessened the carrier's liability otherwise than as provided by the Hague Rules and to that extent was null and void under article II, rule 8. Accordingly, the plaintiffs, by presenting the documents specified in the letter of credit, had complied with its terms and were entitled to succeed.

Walters v. *Joseph Rank* (1923) 39 T.L.R. 255; *Studebaker Distributors* v. *Charlton Steamship Co.* [1938] 1 K.B. 459; 54 T.L.R. 77; [1937] 4 All E.R. 304; *Holland and Colombo Trading Society Ltd.* v. *Segu Mohamed* [1954] 2 Lloyd's Rep. 45 applied.

ACTION.

On November 6, 1957, the defendants, the Midland Bank Ltd., wrote to the plaintiffs, British Imex Industries Ltd., in the following terms: "Advice of Arab Bank Ltd. Irrevocable "Credit. We have to inform you that we have received advice "from the Arab Bank Ltd., Amman, that they have opened "with us their irrevocable credit in favour of yourselves on "account of Hamzeh Malass and Sons, Amman, to the extent "of £23,000 valid at this office until November 30, 1957, and "available by your drafts at sight accompanied by triplicated "commercial invoice, original certified by chamber of commerce ". . . shipped bills of lading in complete set issued to order and "blank endorsed 'Aqaba, Jordan' evidencing current shipment "by the s.s./m.v. latest 30.11.1957 from any European port ". . . transhipment prohibited . . . to Aqaba in one of several "shipments of the undermentioned goods: about 520 long tons "reinforcing steel bars . . . at £42 17s. 6d. per long ton basic ". . . C & F Aqaba." The letter added that the defendants were requested to advise the plaintiffs of the terms of the credit which was irrevocable on the part of the Arab Bank Ltd., Amman, but they were not asked to add their confirmation and therefore the advice was given for the plaintiffs' guidance only, and did not

[1] The Hague Rules, art. IV, r. 2: "Neither the carrier nor the ship "shall be responsible for loss or "damage arising or resulting from ". . . (*n*) Insufficiency of packing; "(*o*) Insufficiency or inadequacy of "marks."

involve any undertaking on the defendants' part. On November 13, 1957, the defendants wrote again to the plaintiffs advising them of certain alterations in the credit, namely, "Validity "extended until December 10, 1957. (The latest date for ship- "ment remains unchanged.)" In that letter they stated "this "credit now bears our confirmation, and we hereby undertake to "honour all drafts on presentation provided they are drawn and "presented in accordance with the terms of the credit. It is a "condition of this amendment that our confirmation commission "amounting to £18 is for your account. We understand . . . "that you agree to pay this commission, and we await your "remittance in due course. All other conditions of this credit "remain unchanged." The plaintiffs confirmed that they were willing to pay the commission and paid it, and accordingly the defendants became liable to pay the plaintiffs in accordance with the terms of the credit.

On November 27, 1957, the goods were shipped from Antwerp under bills of lading of the "Hansa" lines. Each bill of lading provided on its face "Shipped at Antwerp in apparent good order "and condition, weight, measure, marks, numbers, quality, "contents and value unknown, by the British Imex Industries, "London, on board the good vessel called the *Nordstern* for "carriage to Aqaba." The marks, number of packages, description of packages and goods, and the approximate gross weights were also given, and "Freight to be prepaid" was written across the face of the bills. The printed clauses and conditions on the back of each bill included, inter alia, clause 2, the paramount clause, which provided that the Hague Rules contained in the International Convention for the unification of certain rules relating to bills of lading, dated Brussels, August 25, 1924, as enacted in the country of shipment should apply to the contract. There were a number of additional printed clauses, one of which, additional clause B, related to iron and steel, angles, bars, channels, etc., and provided as follows: "Vessel not responsible "for correct delivery and all expenses incurred at port of dis- "charge consequent upon insufficient securing or marking will be "payable by consignees unless (a) every piece is distinctly and "permanently marked with oil paint; (b) every bundle is securely "fastened, distinctly and permanently marked with oil paint and "metal tagged, so that each piece or bundle can be distinguished "at port of discharge."

On December 10, 1957, the plaintiffs presented to the defendants all the documents referred to in the letter of credit together with sight drafts amounting to £21,468, but the defendants refused to pay the sum claimed on the ground that the bills of lading contained no evidence that the requirements of additional clause B on the back of the bills of lading had been complied with.

On December 11, 1957, the plaintiffs issued the writ in this action, claiming from the defendants the sum of £21,468, damages and interest. They alleged a breach by the defendants of the

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letter of credit dated November 6, 1957 (as altered by the letter of November 13, 1957). On the day that the writ was issued the action was transferred to the commercial court by Ashworth J., who made an order for it to be tried without pleadings. The defendants, in a letter to the plaintiffs of December 13, 1957, stated that as the bills of lading contained no acknowledgment that the conditions of additional clause B on the back of each bill had been performed, they were not good tender under the letter of credit. The case came on for hearing on December 19, 1957.

A. A. Mocatta Q.C. and *Mark Littman* for the plaintiffs.
Maurice Lyell Q.C. and *H. A. Fisher* for the defendants.

The following cases (other than those referred to in the judgment) were cited in argument: *Urquhart, Lindsay & Co.* v. *Eastern Bank Ltd.*[2]; *Westminster Bank* v. *Banco Nationale di Credito*[3]; *Sandeman & Sons* v. *Tyzack & Branfoot S.S. Co. Ltd.*[4]; *Biddell Bros.* v. *E. Clemens Horst Co.*[5]

SALMON J. The writ in this action was issued on Wednesday of last week. The action came on for hearing yesterday, and judgment is now being delivered just 11 days after the issue of the writ. This case illustrates very well the speed and convenience with which the commercial community can have its disputes determined in this court when it chooses to resort to it.

[His Lordship stated the facts and continued:] It is to be observed that the only remuneration that the bank received was £18. The £23,000 referred to in the credit would have to be paid to the plaintiffs if they complied with the terms of the credit, or, if they did not, presumably would be repaid to the Arab Bank, or to Hamzeh Malass & Sons at Amman. If, as seems not unlikely, the bank's customers took the point that the bank was not entitled to pay on this credit, it is perhaps not at all surprising that the bank would feel obliged, for its own protection, to resist the plaintiffs' claim so that it should be protected by an order of this court.

The point raised in this case is both novel and important, namely: Is it necessary for bills of lading in this form to contain an acknowledgment that the printed terms as to marking and securing have been complied with, or is the bill of lading acceptable so long as it contains no endorsement or clausing to the effect that this printed clause has not been complied with?

The plaintiffs have called before me a witness of the widest experience in the exporting and importing business, including the exporting and importing of iron and steel. I understand that he has 30 years' experience; that he is on the council of the London

[2] [1922] 1 K.B. 318.
[3] (1928) 31 Ll.L.Rep. 306.
[4] [1913] A.C. 680; 29 T.L.R. 694.
[5] [1911] 1 K.B. 934; 27 T.L.R. 331.

Chamber of Commerce; that he is deputy chairman of its exporting and importing section, and on the trade terms committee. He said that a clause in similar terms to additional clause B is not unusual in bills of lading. A great many bills of lading contain no such clause, but a great many bills of lading do contain such a clause. He had never heard of a bill of lading containing the clause in question being objected to on the ground that it did not contain a statement that such clause had been complied with. In his experience such bills of lading were invariably accepted as good without such a statement. Indeed, there has been produced to me such a bill of lading accepted by the defendant bank itself without any such acknowledgment as it is now argued is indispensable; but it may be that in that particular case there were special circumstances. The evidence of the plaintiffs' witness was wholly uncontradicted and not very seriously challenged. I unhesitatingly accept it.

It follows that if the bank is right in its present contention, it will be necessary for those concerned with the exporting and importing of iron and steel to revolutionize their present practice when using bills of lading which contain a clause similar to additional clause B. There may also be a good many disappointed sellers of iron and steel who have already parted with their goods on the faith of confirmed irrevocable credits, relying on the practice of banks to accept bills of lading in this form, that is to say, without any express statement that the terms relating to marking and securing of the goods have been complied with.

The letter of credit stipulated that payment would be made against bills of lading without qualification. The plaintiffs suggest that this does not necessarily mean clean bills of lading. In my judgment, when a credit calls for bills of lading, in normal circumstances it means clean bills of lading. I think that in normal circumstances the ordinary business man who undertakes to pay against the presentation of bills of lading means clean bills of lading; and he would probably consider that that was so obvious to any other business man that it was hardly necessary to state it. That seems to have been the view taken by Bailhache J. in *National Bank of Egypt* v. *Hanniveg's Bank Ltd.*[1] I entirely agree with it. No doubt, as was pointed out by the Court of Appeal in that case,[2] there may be circumstances when, for instance, business has been disorganized by war, in which a credit against bills of lading is not necessarily a credit against clean bills of lading. That is a point which it is unnecessary to decide in this case, for here there are no special circumstances, and I read " bills of lading " in the letter of credit as meaning clean bills of lading. A " clean bill of lading " has never been exhaustively defined, and I certainly do not propose to attempt that task now. I incline to the view, however, that a clean bill of lading is one that does not contain any reservation as to the

[1] (1919) 1 Ll.L.Rep. 69. [2] Ibid. 70.

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Salmon J.

apparent good order or condition of the goods or the packing. In my judgment, the bills of lading in this case are plainly clean bills of lading. They contain no reservation by way of endorsement, clausing or otherwise, to suggest that the goods or the packing are or may be defective in any respect.

The defendant bank contends that inasmuch as the bills of lading do not contain on their face an express acknowledgment that the goods have been marked in accordance with the provisions of additional clause B, then either they are not clean bills of lading—I have dealt with that point—or they are so seriously defective that the bank is entitled to refuse payment. It is to be observed that the letter of credit did not call for bills of lading to be endorsed with any acknowledgment that the provisions of the additional clause B had been complied with. I do not consider that the bank has any right to insist on such an acknowledgment before payment. According to their case, it was their duty for the remuneration of £18 to read through the multifarious clauses in minute print on the back of these bills of lading and, having observed additional clause B, to consider its legal effect and then to call for an acknowledgment that it had been complied with. I respectfully share the doubt that Scrutton L.J. expressed in *National Bank of Egypt* v. *Hannevig's Bank*[3] as to whether any such duty is cast upon the bank. I doubt whether banks are under any greater duty to their correspondents than to satisfy themselves that the correct documents are presented to them, and that the bills of lading bear no indorsement or clausing by the shipowners or shippers which could reasonably mean that there was, or might be, some defect in the goods or their packing.

Assuming, however, that the bank is concerned with the clauses printed on the back of the bill of lading and their legal implications, clause B does not, in my judgment, require the bill of lading to contain an acknowledgment by the shipowner that it has been complied with. This shipment being from Antwerp, the Hague Rules are compulsorily applied to it. Article IV, rule 2, of the Hague Rules provides: "Neither the carrier nor the ship "shall be responsible for loss or damage arising or resulting from ". . . (*n*) Insufficiency of packing; (*o*) Insufficiency or inadequacy "of marks." It has never heretofore been suggested (and, indeed, the defendant bank does not now suggest) that whenever these provisions of the Hague Rules are impliedly written into a bill of lading, the bill of lading should contain some acknowledgment that the goods have been sufficiently packed and adequately marked.

The plaintiffs contend that (1) if the additional clause B goes no further than article IV, rule 2, paragraphs (*n*) and (*o*), of the Hague Rules, it cannot be necessary for the bill of lading to contain any acknowledgment that the clause has been complied with; and (2) if the clause goes further than article IV, rule 2,

[3] See report in Institute of Bankers: Legal Decisions Affecting Bankers, Vol. 3, pp. 213, 214.

paragraphs (*n*) and (*o*), and lessens the liability of the carrier and the vessel otherwise than as provided in the rules, then it is null and void under article II, rule 8, which reads as follows: "Any "clause, covenant or agreement in a contract of carriage relieving "the carrier or the ship from liability for loss or damage to or "in connexion with goods arising from negligence, fault or failure "in the duties and obligations provided in this article, or "lessening such liability otherwise than is provided in these "rules, shall be null and void and of no effect."

These contentions of the plaintiffs are, in my judgment, sound. Additional clause B is perhaps not very felicitously drafted. Counsel for the defendant bank, however, concedes, rightly in my view, that it does go further than article IV, rule 2, paragraphs (*n*) and (*o*). He says that, on its true construction, it means that the vessel is not liable for delivery unless every piece is distinctly and permanently marked with oil paint, and every bundle is securely fastened, distinctly and permanently marked with oil paint and with metal tag, so that each piece or bundle can be distinguished at the port of discharge. He has to concede that, even if the goods are adequately marked, by branding for example, yet if they were not marked with oil paint, the vessel would not be liable for delivery. It may be that the parties can agree what shall be deemed to be adequate marking. In my judgment, however, it is not open to the parties to agree that the goods shall be deemed in certain circumstances to be inadequately marked so as to relieve the vessel or the shippers from liability on that account if in fact and in truth the goods are adequately marked: see *Walters* v. *Joseph Rank*[4]; *Studebaker Distributors* v. *Charlton Steamship Co.*[5] and *Holland and Colombo Trading Society Ltd.* v. *Segu Mohamed.*[6] Accordingly, in so far as additional clause B goes beyond article IV, rule 2, paragraphs (*n*) and (*o*), of the Hague Rules, it is null and void.

For these reasons, I have come to the conclusion that the plaintiffs have complied with their obligations under the confirmed irrevocable credit, and that the bills of lading in cases such as these need contain no express statement or acknowledgment that the printed clause dealing with marking or securing the goods has been complied with. Accordingly, in my judgment, the plaintiffs are entitled to succeed in this action, and I give judgment for them for the sum of £21,468 0s. 8d.

Judgment for plaintiffs.

Solicitors: *Menasse & Tobin; Coward, Chance & Co.*

E. M. W.

[4] (1923) 39 T.L.R. 255.

[5] [1938] 1 K.B. 459; 54 T.L.R. 77; [1937] 4 All E.R. 304.

[6] [1954] 2 Lloyds Rep. 45.

[COURT OF APPEAL.]

C. A.

1957
Oct. 15;
Dec. 14.

Hodson, Morris and Sellers L.JJ.

CORKE *v.* CORKE AND COOK.

Husband and Wife—Divorce—Evidence—Adultery—Evidence by wife and doctor of telephone conversation tending to prove innocence—Whether admissible.

Evidence—Subsequent conduct—Adultery—Evidence of telephone conversation with doctor tending to establish innocence—Whether admissible.

A wife who had left her husband because of his conduct, and in order to support herself and her children let rooms in her house to lodgers, was charged by her husband with committing adultery with the co-respondent, a male lodger. She immediately, though it was then after midnight, telephoned her doctor requesting him to come at once and examine both her and the co-respondent with a view to establishing their innocence of misconduct. The doctor did not examine them, being of opinion that any negative evidence which he might obtain would be valueless. At the hearing of the husband's petition the trial judge admitted the evidence of the wife, the co-respondent and the doctor as to the telephone conversation, and dismissed the petition. The husband appealed, contending that the judge had misdirected himself in law in admitting evidence of the contents of the telephone conversation:—

Held (*per* Hodson and Sellers L.JJ.) that it is a general rule of evidence that while a statement may be used against a witness as an admission, evidence of statements made on other occasions by a witness cannot be admitted in confirmation of his or her testimony at the trial. The evidence of the telephone conversation should therefore not have been admitted by the trial judge.

Dicta of Swinfen Eady L.J. and Neville J. in *Jones* v. *South Eastern & Chatham Railway Co.* (1918) 87 L.J.K.B.(N.S.) 775, 777, and 778, and of Eyre C.J. in *Rex* v. *Hardy* (1794) 24 State Trials 199, 1093 applied.

Per Morris L.J. (dissenting). The essential test as to the admissibility of evidence is the test of relevance to an issue to be tried, and relevance is to be judged by applying a fair-minded common-sense approach. If conduct which suggests guilt may be proved so may conduct which suggests innocence. If the respondent and the co-respondent genuinely believed that an immediate examination by a doctor could or might establish their innocence then their willingness to submit to an independent examination ought not to be regarded as irrelevant.

Observations of Viscount Simon in *Harris* v. *Director of Public Prosecutions* [1952] A.C. at pp. 706 and 710; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044; and of Lord du Parcq in *Noor Mohamed* v. *The King* [1949] A.C. at p. 192; 65 T.L.R. 134; [1949] 1 All E.R. 365 applied.

Held, further (per totam curiam), that the husband had not by his evidence established adultery and his petition must be dismissed.

APPEAL from Mr. Commissioner Blanco White Q.C.

The husband, Corke, petitioned for divorce, alleging that his wife had committed adultery with the cited co-respondent, Cook, who was a lodger in the lodging-house of Mrs. Corke. The wife and the co-respondent denied adultery and the former cross-petitioned on the ground of cruelty. The case for the husband

was that he and an inquiry agent on the night of April 2–3, 1955, were watching Mrs. Corke's house, 3, Bay Pond Road, Eastbourne, and overheard conversation between the wife and the co-respondent, and also sounds of a bed creaking in the bedroom of the co-respondent, which led them to infer adultery and to charge the parties with misconduct. The wife and the co-respondent at once denied the charge, and some ten minutes later the wife telephoned her doctor requesting him to come and examine both her and the co-respondent. It was then after midnight and the doctor did not comply with the request, being of the opinion that any negative evidence which he might obtain would be of no value.

At the hearing of the petition the commissioner admitted evidence of the contents of the telephone conversation and dismissed both the petition and the wife's cross-petition.

The husband appealed, contending that the commissioner had misdirected himself in law in admitting evidence of the contents of the telephone conversation between the wife and the doctor as part of the examination-in-chief of the doctor, the wife and the co-respondent.

H. B. Grant for the husband.

D. E. Peck for the wife.

The co-respondent did not appear and was not represented.

The following cases, in addition to those cited in the judgments, were referred to in argument: *Lejzor Teper* v. *The Queen* [1]; *Chan Kau* v. *The Queen.* [2]

Cur. adv. vult.

December 14. Their Lordships read the following judgments:

HODSON L.J. This is an appeal by a husband petitioner from an order of Mr. Commissioner Blanco White, who on February 18, 1957, dismissed a petition for divorce based on adultery, finding that the petitioner had not sufficiently proved the contents of his petition.

The suit was defended and both the respondent and co-respondent gave evidence denying the adultery alleged, but the commissioner found himself unable to regard either of them as witnesses of truth. He carefully considered the evidence tending to show whether or not the case was proved against the wife and co-respondent, and dismissed the charges of cruelty made by the wife against the husband in her answer.

By his judgment the commissioner made it clear that the balance was tilted in his mind in favour of the defence by one piece of evidence, and said in terms that if that evidence were excluded further consideration would, in his view, be necessary

[1] [1952] A.C. 480; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447.

[2] [1955] A.C. 206; [1955] 2 W.L.R. 192; [1955] 1 All E.R. 266.

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before he could decide whether adultery had been proved or not. Having admitted the evidence he found in favour of the defence and concluded by indicating that in his view, if he were wrong, there should be a new trial. This position was accepted by counsel for the respondent, who has resisted the appeal, the co-respondent not having been represented or taken any part in the appeal. If this concession was rightly made and there was a case for the respondent and co-respondent to answer, on the facts found, the court would have no alternative to ordering a new trial if the court were of opinion that the scales were weighted in favour of the defence by an inadmissible piece of evidence.

It is necessary first to consider what the case for the petitioner was on the facts found by the commissioner. The wife had left the husband, driven, not by his cruelty, but by his conduct in showing her that he wanted to be rid of her. Her evidence as to this was accepted. She was thereafter living at 3, Bay Pond Road, Eastbourne, on an income of £3 10s. a week, out of which she had to pay £1 a week rent and to support herself and her children. The petitioner lived in another part of Eastbourne. No suggestion was made against her as a mother to the children or as to her moral character. She was almost inevitably forced to take in lodgers. The petitioner knew and did not object to male lodgers, of which the co-respondent was not the first. At the time of her alleged adultery, namely, April 2–3, 1955, she had two lodgers, a Mrs. Pelling in a small bedroom over the kitchen, and the co-respondent, Cook, in a larger back room normally occupied by one or more of the children. No evidence was given to show that the respondent and co-respondent were on terms other than that of landlady and lodger, nor was there any concealment from the husband of the position.

The petitioner on March 12 inquired by letter of the respondent what her intentions were with regard to the co-respondent. On receipt of the letter by the respondent the co-respondent visited the petitioner and they both saw the respondent, but nothing of significance occurred at this conversation and the petitioner expressed himself satisfied although his was only a pretended satisfaction. The petitioner then engaged an inquiry agent to watch the house, 3, Bay Pond Road. The effect of this evidence was that the co-respondent came to the house at 9 o'clock, there was conversation in the co-respondent's bedroom and creaking of the bed, lasting about 15 minutes, somewhere about midnight. There was no dispute that the bed was creaking and that the wife was sitting on the co-respondent's bed. What she was doing in the co-respondent's room was explained by the wife and the co-respondent but their evidence was not accepted by the commissioner, who did not feel that their explanation was correct and expressly disbelieved the wife when she said that that was the first time she had been in the co-respondent's bedroom. Even if this answer is disbelieved, the fact remains

that there was no evidence that the respondent had ever been in the lodger's bedroom when he was there on any other occasion, and the rejection of her denial is no substitute for such evidence. The wife heard a noise, as she said, as she left the co-respondent's bedroom, went downstairs and confronted the petitioner and the inquiry agent, who accused her of adultery which she denied. The co-respondent came down also and so far from making any admission of adultery, abused the petitioner roundly.

The commissioner, in a careful judgment, recognized that the respondent was of good reputation, and that there was a considerable disparity of age between the parties—the co-respondent being 56 and the respondent 34 years of age—and that there was nothing in the evidence to show that the relationship between them was other than an extremely friendly one between lodger and landlady. He also noticed that the petitioner and the inquiry agent spoke of conversation during the 15 minutes on the night in question, which struck him as remarkable if they were purporting to prove that adultery was then taking place. He also noticed that Mrs. Pelling, although handicapped as a witness by deafness, said that she never saw any improper conduct or familiarity between her landlady and the other lodger.

Upon these facts, standing alone, unsupported by the further matter which influenced the commissioner's mind, it appears to me that the petition should fail and that this court is in a position to support the commissioner's judgment. Opportunity for adultery no doubt there was, but evidence of inclination to commit adultery there is none, unless it can be inferred from the circumstances that the landlady was talking to the co-respondent, who was in his bed in his own bedroom, for 15 minutes on the night in question. I cannot draw that inference from those circumstances, nor do I feel it possible to do so when the additional circumstance is added that the respondent was disbelieved when she said that this was the first time that she had been in the co-respondent's room, and that the co-respondent was found to be a witness unworthy of credit, having given an answer which the commissioner found to be untrue with regard to his own marital situation.

Since, however, the commissioner rested his final decision on a piece of evidence which, in his view, settled the question in favour of the defence, and this has been the only ground of appeal argued in this court, I ought to express my view upon it, especially as, if he was right in the conclusion that the matter was otherwise so evenly balanced that this piece of evidence tilted the scale in favour of the defence, there would be the necessity for a new trial if the evidence were wrongly admitted.

The ground of appeal is that the judge misdirected himself in law in admitting evidence of the contents of a telephone conversation between the respondent and a Dr. Churcher in the early morning of April 3, 1955, as part of the examination-in-chief of Dr. Churcher and of the respondent and co-respondent.

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The evidence admitted was to the effect that after the departure of the petitioner and the inquiry agent the respondent, at the instigation of the co-respondent, rang up her doctor, Dr. Churcher, and asked him to come down at once—at about 12.30 in the morning of April 3—and examine her and a gentleman to prove that they had not been guilty of adultery with one another. The doctor did not come because he said he could prove nothing of the kind, and when he gave evidence he confirmed that he had been asked to examine the respondent and a person staying in the house but made it plain that any negative evidence he would have given would have been, in his opinion, valueless.

The commissioner relied upon article 7 of Stephen's Digest of the Law of Evidence, 12th ed., p. 13, which reads as follows: "When there is a question whether any act was done by any "person, the following facts are deemed to be relevant, that is "to say—any fact which supplies a motive for such an act, or "which constitutes preparation for it; any subsequent conduct of "such person apparently influenced by the doing of the act, and "any act done in consequence of it by or by the authority of "that person." He said that the conduct of the wife in ringing up the doctor seemed to be clearly admissible on the general principle indicated in that article and the words she spoke to the doctor also appeared to him to be admissible as explaining what she was doing in ringing up the doctor. He concluded by saying that this subsequent conduct throws great light upon the fact whether or not she had committed adultery.

The question is really whether her words spoken to the doctor can be received, because her conduct in thus ringing up the doctor is of no significance without the words spoken, either given in evidence or inferred from the fact that she spoke to him at all at that time. At first impression there is much to be said for the view formed by the commissioner; but on consideration I have come to the conclusion that this view is incorrect and not supported by authority, which indeed is all the other way. It is first to be noticed that the article in Stephen's Digest is dealing with matters which are evidence against any person, not in their favour. This appears from the illustrations which follow the Article itself, the last of which, taken from a civil case, I will read:

"(e) The question is, whether A suffered damage in a "railway accident.

"The fact that A conspired with B, C and D to suborn false "witnesses in support of his case is deemed to be relevant, as "conduct subsequent to a fact in issue tending to show that it "had not happened."

This illustration was taken from *Moriarty* v. *London, Chatham & Dover Railway Co.*,[1] where it was held that evidence was rightly received as amounting to evidence of an admission.

[1] (1870) L.R. 5 Q.B. 314.

by conduct, of the plaintiff that he had a bad case. The rule in this article deals with admissions and it does not follow that conduct of a party evidenced by statements in his or her own favour can be proved to support his or her case.

A good illustration of the rule as to the rejection of statements not amounting to admissions is contained in *Jones* v. *South Eastern & Chatham Railway Co.*[2] A woman's hand was injured by blood poisoning. She alleged that the injury was caused by pinching her thumb on a nail while working on her employers' premises. They alleged that the injury was received at her home. Evidence was heard of statements made by her to certain persons that she had done it at home and evidence to the contrary effect of statements made by her inter alia to a doctor was rejected as inadmissible. It was argued on her behalf that such evidence should be received to substantiate the consistency of her story as to the accident and to show that it was not subsequently fabricated, especially as evidence of statements adverse to her interest had been admitted. This argument was not accepted. It was held by the Court of Appeal that the statements in the appellant's favour were rightly rejected as inadmissible. Swinfen Eady L.J. said[3]: "It was argued that "there is in certain cases a rule under which a witness may be "asked to give particulars of what a person has said shortly after "an occurrence, and the complaint that such a person may have "made shortly after an occurrence, not as being evidence of the "facts complained of but as being evidence of the consistency of "the story of the complainant from beginning to end, and it is "said that such a question ought to have been admitted in the "present case on that principle. The answer is twofold; first, "that the principle has no application to a case of this kind. "No doubt in cases especially of violence upon women and girls "the rule is established under which a question of that kind is "allowed to be put, and a recent statement is allowed to be "given in evidence—see *Regina* v. *Lillyman*[4]—that is to say, "that upon the trial of an indictment for offences against women "and girls involving violence, the fact that complaint is made "by the prosecutrix shortly after the occurrence, with the particulars of the complaint made, so far as they relate to the "charge against the prisoner, are allowed to be given in evidence "on the part of the prosecution, not as being evidence of the "facts complained of, but as evidence of the consistency of the "conduct of the prosecutrix with the story told by her in the "box, and as tending to negative any consent of hers. That is "a special class of case in which such evidence has for a very "long time been allowed to be admitted, but it has nothing to "do with such a case as the present."

Bankes L.J. was of the same opinion and Neville J. gave

[2] (1918) 87 L.J.K.B.(N.S.) 775.
[3] Ibid. 777.
[4] [1896] 2 Q.B. 167; 12 T.L.R. 473.

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judgment as follows[5]: "I have come to the same conclusion. "The short point is whether the learned county court judge "rejected the evidence improperly under these circumstances. "The applicant, who had injured her thumb, alleged that the "injury was occasioned upon her employers' premises, and gave "evidence to that effect. She was cross-examined to show that "she had made statements after the happening of the accident "inconsistent with her story there, and the point was made, as "I understand it, that that being so, it is permissible to call "evidence to show that she had made statements to persons "consistent with the story which she told in the box so as to "negative any idea suggested by the cross-examination of her "story being a made-up affair. I think that the cases which "have been cited are in no sense in pari materia, and I think "that we have simply to apply here the general rule of evidence "that statements may be used against a witness as admissions "but that you are not entitled to give evidence of statements "on other occasions by the witness in confirmation of her testi-"mony. I think, therefore, that no question of any difficulty "arose before the county court judge, and that he was perfectly "right in ruling as he did."

In the opinion of the Privy Council these observations of Neville J. correctly set out the rule: see *Gillie* v. *Posho Ltd.*[6] The rule is of long standing and is always strictly applied in criminal cases. See the language of Eyre C.J. in *Rex* v. *Hardy*[7]: "Nothing is so clear as that all declarations which "apply to facts and even to the particular case that is charged, "though the intent should make a part of that charge, are "evidence against a prisoner and are not evidence for him, "because the presumption . . . is, that no man would declare "anything against himself, unless it were true; but that every "man, if he was in a difficulty, or in the view to any difficulty, "would make declarations for himself."

Different considerations may well apply where the state of a person's mind is in issue (for example, domicile cases), but those considerations do not in my judgment apply to this case which involves the straight issue of adultery. This offence could be proved by admissions tending to show that it had been committed but cannot be disproved by statements of the person charged afterwards made to third persons tending to show that it had not been committed.

It appears from the authorities that the rule is justified by the risk of fabrication by a person who, in the words of Eyre C.J., might be in a difficulty. Take this case. The respondent seeks to support her defence by showing that she was ready to submit to a scientific investigation to show that the charge made against her must be untrue. If she had submitted to an examination evidence as to her condition would, of course, be relevant and

[5] 87 L.J.K.B.(N.S.) 778.
[6] [1939] 2 All E.R. 196.
[7] (1794) 24 State Tr. 199, 1093.

admissible, but the statement that she made to the doctor that she was willing to be examined to this end, is of no value. Persons who are unjustly charged will often react in different ways. Some may protest their innocence to all and sundry, others may be so stunned by the allegation that they refrain from so doing or from taking any prompt steps to assert their freedom from guilt. There is no reason, in my opinion, why justice requires the admissibility of such evidence in favour of an accused person for it seems the fundamental basis of the rule is that such evidence has no probative value.

Since, on the view which I have formed upon the facts found by the commissioner, who heard and carefully considered the evidence, the conclusion ought to be that adultery is not proved, quite apart from the admissibility of the evidence I have just discussed, the result should therefore be not that there should be a new trial but that the judgment of the commissioner should be affirmed and the appeal dismissed.

I should add that although counsel for the appellant confined his argument to the point whether or no the commissioner had rightly admitted the questioned evidence, he was offered but did not avail himself of the opportunity of arguing the case on the basis that in any event, upon the facts as found (apart from this evidence), the appeal should be allowed.

MORRIS L.J. The commissioner had before him a husband's petition for dissolution of marriage, based on the allegation of adultery between the wife and the co-respondent. The wife and the co-respondent denied adultery, and the wife alleged that her husband had treated her with cruelty and she cross-prayed for dissolution. The commissioner, in his judgment, said that having had an opportunity of watching the demeanour of the husband and wife in the witness-box he did not regard either of them as being particularly reliable as witnesses. He formed a similar opinion in regard to the co-respondent. Having considered the evidence the commissioner rejected the charges of cruelty made by the wife and, not being satisfied that the wife and the co-respondent had at any time committed adultery, he rejected the husband's petition. There was a specific charge that adultery had been committed on the night of April 2/3, 1955. In rejecting it the commissioner was very considerably influenced by certain evidence which he accepted in regard to the conduct of the wife and the co-respondent on the night in question.

The husband alleged and sought to prove that on the night of April 2/3, 1955, the wife had intercourse with the co-respondent in a bedroom in a house in Eastbourne. The wife and the co-respondent were admittedly in the house. The husband and an inquiry agent kept observation at the back of the house. The co-respondent had a bedroom at the back. The husband and the inquiry agent heard a man and a woman conversing in that room: they also heard the noise of the creaking of a bed in that room:

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they heard that noise during a period of somewhere about a quarter of an hour, at about midnight. The court was invited to say that adultery was being committed by the wife with the co-respondent. The wife and the co-respondent said that the conversation was in fact theirs and that it did take place in the co-respondent's bedroom at a time when the co-respondent was in his bed alone. They gave a full explanation of why it was and how it came about that the wife went into the room. They denied that there was any intercourse. The task of the court was to decide whether or not there had been intercourse. In discharging that task the court would have to consider and weigh up all the relevant evidence and decide what inferences could fairly be drawn. As Lord Buckmaster said in his speech in *Ross* v. *Ross* [8]: "Adultery is essentially an act which can rarely "be proved by direct evidence. It is a matter of inference and "circumstance. It is easy to suggest conditions which can leave "no doubt that adultery has been committed, but the mere fact "that people are thrown together in an environment which lends "itself to the commission of the offence is not enough unless it "can be shown by documents, for example, letters and diaries "or antecedent conduct, that the association of the parties was "so intimate and their mutual passion so clear that adultery "might reasonably be assumed as the result of an opportunity "for its occurrence."

In the same case Lord Atkin in his speech said [9]: "But from "opportunities alone no inference of misconduct can fairly be "drawn unless the conduct of the parties prior, contemporaneous, "or subsequent justifies the inference that such feelings existed "between the parties that opportunities if given would be used "for misconduct."

After the husband and the inquiry agent had observed and listened, they made their presence known, and in circumstances which need not be detailed they orally charged the wife and then the co-respondent with having had intercourse. The charge was denied. The husband and the inquiry agent then left. After an interval of a few minutes the wife and the co-respondent went to a nearby telephone call-box and the wife telephoned her doctor. The wife gave evidence that she asked her doctor if he would then come to her house in order to examine her and to examine the co-respondent and give his opinion as to whether or not there had been intercourse. The co-respondent gave evidence to the same effect. The doctor was also a witness and said that he was asked to go to prove that sexual intercourse had not occurred. The doctor formed the view that an examination of the wife was not worth undertaking for the purpose of substantiating that intercourse had not taken place. He accordingly declined to go to the house. In his evidence in court he said that if an examination revealed fresh semen in the vagina, there would then be

[8] [1930] A.C. 1, at p. 7. [9] Ibid. 21.

evidence that intercourse had occurred, but that if examination revealed no traces of semen in the vagina or elsewhere, this would not amount to positive proof that intercourse had not occurred.

The notice of appeal against the dismissal of the husband's petition raises only one point; it is said that the commissioner "misdirected himself in law in admitting evidence of the contents "of a telephone conversation between the respondent and one "Dr. Churcher in the early morning of April 3, 1955, as part of "the examination-in-chief of Dr. Churcher and of the respondent "and co-respondent." In the notice of appeal the order which was sought was that the judgment dismissing the petition should be set aside and a decree pronounced; alternatively, a new trial was sought. On the hearing before us it was argued on behalf of the husband that there should be a new trial. Though counsel for the wife did not take the point (and counsel for the husband, being given the opportunity, did not wish to deal with the point), it would not seem, on the findings as recorded in the judgment, that the evidence against the wife and the co-respondent was sufficient to warrant a finding of adultery. The commissioner's view was that if the evidence to which objection was taken had been excluded, further consideration would have been necessary as to whether adultery was or was not sufficiently proved.

At the hearing it in fact happened that the doctor gave evidence before the wife and co-respondent. That came about merely as the result of assisting the convenience of a medical man. Actually the evidence objected to was given in response to a question put by the commissioner. The doctor had earlier said that he had been telephoned by the wife. What then was asked was as follows: "Mr. Peck: Will you please answer this "question 'yes' or 'no.' Did Mrs. Corke make a request to "you that was somewhat surprising? The commissioner: Wait "a moment. That is not evidence. You can ask whether Mrs. "Corke spoke to him. Dr. Churcher: Oh, yes. Mr. Peck: Did "what she said to you surprise you in any way? The commis-"sioner: That is not evidence, whether he was surprised. I take "it it is relevant to cruelty? Mr. Peck: Relevant to adultery. "The commissioner: Then I do not know that you are entitled "to get anything. When you are dealing with cruelty you are "entitled to ask if there is a complaint. Mr. Peck: Am I not "entitled to ask whether what was said to him affected his mind "in any way? The commissioner: No. Nobody is charging "anyone with being cruel to the doctor. Mr. Peck: What I am "trying to get is the impression of what was said, not the words "said. The commissioner: No."

In view of the basis advanced to justify the questions I think that the commissioner was clearly right in not allowing the matter to be pursued. Later, when the doctor was being cross-examined, the commissioner put this question: "Did she, when she rang "you up on the telephone, by any chance ask you if she could

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"be examined to see whether she had had recent sexual con-
"nexion? (A.): She asked me to come to examine her and
"someone who was staying in the house." There was objection taken and the commissioner ruled as follows: "I hold that it is "admissible as conduct on her part, at any rate so far as it "deals with recent matters, to show innocence of a matter of "which she had been accused. What she says to the doctor is "not evidence of anything that has happened but it is conduct "on her part." When, later, the wife gave evidence and said that she went to the telephone box and telephoned Dr. Churcher the question was put to her: "For what purpose did you "telephone Dr. Churcher?" The substantial question raised in the appeal is whether she was entitled to answer the question.

One of the issues at the hearing was whether she had sexual intercourse at a particular time. The question now raised is whether she could prove that immediately after the time of the alleged intercourse she was willing to be examined and took steps to have herself examined by a medical man. It is said, in a case in which all surrounding circumstances may be examined to see whether any inferences of guilt may be drawn, that the wife and the co-respondent in defending themselves are precluded from informing the court as to the above-mentioned feature of their conduct and attitude when accused.

The case is not one in which attempt is merely being made to give evidence of some statement made by a party by way of an affirmation of innocence or in support of the party's case. If the wife had telephoned to a friend and had said that she had been accused of committing adultery and had said that the accusation was false, it would clearly not be possible to allow her or the friend to give evidence of the conversation. The value of any such proffered evidence would be negligible even if some tenuous reason for its admissibility could be formulated: a court could not be assisted by being told that the wife, who at a hearing could give evidence on oath which would be subject to cross-examination, had in a conversation with a friend or even in dozens of conversations with dozens of friends, made unsworn protestations of innocence; the accumulated experience of the past, coupled with knowledge of the obvious possibilities of fabrication of any such evidence, would direct the rejection of the evidence as lacking in the qualities which assist proof and so as being valueless and irrelevant. (Compare *Jones* v. *South Eastern and Chatham Railway Co.*[10])

In my judgment the essential test as to the admissibility of evidence is the test of relevance. In dealing with a criminal case Lord Simon, in his speech in *Harris* v. *D. P. P.*,[11] said: "The substance of the matter appears to me to be that the "prosecution may adduce all proper evidence which tends to "prove the charge." But to that Lord Simon added that regard

[10] 87 L.J.K.B.(N.S.) 775.

[11] [1952] A.C. 694, at p. 706; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044.

must be had to a rule of judicial practice which is followed by judges when trying a charge of crime. The rule was expressed by Lord du Parcq in *Noor Mohamed* v. *The King* [12] in these words: "the judge ought to consider whether the evidence "which it is proposed to adduce is sufficiently substantial, having "regard to the purpose to which it is professedly directed, to "make it desirable in the interest of justice that it should be "admitted. If, so far as that purpose is concerned, it can in the "circumstances of the case have only trifling weight, the judge "will be right to exclude it. To say this is not to confuse weight "with admissibility. The distinction is plain, but cases must "occur in which it would be unjust to admit evidence of a "character gravely prejudicial to the accused even though there "may be some tenuous ground for holding it technically admis-"sible. The decision must then be left to the discretion and the "sense of fairness of the judge." So later in his speech Lord Simon said [13]: "A criminal trial in this country is conducted for "the purpose of deciding whether the prosecution has proved that "the accused is guilty of the particular crime charged, and evi-"dence of 'similar facts' should be excluded unless such evidence "has a really material bearing on the issues to be decided."

The principle is therefore that all proper evidence may be given which tends to prove a charge: but when trying a charge of crime the essentials of justice are to be set above technical rule if a strict operation of the latter would operate unfairly against an accused.

In the present case the issue before the court was whether two people had had sexual intercourse at a particular time. Those who asserted that they had were entitled to put before the court all relevant evidence from which an inference of misconduct could fairly be drawn. Evidence could be given of the conduct of the parties "prior, contemporaneous or subsequent" if it justified an inference of strong mutual attachment. If the test of admissibility is the test of relevance to an issue to be tried, then, in my judgment, relevance is to be judged by applying a fair-minded common-sense approach. In the present case, just as all relevant evidence may be given to prove the charges asserted, so, in my judgment, all relevant evidence may be given to disprove them. If conduct which suggests guilt may be proved, so may conduct which suggests innocence.

There are innumerable circumstances in which evidence is given which seems to prove a consciousness of guilt, and which fair-minded persons deem relevant when considering whether guilt is proved. Thus it may be that in certain circumstances evidence would be admissible that an accused person had taken flight or concealed himself, or assumed a false name or indulged in falsehood as by giving a false name or address or explanation, or had fabricated evidence or suppressed it or had sought to

[12] [1949] A.C. 182, at p. 192; 65 T.L.R. 134; [1949] 1 All E.R. 365.

[13] [1952] A.C. 710.

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suborn witnesses by bribery. Questions as to the admissibility of evidence have to be decided upon a consideration of the facts of the situation in a particular case. In so many cases evidence of a person's conduct may be very relevant in regard to the issue to be tried.

In the present case, if the wife and the co-respondent genuinely believed that an immediate examination by a doctor could or might establish whether they had recently had intercourse, then, in my judgment, their willingness to submit to the independent examination of a professional man ought not to be regarded as irrelevant. The co-respondent in his evidence said: "I had the impression—I had the thought that if the doctor "could examine both Mrs. Corke and myself, he would be able "to decide whether any sexual intercourse had taken place or "not. I did not know. It was in desperation. I wanted some-"one to come along and say that it did not happen. We have "said it, and everyone else says, 'Oh, but it did,' but it did not, "and I knew if I could get a doctor, with the medical evidence "to say so, that his word would be accepted. That is why I had "the doctor phoned."

In my judgment, evidence as to the conduct of the wife and co-respondent upon being accused of adultery cannot be ruled out as irrelevant. The weight of it was for the trial judge. I cannot but think that members of a jury—if a jury had been trying the case—would have regarded the evidence of the conduct of the wife and co-respondent as being evidence fit to be considered as being relevant to their inquiry. They would judge whether much or little weight should be given to it. The commissioner, with his experience, certainly found it helpful. In his judgment he said: "I regard the action of the respondent, "at the co-respondent's instance, in ringing up the doctor and "endeavouring to get the doctor to come down and examine both "her and the co-respondent, as a very strong point in her favour "and his favour, which makes it quite impossible for me to say "that I am satisfied beyond reasonable doubt that sexual "intercourse took place that night."

The wife and the co-respondent were open to cross-examination as to their conduct. If it had been shown that they had no belief that an examination of them by a doctor would be of any value, or no expectation that the doctor would come, then their attempt to get the doctor might have been exposed as insincere humbug and might have recoiled against them as conduct tending to suggest or to confirm a guilty intrigue. Any such possibilities were for consideration by and for the assessment of the trial judge. If the doctor had in fact gone to the house and examined the two people, he could have given evidence as to what was the result of his examination. But I consider that the wife could have given evidence as to how it came about that the doctor had visited. I see no reason why in that situation the court should be uninformed and merely left to guess as to why

the visit was made. It may be said that the wife would not have requested a visit unless she had thought that her innocence might as a result be proved, and that in giving evidence that she asked for a visit she was inferentially protesting her innocence. But there is much more than an implied protestation: there is the willingness to submit to the examination of an independent professional man. If such willingness may fairly be regarded as an indication of innocence, then the best of reasons exists for bringing it to the consideration of a court whose solemn duties include both clearing the innocent and convicting the guilty.

Professor Wigmore, in his Treatise on the Law of Evidence (see Vol. 1, p. 384), points out that a tendency to reject evidence of a consciousness of innocence is due to a distrust of the inference from conduct, since conduct is often feigned and artificial. While referring to the circumstance that a majority of the courts have refused to allow conduct to be considered for the purpose of drawing an inference of consciousness of innocence, he reasoned: "It is judicially conceded that the inference of consciousness of guilt is a highly dubious one, and that the evidence is never to be emphasized or treated as of much value. If this is so, why should we strain a doubt to admit a dubious inference against the accused and yet refuse to admit in his favour a scarcely more dubious one? Such an attitude is wholly inconsistent with itself and is out of harmony with the spirit of our law. Let the accused's whole conduct come in: and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person falsely accused of the inference which common sense draws from a consciousness of innocence and its natural manifestations."

In my judgment, the test to be applied in deciding whether evidence was receivable of the telephone conversation was simply the test of relevancy. The substance of the matter was that the wife was asking the doctor to come to examine her and the man. It was not as though the wife was merely making some statement to someone else which she could equally well make at a later time in the witness-box. It was for the commissioner to consider whether the wife was indulging in some cunning play-acting. If he thought that she was not, and if he thought that she genuinely believed that she could establish her innocence, then the commissioner would give such weight to the question of her conduct and behaviour as seemed fitting. In my judgment, the commissioner was justified in admitting the evidence which he received, because he was entitled to consider the conduct of the parties as being within the range of all the many facts and circumstances which he could review and have in mind when deciding the issue which was before him.

I would dismiss the appeal.

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SELLERS L.J. I agree with both of my Lords, and for the reasons they give, that the evidence adduced on behalf of the petitioner was insufficient to justify a finding of adultery by his wife, and that the appeal must be dismissed on that ground.

In these circumstances, it will not avail the husband to establish that evidence which the commissioner thought told in favour of the wife was wrongly admitted. I do not, therefore, examine in detail the authorities which might throw light on the question of the admissibility of the wife's request over the telephone to the doctor to come to examine both her and the co-respondent, and of the doctor's evidence of what the wife said on the telephone. The doctor did not go out and examine the wife or the co-respondent, and one cannot assume or conjecture what he would have found if he had. Dr. Churcher's view at the time of the request, and in his evidence, was that an examination for the purpose of "substantiating that sexual intercourse "had not taken place was not worth doing." He added later: "If fresh semen is found in the vagina, that is evidence that the "act has occurred, but to adduce evidence and say that it has "not occurred is not evidence at all. The only evidence that is "of value is positive evidence. Negative evidence has no value "whatever."

If, therefore, he had conducted an examination of the wife in the early hours of the morning after the husband's unexpected call at the wife's house about midnight, the doctor would either have found some evidence of intercourse (in which case the wife would not have called him, one imagines, as a witness), or else would have found negative conditions of no value whatever.

The wife had had three children, and it is difficult to follow the commissioner's comparison with medical evidence in the criminal courts, which generally refers to positive findings indicating intercourse of male or female, or negative findings in relation to very young girls or virgins. The commissioner finds that the respondent could not have known that an examination would not have been of assistance to the court. This seems to me to be unsustainable. It might have served to deceive the court. Intercourse might well have taken place in a manner which would leave no trace of spermatozoa. In 1952 the wife had been very worried about her third pregnancy, which she had been most anxious to avoid. It was unlikely that she would willingly risk another in the circumstances in which she found herself. How bold a suspected wife could be to ring up her doctor—or indeed to go to her doctor—when she would know either that no trace of intercourse would be there, or any that had occurred had been removed, or even know, as she might, that the doctor would not undertake an examination when she was not ill, or to seek to establish a negative condition of no value.

In my view, not only is the evidence of what the wife did and said valueless and might indeed be misleading to the court, but it is not admissible. To what issue, it should be asked, does it

go? It does nothing to prove the condition of either the female or male organ respectively of the parties alleged to be involved. It does nothing to disprove the intercourse the husband had alleged. The most that could be said is that the wife was showing a belief in her own story and adding some reason why the court should believe her. In this case I do not think the conduct and statement of the wife have that effect, but it is clear that a skilful witness might well embark on circumstantial matters to bolster up his or her story. Neville J.'s statement in *Jones* v. *South Eastern and Chatham Railway Co.*,[14] cited by my Lord, " that " you are not entitled to give evidence of statements on other " occasions by the witness in confirmation of her testimony " neatly and accurately, in my opinion, states the law which is applicable to the question raised by the appellant.

Whether this rule is strictly logical or not, it is one which keeps the evidence to the main issues in dispute and tends to avoid deception of the court by a resourceful witness. Evidence is not a matter of mere logic. Evidence which is hearsay might well be relevant to the issues and of probative value, but is excluded and made inadmissible for practical considerations.

I agree entirely with Hodson L.J.'s opinion that the evidence was inadmissible and with his citation of authorities in support thereof. The wife's conduct and statement cannot, in my view, be regarded as revealing consciousness of innocence. They reveal at the most a consciousness that the doctor would not find any physical proof of guilt. I apprehend that the dishonest may be resourceful in giving an air of innocence to their transactions. To say " You can take my finger-prints " would establish nothing unless finger-prints for comparison were available. If the wife's statement in question was not admissible in her favour, the doctor's evidence of what the wife said was even more clearly inadmissible. Were it to be held otherwise, one wonders where ingenuity in bolstering up a witness's evidence would stop.

The idea of telephoning the doctor originated in this case not from the wife but from the lodger, the co-respondent, and after some discussion the parties got dressed and went out to a telephone kiosk. There was abundant time to weigh up the advantages of such a course and to prepare, if necessary, for the requested examination. I would hold that the appellant should succeed on the legal point of the inadmissibility of evidence which was his sole ground of appeal, and that the commissioner's first view that the evidence was inadmissible was correct.

Nevertheless, the appeal as a whole should be dismissed.

Appeal dismissed.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co. for Mayo & Perkins, Eastbourne; Hart, Reader, Rippon, Dodd & Chatfield, Eastbourne.*

A. W. G.

[14] 87 L.J.K.B.(N.S.) 775, 779.

[CHANCERY DIVISION.]

1957
Dec. 16, 20.

Wynn-Parry J.

In re PHOENIX OIL AND TRANSPORT CO. LTD. (No. 2).

[No. 00139 of 1950.]

Company — Winding up — Contributories — Compulsory winding up— Surplus assets—Register out of date—Distribution among contributories — Whether order of court necessary — Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 245 (1), 245 (2) (*h*), 265, 302, 303 (2)— *Companies* (*Winding-up*) *Rules,* 1949 (*S.I.* 1949, *No.* 330 (*L.*4)).

In the compulsory winding up of a company under an order of the court made in 1950, the liquidator had surplus assets sufficient to pay 10s. 2d. per £1 of stock held. There were some 9,100 stockholders on the register, which was now some seven years out of date. On July 31, 1957, the court made an order dispensing with the settlement of a list of contributories: [1957] 3 W.L.R. 633; [1957] 3 All E.R. 218. In the present summons the liquidator asked that it might be determined whether, on the true construction of the Companies Act, 1948, and in the events which had happened, he was entitled to distribute the surplus assets of the company amongst the contributories in accordance with their respective rights thereto. Alternatively, he asked that he might be at liberty to make a return of capital at the rate of 10s. 2d. per £1 of stock held to the contributories, on the ground that rule 120 of the Companies (Winding-up) Rules, 1949, gave the court a discretion to allow him to make a distribution before an inquiry was made in respect of contributories: —

Held, (1) that the court exercised a much greater degree of control in a compulsory winding up than in a voluntary winding up, and the operative section relating to a compulsory winding up, section 265, required an order of the court before the liquidator was entitled to distribute the assets, whether or not any adjustment had to be made among the contributories.

(2) That although the court might, under rule 120, in a suitable case dispense with certain requirements, this was not a case where it would authorize the liquidator to make a return of capital before he had made an inquiry as to the persons entitled, which he had to do at some stage before he was able to ascertain among whom the surplus should be distributed.

ADJOURNED SUMMONS.

The liquidator in the compulsory winding up of Phoenix Oil and Transport Ltd. by this further summons, dated November 22, 1957, asked the court to determine questions relating to the distribution of surplus assets.

The company was incorporated on June 24, 1920, with a nominal capital of £1,050,000, which by January, 1939, had been increased to £4,500,000. By an order of the court dated July 3, 1939, the capital was reduced to £2,150,680 by cancelling 13s. 4d. of the capital paid upon 3,523,980 of the issued £1 shares and reducing the nominal amount of each share to 6s. 8d. The issued shares were subdivided and consolidated and converted into £1,438,268 stock in accordance with the terms of a scheme of arrangement made between the company and its members. By a minute of the company, approved by the court, the capital

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was thus increased to its former amount of £4,500,000, being divided into £1,438,268 stock and 3,061,732 shares of £1, none of which had been issued. The company was ordered to be wound up on its own petition by an order of the court, dated February 27, 1950, when the capital remained unaltered from the above figures.

At the date of the liquidation there were 1,220 members or former members entitled between them to £174 0s. 2d., being the proceeds of sale of certain stock representing fractions of £1 to which members were entitled as a result of the reorganization, which these members or former members had failed to claim. There were also sums totalling £1,225 3s. 11d. due to 639 members or former members in respect of unclaimed dividends. Except for these sums of £174 0s. 2d. and £1,225 3s. 11d. and two debts to creditors who had not answered notices sent to them, all the liabilities of the company had been settled in full and the liquidator had in hand a surplus of approximately £640,000 available for distribution among the holders of the company's stock. There were approximately 9,100 members on the register entitled to rank pari passu in the distribution of the surplus assets and the liquidator estimated that he would be able to make a return of 10s. 2d. on each £1 of stock held. The register was now, however, some seven years out of date.

Roxburgh J., on July 31, 1957,[1] held that the holders of fully paid shares fell within the definition of "contributories" in section 213 of the Companies Act, 1948, but that the distribution of surplus assets did not of itself involve an adjustment of the rights of contributories, as those contributories were holders of fully paid shares within the meaning of section 257 (1) of the Companies Act, 1948, and the court could and in the present case would dispense with the settlement of a list.

The questions on the present summons of November 22, 1957, relevant to this report were questions (2) and (3), namely: (2) that it might be determined whether upon the true construction of the Companies Act, 1948, and in the events which had happened, the liquidator was entitled to distribute the surplus assets of the company amongst the contributories in accordance with their respective rights thereto as such contributories without further order. Alternatively, (3) that the liquidator might be at liberty to make a return of capital at the rate of 10s. 2d. per £1 of stock held.

R. O. Wilberforce Q.C. and *Arthur Bagnall* for the liquidator.
Denys Buckley for the Board of Trade.

Cases cited in argument not referred to in the judgment: *Birch* v. *Cropper*[2]; *In re Merchant Navy Supply Association Ltd.*[3]

Cur. adv. vult.

[1] [1957] 3 W.L.R. 633; [1957] 3 All E.R. 218.

[2] (1889) 4 App.Cas. 525; 5 T.L.R. 722.

[3] [1947] 1 All E.R. 894.

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Dec. 20. WYNN-PARRY J. read the following judgment. As Mr. Wilberforce said in opening the summons on behalf of the liquidator, the point raised by question (2) is a new one, and is entirely uncovered by authority. It is, however, a short point.

The company was on its own petition ordered to be wound up by the court by order dated February 27, 1950. At that time it was thought to be insolvent, but, in the events which have happened, the liquidator has a large surplus in his hands available for distribution amongst the contributories. There is issued £1,438,268 of stock held, so far as the register of members is concerned, by 9,100 stockholders, and there is sufficient money available to make a payment at the rate of 10s. 2d. in the £ to those who may now be entitled. The difficulty which arises is that the register is at least seven years or more out of date, and it is clear that no distribution can be made on the basis of the register as it now stands.

On July 31, 1957, Roxburgh J. made an order, on a summons taken out by the liquidator in the liquidation, dispensing with the settlement of a list of contributories. His decision is reported: *In re Phoenix Oil and Transport Co. Ltd.*[1] The basis of his decision was that the distribution of surplus assets does not of itself involve an adjustment of the rights of contributories, and that in the circumstances of the case the court should and would dispense with the settlement of a list.

At the present time, and for a very long time past, it has been the practice of the court in the case of a compulsory winding up to control the making and distribution of surplus assets among those entitled thereto by requiring the liquidator to bring in at the appropriate time, when he asks for an order for distribution, a list of those who, he says, are entitled, verified by affidavit. The Board of Trade has insisted on this practice, because, as Mr. Buckley, who appeared for the Board of Trade, said, the order of the court which is involved affords proper protection to the Board of Trade, who, upon the making of the order, then ask the Bank of England to draw the necessary cheques.

On this summons, however, Mr. Wilberforce, on behalf of the liquidator, has challenged the necessity for this practice, and has contended that in a compulsory winding up the liquidator is free to make a distribution (that is, to require the Bank of England to make the necessary payments) without the necessity of obtaining any order from this court.

A study of the relevant sections of the Companies Act, 1948, dealing with winding up shows clearly that as regards voluntary winding up the legislature has followed (in pursuance of the policy of previous Companies Acts) a different policy from that laid down in the case of compulsory winding up. The reason is not far to seek. In the case of voluntary winding up, the jurisdiction of the court is not invoked in order to place a company in liquidation.

[1] [1957] 3 W.L.R. 633.

In the case of a creditors' liquidation, the creditors, through their committee of inspection, are in control as against the contributories; while in the case of a members' voluntary winding up it is the members who are in control. In both cases the court is given a certain degree of jurisdiction, but I think it can be accurately, though shortly, said that in both forms of voluntary winding up the court is in the background to be referred to if the necessity should arise. In the case of a winding up by the court, however, different considerations arise. In this case the court is conducting an administration, and so, as in the case of an ordinary administration action in the Chancery Division, it retains, under the express provisions of the statute, a much greater degree of control.

It is against this background, in my view, that the relevant sections of the Companies Act, 1948, should be considered. In a voluntary winding-up it is the liquidator who, without any reference to the court, is charged with the duty of distributing the assets among the members: section 302; and also has the duty of adjusting the rights of the contributories among themselves: section 303 (2). In the case of compulsory liquidation the relevant sections appear to me to be section 245 (2) (*h*) and section 265. Section 245 (2) (*h*) reads: "The liquidator in a "winding up by the court shall have power— . . . (*h*) to do all "such other things as may be necessary for winding up the affairs "of the company and distributing its assets."

Mr. Wilberforce submitted that if that were the only provision in the Act relating to distribution of assets, the necessary conclusion would follow that the liquidator in a compulsory winding up has power to distribute the surplus assets among those entitled without the necessity of obtaining any order of the court or the committee of inspection: see the opening words of section 245 (1): "The liquidator in a winding up by the court shall have power, "with the sanction either of the court or of the committee of "inspection,—. . ." I should feel constrained to agree with this submission if section 245 (2) (*h*) were the only provision in the Act relating to distribution of assets, but solely because it was the only provision. Taken by itself it does not appear to me to be couched in very appropriate language for the purpose for which Mr. Wilberforce seeks to use it. To my mind it is properly to be regarded as a mopping-up provision at the end of a list of functions which the liquidator is enabled to perform in connexion with the administration of the particular company's affairs and no more. Paragraph (*h*) is in very general terms and does not indicate among whom the assets are to be distributed nor how they are to be ascertained. The other relevant section, section 265, reads as follows: "The court shall adjust the rights of the con- "tributories among themselves and distribute any surplus among "the persons entitled thereto." Prima facie, this section directs the court to do two things: first, to adjust the rights of contributories among themselves and then to distribute any surplus among the persons entitled. It is argued, however, by Mr.

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Wilberforce that the direction to the court to distribute any surplus only comes into operation if an adjustment among the contributories has first to be made. I am unable to accept this construction. The section is mandatory and I read it as meaning that the court is to make an adjustment among the contributories, if that be necessary, and after having done that, if it be required, it is then to proceed to make the distribution contemplated. I can see no good sense in the limited construction contended for. It would have this odd result: if no adjustment among the contributories were required, then the distribution would be made by the liquidator under section 245 (2) (*h*) without any reference to the court; whereas, if adjustment were required, an act which only in exceptional circumstances could be expected to involve difficulty, then the distribution would have to be made by the court. In my view, section 265 is the only operative section as regards actual distribution, and it applies whether or not an adjustment among the contributories is required. I therefore answer question (2) in the negative.

Question (3) is raised upon the basis that the answer to question (2) is, as I have decided, in the negative. It is then sought to invoke certain words in rule 120 of the Winding-up Rules,[2] which, it is said, in effect confer a discretion on the court, the exercise of which in favour of the liquidator would enable him to make the proposed distribution of 10s. 2d. without any further order of the court. It is quite clear that, having regard to the lapse of time since the order for winding up in 1950, no distribution could be made upon the basis of the register as it stands. Something in the nature of an inquiry as to who are the persons entitled to the surplus assets must be made by the liquidator at some stage. The sole remaining question, therefore, is whether in advance of that inquiry the liquidator should be authorized by an order under question (3) of the summons to distribute to those persons whom he finds entitled on making the inquiry, or whether he should first make the inquiry, and then, following the normal practice, apply for leave to distribute to the persons found entitled, whose names will appear in a list exhibited to a short affidavit in support of his application.

I confess that I cannot help approaching a consideration of rule 120 without having in mind what I have said in considering

[2] Companies (Winding-up) Rules, 1949, r. 120: "Every order by which "the liquidator in a winding-up by "the court is authorized to make a "return to contributories of the com- "pany shall, unless the court shall "otherwise direct, contain or have "appended thereto a schedule or list "(which the liquidator shall prepare) "setting out in a tabular form the full "names and addresses of the persons "to whom the return is to be paid, "and the amount of money payable to "each person, and particulars of the "transfers of shares (if any) which "have been made or the variations in "the list of contributories which have "arisen since the date of the settle- "ment of the list of contributories and "such other information as may be "requisite to enable the return to be "made. The schedule or list shall "be in the Form 70 in the appendix "with such variations as circum- "stances shall require, and the liqui- "dator shall send a notice of return "to each contributory."

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question (2) of the summons, and that, therefore, I should want a very clear indication in rule 120 that the legislature had in the Winding-up Rules reversed or varied a policy which, so far as I am concerned, I find clearly stated in the body of the Act. [His Lordship read rule 120 and continued:] That rule begins by presupposing that an order of the court is required in the case of a distribution in a winding up by the court. The rule then proceeds to require that the order shall contain, or have appended to it, a schedule or list containing the particulars set out in the rule. That is the normal case. There is, however, a proviso, "unless "the court shall otherwise direct." I can conceive that in a simple case the court might be persuaded to dispense with some of the particulars mentioned in the rule, but I can see no justification for doing so in a case like the present, where, ex concessis, not only has there not been a settled list of contributories but the liquidator is faced with, as I have put it, something in the nature of an inquiry before he can say among whom the surplus should be distributed. I am unable to see that what I am asked to do would achieve anything more than putting the cart before the horse, an activity in which I am unwilling to indulge. Nor am I able to agree that by refusing to do what I am asked to do under question (3) I am taking a course—the normal course—which will increase the costs of the liquidation, except to the extent of the costs involved in applying to the court for an order giving leave to distribute on the basis of the list, which must at some time be compiled. As I said in argument, the difficulty in which the liquidator finds himself, if it be a difficulty, may well be due to his success in obtaining the order dispensing with a list of contributories. I make no order on question (3) of the summons.

Order accordingly.

Solicitors: *Herbert Smith & Co.; Solicitor, Board of Trade.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

KRUHLAK *v.* KRUHLAK.

1957
Dec. 11, 19.

Lord Goddard C.J. Devlin and Pearson JJ.

Bastardy — "Single woman" — Wife's application against husband — Child born during previous marriage — Wife living apart from husband — Separation order containing non-cohabitation clause — Whether wife a "single woman"—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

A woman who had given birth to a bastard child subsequently married the man alleged to be the father of the child, but the circumstances were such that the child was not legitimated by the marriage. After some years a separation order containing a non-cohabitation clause was made in favour of the wife on the grounds

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of the husband's cruelty. The wife then issued a complaint under section 3 of the Bastardy Laws Amendment Act, 1872, against the husband applying for maintenance in respect of the child, and the husband contended that, as against him, the wife could not establish herself to be a "single woman" within the meaning of the Act:—

Held, that a married woman living apart from her husband might, if circumstances permitted, be regarded as a single woman for the purposes of the Bastardy Laws Amendment Act, 1872, and that as at the time of her application the wife was living apart from her husband under the separation order she was entitled to take proceedings against him in respect of the child just as she might against any other man.

Mooney v. *Mooney* [1953] 1 Q.B. 38; [1952] 2 T.L.R. 711; [1952] 2 All E.R. 812 distinguished and explained.

Per Devlin J. The fact of singleness is determined by looking at the actual state to which the woman has been reduced and not at her status in the eyes of the law, and a woman whose husband has deserted her or cast her off can say to him with as much force as she can say it to anyone else, that he has reduced her to living as a single woman.

CASE STATED by Osgoldcross, West Riding of Yorkshire, justices sitting at Castleford.

On April 5, 1957, a complaint under section 3 of the Bastardy Laws Amendment Act, 1872,[1] was preferred by the appellant, Hilda Mary Kruhlak, against the respondent, Hilko Kruhlak, alleging that he was the father of a bastard child of which she was delivered on December 2, 1953.

The following facts were found by the justices. The appellant gave birth to a girl named Joan on December 2, 1953, at 7.30 a.m., of which she alleged the respondent to be the father. At 10 a.m. on the same day (December 2, 1953) an order of decree nisi was made absolute in favour of the appellant's former husband from whom she had been living separate and apart since 1940. The appellant and the respondent, who had been on intimate terms since September, 1952, were married on December 19, 1953, and there was one child of that marriage, a boy, John, born in September, 1955. On March 27, 1957, a separation order was made in favour of the appellant against the respondent by justices sitting at Leeds, on the grounds of persistent cruelty, when the appellant was also awarded the custody of the boy John. That separation order contained a non-cohabitation clause.

On behalf of the appellant it was contended that she was a single woman quoad the respondent in relation to the child who was the subject of the complaint.

On behalf of the respondent it was contended that the appellant could not establish herself to be a single woman quoad the respondent, he being her husband.

The justices were of the opinion that there was a distinction

[1] Bastardy Laws Amendment Act, 1872, s. 3: "Any single woman who "may be . . . delivered of a bastard "child may . . . make application "... for a summons to be served on "the man alleged by her to be the "father of the child."

from the facts in *Mooney* v. *Mooney* [2] in that the appellant had obtained an order against the respondent on the grounds of persistent cruelty, but that in view of the judgment in that case it was not open to them to hold that a married woman who summoned her husband could be heard to say that she was a single woman, and accordingly they dismissed the complaint.

The appellant appealed, and the question for the opinion of the court was whether on the facts found the case might be distinguished from that of *Mooney* v. *Mooney* [3] and the appellant held to be a single woman quoad the respondent in relation to the child who was the subject of the complaint.

R. D. Ranking for the appellant wife.
J. B. Deby for the respondent husband.

The following cases were referred to in argument: *Boyce* v. *Cox* [4]; *Mooney* v. *Mooney* [5]; *Jones* v. *Evans* [6] and *Armytage* v. *Armytage*.[7]

Cur. adv. vult.

December 19. LORD GODDARD C.J. I have communicated with the clerk to the justices of Osgoldcross in the West Riding and asked him the terms of the separation order which was referred to in the case. The court particularly desired to know whether there was a non-cohabitation clause in that order, and the justices' clerk has informed us that there was. That point was not specifically dealt with in the case. Devlin J. will read the first judgment.

DEVLIN J. The question in this case is whether the appellant can be said to be a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, notwithstanding the fact that she is married to the respondent, by whom she had previously had an illegitimate child.

It has been settled by a series of cases that in construing the expression "single woman" the courts will have regard to the de facto position of the woman rather than to her status in the eyes of the law. Thus, a woman who has been legally separated from her husband or one who lives apart from him and has by her conduct forfeited the right to maintenance has been held to be a single woman. The importance of this last factor is that until 1948 a man who married a woman with an illegitimate child was bound to support the illegitimate child as well as any children of his own by the marriage. So if a wife could obtain maintenance for the child both from the husband and from the putative father there would have been a double liability; and this indeed was the

[2] [1953] 1 Q.B. 38; [1952] 2 T.L.R. 711; [1952] 2 All E.R. 812.
[3] [1953] 1 Q.B. 38.
[4] [1922] 1 K.B. 149; 38 T.L.R. 51.
[5] [1953] 1 Q.B. 38.
[6] [1944] 1 K.B. 582; 60 T.L.R. 374; [1945] 1 All E.R. 19.
[7] [1898] P. 178; 14 T.L.R. 480.

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reason why relief under the Act of 1872 was given to a single woman. The National Assistance Act, 1948, now provides that a husband is bound to support only his own children.

Until *Mooney* v. *Mooney* [1] all the cases which the courts had considered were cases in which the woman, having had an illegitimate child by one man, had later gone off and married someone else. *Mooney* v. *Mooney* [1] was a case, as is the present one, in which the woman married the putative father; and it was also a case, as is this one, in which the subsequent marriage did not legitimate the child. Such a case would have raised no problem before the Act of 1948, since before then the man would have been obliged either as husband or putative father to support the child anyway. But after the Act of 1948 the only way in which the woman could get maintenance for the child was by means of a bastardy order. The artificiality of the construction which the courts have given to the expression "single woman" is brought into high relief when a wife asserts against her own husband that she is a single woman. Nevertheless, once the point is reached when the fact of singleness is determined by looking at the actual state to which the woman has been reduced and not at her status in the eyes of the law, it seems to me that a woman whose husband has deserted her or cast her off can say to him, with as much force as she can say it to anyone else, that he reduced her to living as a single woman. If she cannot say that, it would mean that he escapes the obligations of putative fatherhood first by marrying her and then by committing a matrimonial offence.

In *Mooney* v. *Mooney* [2] the husband and putative father supported the illegitimate child from the time of the marriage until his wife left him. She left him in circumstances which precluded her from obtaining a maintenance order on the ground of desertion; he was willing to have her back and support her and her child but she refused to return to him. This raised the question of whether a woman can choose to reduce herself to the condition of a single woman within the meaning of the Act by deserting her husband. There is no case in which the courts have permitted that to be done.

The court in *Mooney* v. *Mooney* [2] were dealing with a case in which the husband was willing to give his wife all the benefits of marriage and to treat his illegitimate child just as though it had been born in wedlock. In such circumstances the court held that a wife could not be heard to say, as against her husband, that she was to be treated as if she were a single woman.

Now the facts in the present case are entirely different. It is not the appellant who has broken off the marriage; on March 26, 1957, she obtained a separation order including a non-cohabitation clause against the respondent on the ground of persistent cruelty.

Mr. Deby, who has argued this case extremely well, has

[1] [1953] 1 Q.B. 38. [2] Ibid.

contended that *Mooney* v. *Mooney* [3] must be taken as laying it down as an invariable rule that whatever the circumstances a wife can never claim as against her husband that she is a single woman. There are expressions in the judgment which, taken by themselves, might bear that interpretation, particularly the one to which I have already referred, namely, that when a married woman summons her husband she cannot be heard to say that she is a single woman. But the phrase "cannot be heard" is not being used as if to indicate that it is a question of estoppel. No such principle can apply to the construction of a statute. If the facts of a case make a woman a single woman within the meaning of the statute, then she is so for all the purposes of the statute; and different constructions cannot be given to the statute according to the different status of the persons who may be parties to proceedings that are brought under it. The expression "cannot be heard" means, I think, that in all the circumstances of that case it was an impossible contention for the appellant to make. In the circumstances of this case I can see nothing to prevent the appellant from relying on the separation order in the same way as has been done in the past to justify her claim that she is a single woman.

The justices considered this case to raise a difficult problem, as indeed it does. They thought that it was not for them to find ways of distinguishing *Mooney* v. *Mooney* [3] and that such a matter had better be left for the High Court; they invited the parties to apply for this case to be stated. In my judgment, the appeal should be allowed, the question stated should be answered in the affirmative and in favour of the appellant, and the justices should now proceed to the hearing of the appellant's complaint.

I desire to add that, in the course of the argument, Mr. Deby raised the point as to whether the child had not been legitimated. The position was that on December 19, 1953, the appellant was married to the respondent. Seventeen days before that, on December 2, 1953, the appellant had given birth to the illegitimate child, a girl, whose father she alleged the respondent to be. If that allegation is right the subsequent marriage would, under section 1 (1) of the Legitimacy Act, 1926, subject to section 1 (2) of the Act, have legitimated the child. But section 1 (2) provides that nothing in the Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born. In fact the appellant had been married to another man, from whom she had been separated since 1940 and whom she divorced before she married the respondent. The decree absolute dissolving this earlier marriage was pronounced at 10 a.m. on December 2, 1953, the child having been born 2½ hours earlier at 7.30 a.m. on the same day. Since the birth of the child and the dissolution of the marriage occurred on the same day, there may be room for argument about the

[3] [1953] 1 Q.B. 38.

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effect of section 1 (2). If it does not apply, and assuming, of course, the paternity of the respondent, he would be liable on any view to maintain the child. But this possibility did not occur to anyone until it was perceived by Mr. Deby, who has appeared for the appellant in this court. All that the justices were asked to deal with was a summons by the appellant under the Bastardy Laws Amendment Act, 1872, and the illegitimacy of the child was not put in issue. The only question stated in the case is whether the appellant can be held to be a "single "woman" within the meaning of that Act. That is the only point with which I have dealt in this judgment, and the other point as to legitimacy remains open for what it is worth.

LORD GODDARD C.J. I agree in the result with the judgment that has just been delivered, but as I was a party to the decision in *Mooney* v. *Mooney*[4] I desire to give my reasons, which I can do quite shortly. It is firmly established that for the purposes of the Bastardy Laws a married woman living apart from her husband may be regarded, if the circumstances permit, as a single woman and so entitled to take proceedings in bastardy. I say if the circumstances permit because unless non-access can be proved or inferred the child would be regarded as legitimate if born in wedlock. If a woman was in fact living apart from her husband and by her adultery had lost her title to maintenance in his home it was said by Littledale J., in *Rex* v. *Flintan*,[5] "she returns to the same state as if she were not married." If she is separated either by deed or by the order of the court the presumption of access and the legitimacy of the child is rebutted provided that the parties are actually living apart under the deed or in consequence of the order. As the parties in this case are living apart under an order of the court which contains a non-cohabitation clause there can be no doubt that had this woman borne a child conceived since the date of the order she could have taken proceedings as a single woman against the putative father. The difficulty that arises here is because the mother of the child married the alleged father after the birth of the child. A married woman who was living with her husband at the time when the application was made has never been treated as a single woman but as in this case she was living apart from him under this order I do not see why she should not take proceedings against him as the child was born before marriage just as she could against any other man. *Mooney* v. *Mooney*[6] was different. That, again, was a case where a woman sought an order against her husband and it was not disputed apparently that the husband was the father of the child as he had cohabited with the mother before marriage. But she had left her husband against his will and he was ready to receive her back but she would not return. There seemed, accordingly, no ground on

[4] [1953] 1 Q.B. 38.
[5] (1830) 1 B. & Ad. 227, 230.
[6] [1953] 1 Q.B. 38.

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which she could be regarded as a single woman. I agree that this appeal should be allowed. The case raised a difficult point for the justices and I think that it was quite reasonable for them to say as they did that if it was to be distinguished from *Mooney's* case [7] the distinction should be drawn by this court.

PEARSON J. I agree. It is clear from the many cases decided under the Bastardy Laws Amendment Act, 1872, that the expression "single woman" cannot be interpreted literally but has an extended meaning including some married women. In my view, the principle to be deduced from the previously decided cases is simply that a married woman who is for the time being effectively separated from her husband may be regarded as a single woman for the purposes of the Act of 1872, and the material time is the time of the application. Here we have a married woman who was living apart from her husband under a separation order. There could be no more effective separation than that. I have referred to the cases, and I have not found anything which would conflict with the apparently obvious proposition that a woman in that state can be treated as a single woman having regard, of course, to the other decisions under which it becomes plain that the simple literal meaning cannot be given to that expression. I therefore agree with the order proposed.

Appeal allowed.

Solicitors: *Long & Gardiner for A. Maurice Smith, Castleford; Collyer-Bristow & Co. for Alf Masser & Co., Castleford.*

J. F. L.

[7] [1953] 1 Q.B. 38.

[COURT OF APPEAL.]

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[1957 B. No. 1839.]

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Nov. 22, 25, 27, 28; *Dec.* 16.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Local Government—Powers—Highway—Creation of one-way street—Power under early Act—"Route to be observed"—"Public processions, rejoicings or illuminations"—"and in any case"—Limited power under later Act—No order by Minister under later Act—Whether order valid—Town Police Clauses Act, 1847 (10 *&* 11 *Vict. c.* 89), *s.* 21—*Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 46 (1) *and* (2), *as amended by Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 29 (4).

Highway—One-way street.

Solicitor—Treasury Solicitor—Appearance on behalf of private individual—Whether Crown sufficiently interested in subject-matter of litigation. Crown Proceedings.

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Ejusdem generis rule — Statute — "Public processions, rejoicings or "illuminations"—Instances constituting genus—Following general words "and in any case."

Judicial Precedent — Decision long undisturbed — Conflict of judicial opinion — Divisional Court decisions — Wrong construction of penal statutory provision—Stare decisis—Whether applicable—No injustice in overruling.

By an order dated March 5, 1957, and purporting to be made under section 21 of the Town Police Clauses Act, 1847,[1] the defendant corporation required that from April 19 to October 19, 1957, all vehicles using a certain road within the borough should observe a route in one direction only. The defendants had earlier made an application to the Minister of Transport for an order under the Road Traffic Act, 1930, s. 46 (2), making the road a one-way street, and that application had been refused. The order dated March 5, 1957, was, therefore, made by the defendants with a view to its continuance in force for a trial period and a further application to the Minister at a later date for an order under the Road Traffic Act, 1930, s. 46 (2). The plaintiffs who owned an hotel situate on the road in question obtained a declaration that the order dated March 5, 1957, was ultra vires and the defendants appealed.

On the appeal, counsel acting for the defendants was instructed by the Treasury Solicitor and the plaintiffs took the preliminary point that the defendants' counsel had been instructed by a solicitor who had no practising certificate. It was not disputed that the Treasury Solicitor might properly offer his services to a private individual in a case in which the Crown had an interest in the subject-matter of the litigation, but it was said that the Crown had no interest because the particular order had expired by effluxion of time and the only live issue remaining was as to an award of costs:—

Held, (1) that although the mere ipse dixit of a Minister of the Crown that the Crown had an interest in the subject-matter of the litigation would not suffice to justify the intervention of the Treasury Solicitor, it was clear that in the present case the Crown was sufficiently concerned. Traffic control was a matter of national concern and the real question at issue was whether a broad class of local authorities could make orders of this type of their own volition under the Act of 1847, or whether the orders could only be competently made under more recent legislation, which required that the orders should be confirmed by the Minister of Transport. Notwithstanding the expiry of the particular order, that issue remained on foot and was a continuing matter of concern.

Rex v. *Archbishop of Canterbury* [1903] 1 K.B. 289; 19 T.L.R. 92 considered.

(2) That the words "route to be observed" in section 21 of the Act of 1847 should not be construed as confined to a route linking

[1] Town Police Clauses Act, 1847, s. 21: "The commissioners may from "time to time make orders for the "route to be observed by all carts, "carriages, horses, and persons, and "for preventing obstruction of the "streets within the limits of the "special Act, in all times of public "processions, rejoicings, or illumina-"tions, and in any case when the "streets are thronged or liable to be "obstructed, and may also give direc-"tions to the constables for keeping "order and preventing any obstruc-"tion of the streets in the neighbour-"hood of theatres and other places "of public resort, and every wilful "breach of any such order shall be "deemed a separate offence against "this Act, and every person com-"mitting any such offence shall be "liable to a penalty not exceeding 40 "shillings."

two termini available to traffic proceeding in either direction, but should include the ordering of traffic in a thoroughfare to observe "one direction" or "route" therein only.

(3) That the expression "in any case" in the context of the section should be construed in accordance with the rule known as the "ejusdem generis" rule of construction as intended only to cover cases of the same class or genus as the three preceding instances, "public processions, rejoicings or illuminations." Even if the genus was not confined to instances strictly similar to those three, the expression covered only cases of traffic dislocation of a special, particular or extraordinary kind, to conditions likely to attract a crowd, as distinct from the circumstances of ordinary day-to-day traffic conditions.

Ejusdem generis rule stated in *Tillmanns* v. *S.S. Knutsford Co.* [1908] 2 K.B. 385, 404; 24 T.L.R. 454 (affirmed [1908] A.C. 406; 24 T.L.R. 786) applied.

(4) That, apart from that rule, the word "case" was apt in the context of section 21 to refer only to particular and special occasions or events, and not to the ordinary and recurrent day-to-day conditions of particular thoroughfares.

Teale v. *Williams* [1914] 3 K.B. 395; *Edwards* v. *Wanstall* (1929) 142 L.T. 288; 46 T.L.R. 101 and *Etherington* v. *Carter* [1937] 2 All E.R. 528 disapproved.

(5) That to the extent that these decisions of the Divisional Court rested on the wrong construction of a penal provision, they should be overruled having regard (i) to the expression of contrary judicial opinion in the first and second of the cases, (ii) to the absence of any effect on property rights or titles if the construction were to be revised, and (iii) to the existence of other statutory powers of making orders of the type in question under section 46 of the Road Traffic Act, subject only to ministerial approval being obtained.

Rule in *Robinson Bros. (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* [1937] 2 K.B. 445; 53 T.L.R. 609; [1937] 2 All E.R. 298 (affirmed [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79) and *Bourne* v. *Keane* [1919] A.C. 815; 35 T.L.R. 560 not applied.

(6) That, on the facts, the holiday season at Poole was not an "event" comparable to "public processions, rejoicings or "illuminations"; and that the appeal should accordingly be dismissed.

Decision of Vaisey J. [1957] 3 W.L.R. 669; [1957] 3 All E.R. 211 affirmed on other grounds.

APPEAL from Vaisey J.[2]

On March 5, 1957, the defendants, Poole Corporation, in purported exercise of section 21 of the Town Police Clauses Act, 1847, made the following order:

"Borough and County of the Town of Poole.

"The Town Police Clauses Act, 1847, s. 21.

"Order made by the Poole Borough Council for the routes to "be observed by vehicles. Whereas the streets to which this "order applies are during certain seasons of the year thronged "and liable to be obstructed: Unless upon the direction or with "the permission of a police officer in uniform, from April 19, "1957, to October 19, 1957 (both dates inclusive)—the route to

[2] [1957] 3 W.L.R. 669; [1957] 3 All E.R. 211.

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"be observed by all vehicles in (i) Banks Road between its "junctions with Panorama Road shall be towards their south-west "junction and (ii) Panorama Road shall be towards its north-"east junction with Banks Road. For the purposes of this "order 'vehicle' includes bicycles and similar machines whether "mechanically propelled or not. All constables are hereby "directed to enforce the provisions of this order." The order was signed by the mayor and town clerk.

The defendants had previously made an application to the Minister of Transport for an order under section 46 (2) of the Road Traffic Act, 1930, making Banks Road and Panorama Road a one-way street, but this application had been refused. Prior to the making of the order dated March 5, 1957, there had been no local inquiry of any sort. The plaintiff company, who owned an hotel situate on Banks Road, applied by originating summons for a declaration that the order of March 5, 1957, was ultra vires and void. Vaisey J. held that it was ultra vires and declared accordingly, and the defendants appealed.

On appeal the preliminary point was taken that the defendants' counsel, who on that occasion had been instructed by the Treasury Solicitor, was instructed by a solicitor who had no practising certificate. It was conceded that, in a case in which the Crown had had an interest in the subject-matter being litigated, the Treasury Solicitor might properly have offered his services to a private individual but it was contended that in the present case the Crown had no interest, because the only subsisting issue, since the expiry of the particular order by effluxion of time, was as to an award of costs.

Leave of the court was obtained by the plaintiffs to raise a point not taken before Vaisey J., namely, that the expression "in any case in which the streets are liable to be thronged, etc.," should in the context of section 21 of the Act of 1847 be construed as limited to apply only to special or extraordinary events causing traffic dislocation.

Denys Buckley and *John Arnold* for the defendants.

G. D. Squibb Q.C. and *Jeremiah Harman* for the plaintiffs.

In addition to the cases referred to in the judgments, the following were cited in argument: *Kelani Valley Motor Transit Co.* v. *Colombo-Ratnapura Omnibus Co. Ltd.*[3]; *Landed Estates Co.* v. *Weeding*[4]; *Stockton and Darlington Railway Co.* v. *Brown*[5]; *Younghusband* v. *Luftig*[6]; *Anderson* v. *Anderson*[7]; *In re Forsey and Hollebone's Contract*[8]; *Perrin* v. *Morgan*[9];

[3] [1946] A.C. 338; 62 T.L.R. 459.
[4] [1871] W.N. 148.
[5] (1862) 9 H.L.Cas. 246.
[6] [1949] 2 K.B. 354; 65 T.L.R. 397; [1949] 2 All E.R. 72.
[7] [1895] 1 Q.B. 749.
[8] [1927] 2 Ch. 379.
[9] [1943] A.C. 399; [1943] 1 All E.R. 187; 59 T.L.R. 134.

Westminster Council v. *Southern Railway*[10]; *Attorney-General* v. *Brown*.[11]

Cur. adv. vult.

December 16. LORD EVERSHED M.R. (judgment read by Romer L.J.). This is an appeal against a judgment of Vaisey J. declaring ultra vires and void an order made by the defendants on March 5, 1957, under powers which they claim to be available to them under section 21 of the Town Police Clauses Act, 1847. Omitting formal parts, the terms of that order, the intended effect of which was to make, for the period of six months specified therein, the thoroughfare described in the order what is commonly called a " one-way street " [were as set out above. His Lordship continued:]

Before Mr. Buckley could begin to open the appeal on the defendants' behalf, Mr. Squibb for the plaintiffs took a preliminary objection which, in the form as it was first presented, was that Mr. Buckley's instructions came from a solicitor who had no practising certificate in accordance with the Solicitors (Amendment) Act, 1956. The real substance, however, of the objection was directed to the fact that the Treasury Solicitor (who, being in fact a member of the Bar, is incapable of obtaining a practising certificate) was representing the defendants for the purpose of the appeal. The office of Treasury Solicitor is derived from the Revenue Solicitors Act, 1828. He normally acts for Her Majesty or for Ministers of the Crown or other persons in the service of Her Majesty. But he may also, in certain circumstances, be instructed by or on behalf of the Crown to offer his services to a private individual in the course of litigation and, if his services are accepted, may thenceforward act for such private individual. The circumstances which justify such instructions and such a result are that the Crown has an interest in the subject-matter of the litigation: see the decision of this court in *Rex* v. *Archbishop of Canterbury*.[1]

So far there was no contest between Mr. Squibb and Mr. Buckley. But it was Mr. Squibb's contention that the Crown had in truth no interest whatever in the subject-matter of the present appeal, which was one exclusively between the defendant corporation on the one hand and the plaintiff company, a property owner within the local jurisdiction of the corporation, on the other; and Mr. Squibb sought particular support for his submission from the circumstance that the order of March, 1957, had in any case expired on October 19, 1957, so that (as he claimed) the only live issue between the plaintiffs and defendants was that of the award by Vaisey J. to the plaintiffs of the costs of the action.

After hearing arguments from Mr. Squibb and Mr. Buckley,

[10] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.
[11] [1920] 1 K.B. 773; 36 T.L.R. 165.
[1] [1903] 1 K.B. 289; 19 T.L.R. 92.

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we intimated that we were not disposed to accept the objection as fatal to the appeal in limine; and we proceeded to hear the substance of the appeal accordingly. In the result, I have for my part been strongly confirmed in the view which I had been earlier disposed to take, videlicet, that the Crown has in the present case an interest in the subject-matter amply sufficient to support and justify its intervention.

In the *Archbishop of Canterbury's* case,[1] the question at issue had been whether upon the election of a bishop objections could be put forward on doctrinal grounds after confirmation of the election by the archbishop; and the court had no difficulty in holding that the Crown had a sufficient interest in the matter to justify the Treasury Solicitor's appearance for and representation of the archbishop. No exposition is to be found in the judgments of what constitutes a sufficient "interest" for present purposes. Mr. Buckley submitted that it sufficed if the Crown or some Minister of the Crown or, perhaps, the Treasury Solicitor himself, asserted the existence of an "interest" in the Crown. The argument does not appear to have been advanced by Sir Edward Carson S.-G. in the *Archbishop's* case,[2] and the language, at any rate of Romer L.J. seems clearly to avoid so deciding. He said[3]: "Under those circumstances, the Crown, for what "appear to me good and sufficient reasons, came to the con- "clusion that it was to the interest of the Crown that it should. "at its own expense, defend on behalf of the archbishop. . . . "It appears to me that where the Crown for good and sufficient "reasons thinks it is for its interests that the defence of an "individual, in an action or proceeding against him, should be "undertaken, and the Treasury Solicitor is delegated by the "Treasury authorities to act as solicitor for that individual, that "is within the rights of the Crown, and is within the purview "of the ordinary duties of the solicitor."

No doubt in 99 cases out of 100 the view of a Minister of the Crown that the Crown was "interested" in any given subject-matter would at the least strongly support the conclusion that it was; but I should not, as at present advised, be disposed to hold that in such cases the ipse dixit of a Minister or his representative was itself conclusive. In the present case, however, I feel no doubt at all that the Crown has an "interest," according to the ordinary acceptation of that word, in the subject-matter in dispute. Traffic control is notoriously a matter of national concern; and the real question at issue in the action is whether a broad class of local authorities, of which the defendant corporation is one, has, by virtue of the Act of 1847, power, of its own motion, to regulate traffic within the ambit of its jurisdiction by means of orders of the kind so far successfully impugned in this action; or whether such orders can only competently be made under the much more recent road traffic

[1] [1903] 1 K.B. 289; 19 T.L.R. 92.
[2] [1903] 1 K.B. 289, 294.
[3] Ibid. 294, 295.

legislation which requires their confirmation by the Minister of Transport. In my judgment, it is impossible sensibly to deny that the Crown, and particularly the Minister of Transport, has an interest in that question. Nor can I accept Mr. Squibb's argument that the expiry of the defendants' order of March according to its terms makes the matter purely academic or that the only "live issue" is one of costs, in which (as such) the Crown could legitimately have no interest at all. The question of the scope and availability to the defendants of section 21 of the Act of 1847 for the purposes of traffic regulation remains, in my view, a "live issue" notwithstanding the expiry of the order of March by effluxion of time. It is not in doubt that the defendant corporation wishes to avail itself of the powers of the Act of 1847 (if they subsist) for the purposes of traffic regulation as occasion may require; and we were informed that the decision of the court below has similarly affected other municipal authorities. Put conversely, it is not suggested that the order of March, 1957, exhausted the intended invocation by the defendants of the powers of the Act of 1847 for regulating the traffic of Banks Road and Panorama Road, let alone other thoroughfares within their jurisdiction: still less that (as in the *Sun Life Assurance Co. of Canada* v. *Jervis* [4]) the result of this appeal could be said to be a matter of indifference to the plaintiffs.

I turn, therefore, to the substance of the appeal itself; section 21 of the Town Police Clauses Act, 1847 (of the powers conferred by which the defendants' recited order of March, 1957, purported to be an exercise) reads as follows: [His Lordship read the section as set out above and went on:]

It was the contention of Mr. Squibb and Mr. Harman which they put in the forefront of their case in support of the conclusion of Vaisey J. that the defendants' order, the declared intention and effect of which was to make of Banks Road and Panorama Road (as defined in the order) a "one-way street," was outside the scope of the section since, notwithstanding the express use therein of the five vital words, the order did not amount to an order for "the route to be observed" by vehicles as that phrase in the section ought properly to be interpreted. The argument of Mr. Squibb and Mr. Harman was to the effect that the word "route" in the section was used and used exclusively in the same sense in which it is used in phrases like "a "bus route" or "a tram route" and signified the course or the street or streets used (or to be used) by vehicles in proceeding from one point to another, regardless of direction; that the phrase was not apt to mean or include merely a direction to be followed; and more particularly, that "an order for the route to be "observed" was never intended to mean or cover and should not be taken to mean or cover an order designed to give to a particular street or streets a special quality or characteristic,

[4] [1944] A.C. 111; 60 T.L.R. 315; [1944] 1 All E.R. 469.

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videlicet, such that any vehicle in the street or streets, whatever might be its point of entry or its destination, must move in the street in one direction only.

In support of the argument it was said, and said with some force, that the idea of "one-way streets" as a means of dealing with day-to-day traffic congestion was something not dreamt of in 1847; and counsel drew attention to the language of section 46 of the Road Traffic Act, 1930, in which a distinction is drawn in the paragraphs of subsection (2) between the specification of routes to be followed by vehicles, on the one hand, and, on the other, the prohibition of the driving of vehicles on a specified road otherwise than in a specified direction. Finally, it was submitted that the inapplicability of the section to a "one-way "street" order is shown by the terms of the present order itself, which, by straining the language of the section to achieve such a purpose, produces the result that, as a strict matter of language, a vehicle cannot turn out of Banks Road or Panorama Road into one or other of the side streets, but must pursue the stipulated direction at least to the south-west junction of the two roads.

But notwithstanding the strong reliance placed by Mr. Squibb and Mr. Harman upon this part of their case (which was indeed made the subject of their notice under Ord. 58, r. 6), I have felt unable to give to the essential words "the route to be observed" so strict and confined a meaning. Though it is no doubt true that the words may have been primarily intended—particularly having regard to their context and to the immediately following words "by *all* carts, carriages, horses, *and persons*"—to provide for such expedients as the temporary closing of certain streets or parts of streets and the total diversion of all traffic, including pedestrian, it does not seem to me that the words according to their ordinary and proper usage can be interpreted so as to exclude the ordering of traffic in a thoroughfare to observe one "direction" or "route" therein only. The word "route" is, after all, defined in the Shorter Oxford English Dictionary as: "A way, road or course; a certain direction taken in travelling "from one place to another. . . ." Moreover, if a total diversion of all traffic from a particular street or part of a street is comprehended, I do not see why, upon the principle that the greater includes the less, there is not also included the diversion of that part only of the traffic that would otherwise go in one direction along it.

The point is, in the end, a short one, and I hope I shall not be thought disrespectful of the plaintiffs' argument if I do not attempt further elaboration. In my judgment the plaintiffs fail upon this point to sustain the judgment under appeal.

But it is by no means the end of the case. The defendants' order which is challenged in these proceedings recites that the streets to which it applies are "during certain seasons of the "year thronged and liable to be obstructed." It then proceeds to make those streets one-way streets for 24 hours of the day

during the six months period from April 19, 1957 (which was Good Friday), to October 19. The words of the section which, according to the defendants, were applicable and justified the making of the order, were the words " and in any case when the " streets are thronged and liable to be obstructed." Those words follow immediately the enumeration " in all time of public pro- " cessions, rejoicings or illuminations "; and the question emerged during the argument whether, upon their proper construction in the context in which they appear, the words " in any case," etc., ought not to be confined to special events, that is, occasions strictly similar to public processions, rejoicings and illuminations, or, at most, to short periods of time when the ordinary day-to-day traffic conditions are liable to be dislocated or obstructed by crowds of pedestrians or streams of vehicles; and so ought to be treated as not at any rate apt or intended to cover the ordinary day-to-day traffic conditions in particular streets so as to provide authority for the making of " one-way street orders " (as Mr. Buckley admitted that his clients claimed to be entitled to do) for long or indefinite periods of time in the general interests of local traffic regulation. It became, indeed, plain during the argument that the choice must lie between construing the general words as limited to special or extraordinary occasions of obstruction, whether or not strictly similar to the preceding examples (on the one hand) and (upon the other) giving them inevitably the wide significance claimed by Mr. Buckley. No middle course —for example, such as to authorize the making of orders for experimental periods only—appeared possible; and if the latter view is correct, the result may appear remarkable. Parliament, in enacting the Road Traffic Act, 1930, thought it right, by the terms of section 46 to which I have earlier referred, to require that proposals for making one-way street regulations should be confirmed by the Minister of Transport. Yet, if Mr. Buckley is right, there exists and had always existed a parallel or corresponding statutory power exercisable without any Ministerial control. It was this result which plainly impressed Vaisey J. and constrained him to decide, as he did, against the validity of the order. If upon its true construction section 21 of the Act of 1847 has the wide ambit for which Mr. Buckley contends, then the court must so decide, notwithstanding the strangeness of the result. But the court will not, in my judgment, be astute to pronounce in favour of such a conclusion, and certainly not the less so since modern traffic conditions calling for one-way street regulation could not have been in the contemplation of the legislation of 1847. The motor traffic to be found in Banks Road and Panorama Road, Poole, in " certain seasons of the year," could not have been within the mischief which the Act of 1847 was designed to remedy.

The plaintiffs do not appear in the court below to have argued for a limitation of the general words to particular or extraordinary occasions; nor had they raised the point in their notice under

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Ord. 58, r. 6. They no doubt rightly felt that the point was concluded against them before Vaisey J. by certain decisions of the Divisional Court later mentioned. Mr. Squibb told us that in this court also he had felt those cases to be a serious obstacle, since the earliest of them had been decided over 40 years ago; and he had also felt somewhat constrained by the fact that the same general words appeared in the Metropolitan Police Act, 1839 (as well as in some private Acts), in a context which made the argument for limitation of their effect more difficult. But after discussion before us, Mr. Squibb asked for leave to amend his notice so as specifically to raise the point; and since Mr. Buckley did not oppose we gave leave accordingly.

I propose to express my view upon the point in the first instance treating it as res integra and without regard to the Divisional Court decisions: and so treating it, I have come to the conclusion that in the context in which they appear the words "in any case" ought to be treated as intended only to cover "cases" of the same class or "genus" as the three preceding instances, that is, either "cases" strictly similar to "public processions, rejoicings or illuminations"; or, alternatively, "cases" of obstruction or dislocation of a special or particular and extraordinary kind; and ought not, therefore, to be treated as covering the circumstances of ordinary day-to-day traffic conditions.

The books provide numerous examples of the application of the so-called "ejusdem generis" rule of construction. I take for a statement of the appropriate principle the following passages from the judgment of Farwell L.J. in *Tillmanns* v. *S.S. Knutsford Co.*,[5] in which this court held the rule to apply so as to limit the phrase "in consequence of war, disturbance, or any other "cause" to causes of the same kind as the two named instances. The Lord Justice, after observing that there is no room for the application of the rule unless there is in truth a class or category, proceeded[6]: "But when there is a clear category followed by "words which are not clear, unambiguous general words, it "would violate a settled rule of construction to strike out and "render unmeaning two words which were presumably inserted "for the purpose of having some meaning." And again[7]: "Now, if the words in this case had been 'in consequence of "'war, disturbance, or any cause whatsoever, whether similar "'to those preceding or not,' there would have been no room "for argument, because there would be no real category at all: "it is universality, and not a category; it is the whole range of "causes. But, inasmuch as you have simply the words 'any "'other cause,' which are ambiguous, then the rule does apply. "The rule may be taken as stated by Lord Tenterden C.J. in "*Sandiman* v. *Breach*[8]: 'Where general words follow particular

[5] [1908] 2 K.B. 385; 24 T.L.R. 454; (affirmed [1908] A.C. 406; 24 T.L.R. 786).
[6] [1908] 2 K.B. 385, 403.
[7] Ibid. 404.
[8] (1827) 7 B. & C. 96, 100.

" ' ones, the rule is to construe them as applicable to persons " ' ejusdem generis.' The same rule was applied in *Reg.* v. " *Cleworth*,[9] which turned on the construction of a statute " enacting that no tradesman, artificer, workman, labourer, or " other person whatsoever should do or exercise any worldly " labour, etc., on the Lord's Day. Cockburn C.J. said[10]: " ' Then there is a general expression " other person whatso- " ' " ever "; but, according to a well-established rule in the " ' construction of statutes, general terms following particular " ' ones apply only to such persons or things as are ejusdem " ' generis with those comprehended in the language of the " ' Legislature.' Crompton J. and Blackburn J. both agreed. If, " therefore, there is a category, then the rules, which have come " down to us from former generations and which still remain in " full force, will apply."

The impression which the language of the present section clearly forms upon my mind is that, within the principle above stated, the general words " in any case . . ." were intended to be confined and should be confined to cases within the " genus " or category of which public processions, rejoicings and illuminations are specific instances. The three instances suffice, in my judgment, to constitute a genus which, even if not confined to instances strictly similar to those three, may be stated as special occasions (not necessarily limited to a single day) when the ordinary day-to-day use of streets or highways is, or is liable to be, obstructed or dislocated by substantial numbers of persons, on foot or in vehicles, participating as spectators or otherwise in the occasion. It is quite true that the word " other " does not occur before the word " case " as, in the authorities, it commonly does in the general words following the particular instances. But I cannot find that the presence of that word has been regarded as essential to the application of the rule as it is, in my judgment, irrelevant to its principle. No reliance is put upon the presence of the word in the *Tillmanns* case[11] or in the older authorities therein cited: and see *Rex* v. *Wallis*,[12] referred to by Romer L.J. in the judgment which he is about to deliver and which I have had the advantage of seeing. As a matter of English, it may indeed be said that the word " other " would tend rather against the limitation of the general words. Nevertheless, Mr. Buckley put the absence of the word " other " in the forefront of his argument. He might even, as I understood him, have been disposed to concede, had the phrase been " and in any *other* " case . . ." that the general words so introduced should be limited to instances ejusdem generis as public processions, etc. But he argued that the relevant part of the section should be treated as applicable to two distinct sets of circumstances, videlicet: (1) public processions, rejoicings or illuminations (of which throngs and obstructions were not essentially characteristic)

[9] (1864) 4 B. & S. 927.
[10] Ibid. 932.
[11] [1908] 2 K.B. 385.
[12] (1793) 5 Durn. & East T.R. 375.

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and (2) " any case " in which streets were thronged or liable to be obstructed.

But it is, in my judgment, impossible to accept the view that Parliament were legislating in regard to " times of public proces- " sions, rejoicings or illuminations " as a distinct and confined class of occasion with which throngs and street obstructions were not necessarily involved. The power conferred is one for ordering " the route to be observed . . . *and for preventing obstruction of* " *the streets.*" It seems to me, therefore, impossible to treat the three specified examples of public processions, etc. (and, if necessary, I would treat the word " public " as applicable to all three), otherwise than as instances when the streets are thronged and liable to be obstructed. If this is right, then in my judgment it is impossible to give the general words which follow any sense different from that which they would bear if the word " other " appeared before the word " case." But even if there be two distinct classes of occasion or event (as Mr. Buckley contended) so that the class introduced by the words " in any " case " were not to be interpreted as ejusdem generis with the three events " public processions, rejoicings and illuminations," still, the use of the word " case " seems to me naturally apt and only in the context apt to refer to particular or special occasions or events, and not (as would have been, for example, such a word as " circumstances ") to mean the ordinarily recurring or day-to-day conditions of particular thoroughfares. If, indeed, the latter had been intended, nothing would have been easier than for Parliament to have said so, or at any rate to have used a simpler and wider phrase such as " and whenever." In the end, the question may resolve itself into no more than that of determining, on the true construction of the section, what are the limits (if any) of the " category " introduced by the words " in any case ": and in my judgment the category is a limited one which, upon any view of it, excludes the circumstances of the six months period of April to October.

I, therefore, if I am free to do so in light of the decided cases, would hold that the general words must be limited so as to be applicable to instances only of particular and extraordinary occasions, a view which appears to me to be in better conformity with the general tenor or purpose of the section, having regard particularly to the traffic conditions of 1847.

I have expressed my view so far upon this matter upon the assumption that the question is novel. The assumption is, however, not correct, having regard to the Divisional Court decisions earlier mentioned. Our attention was directed to five such decisions. The first is that of *Dudderidge* v. *Rawlings*,[13] decided in December, 1912, before Ridley, Coleridge and Bankes JJ. The case was one in which the Corporation of Bristol had made an order under section 21 of the Act of 1847, which, after

[13] (1912) 108 L.T. 802.

reciting that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered the constables to control traffic at cross-roads in those streets by what we now know as ordinary point-duty directions. The appellant was a taxicab driver who declined to obey the signals of a constable operating under the order and had been fined accordingly as for an offence within the terms of the section. The case in the Divisional Court turned upon the narrow point (decided adversely to the appellant) whether disobedience to the constable amounted in truth to a breach of the corporation's order or only to disregard of the constable's signal, which would not itself be an offence under the section. The question of the scope and meaning of the words "in any case," etc., with which we are concerned, does not appear at all to have been raised or debated.

But the matter is otherwise with the second case, that of *Teale* v. *Williams*,[14] decided in April, 1914. There the Corporation of Eastbourne had made an order under the section which, after reciting like the Bristol order that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered (among other things) that no hawker should use the said streets during such hours for the sale of specified goods from trucks or barrows; and gave directions to the police to enforce such order. Upon a prosecution of the respondent, a hawker, for breach of the order, the local justices had held that the section, upon its true construction, only authorized an order to deal with extraordinary occasions of obstruction. Upon appeal to the Divisional Court this decision was reversed. It appears from the leading judgment of Avory J. that some part of the argument had turned upon the submission that the hawker was doing no more than using the King's highway in the ordinary course. It is, however, clear that the point now before us was argued and expressly decided in a sense contrary to that which has commended itself to me. "The question," said Avory J.,[15] "is whether the words 'in any case' mean that they may make "such an order applicable to any street which is usually thronged "or usually liable to be obstructed. In my opinion that is the "plain meaning of the words, and they are not intended to be "limited to cases of extraordinary occasions of obstruction "similar to those of public processions, rejoicings or illumina-"tions." It is, however, no less clear that Rowlatt J. did not himself share this view, though he did not in the end dissent. "However," said he,[16] "the words are wide, and as my "brethren do not feel the difficulty which I feel, I do not desire "to dissent, especially as their construction is from the public "point of view much the more beneficial." Shearman J., on the other hand, went even further than Avory J.; and since his judgment was quoted in full and approved expressly by Lord

[14] [1914] 3 K.B. 395.
[15] Ibid. 398.
[16] Ibid.

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Hewart C.J. in the fourth of the cases, I venture to set it out here at length [17]: "I am of the same opinion. The only question "left to the court in this case is whether the words of section 21 "authorize the making of a general order for the regulation of "traffic in any street where the ordinary traffic of such street "makes such a regulation necessary in the opinion of the local "authority. In my judgment the words are amply wide enough "to confer such a power. The section begins with a general "reference to the regulation of traffic—'The commissioners may "'from time to time make orders for the route to be observed by "'all carts, carriages, horses, and persons, and for preventing "'obstruction.' Those are the opening words. Then it goes on "to give two or three particular occasions—'in all times of "'public processions, rejoicings, or illuminations.' Having given "those three special occasions it then uses the widest possible "words 'and in any case when the streets are thronged or liable "'to be obstructed.' I cannot entertain much doubt that 'in "'any case' means in any case and not in a few special cases. "It appears to me that although the statute is not very aptly "worded the intention is merely to give a few examples and then "to confer the widest possible power to be exercised by the local "authority."

The next case, *Edwards* v. *Wanstall*,[18] came before Lord Hewart C.J., Swift and Branson JJ., in the year 1929. The facts of the case were for practical purposes identical with those in *Teale* v. *Williams*,[19] and that fact, together with the further fact that 15½ years had passed since *Teale* v. *Williams* [19] had been decided, are matters to which I shall attach some importance later in this judgment. In *Edwards* v. *Wanstall* [20] the local justices of Herne Bay appear to have taken the point (which had not been raised in *Teale* v. *Williams* [21]) that an order for an indefinite period, even though otherwise within the scope of section 21 of the Act of 1847, was in truth a by-law which required confirmation under the Public Health Act, 1875; and that since the order in question had not been so confirmed it was invalid. The Divisional Court took the view that the case was directly covered by *Teale* v. *Williams* [21] and allowed the appeal accordingly. Lord Hewart C.J., in following *Teale* v. *Williams*,[21] is not reported as having expressed any view of his own; and Branson J. confined himself to concurrence with his brethren. Swift J., however, though also of opinion that *Teale* v. *Williams* [21] was binding, expressed for himself [22] "a good deal of sympathy "with the doubts which were expressed by Rowlatt J." in the earlier case. Swift J. found difficulty in persuading himself that it was in truth intended that the section in question should extend to the making of "a permanent order closing a number

[17] [1914] 3 K.B. 395, 398.
[18] (1929) 142 L.T. 288; 46 T.L.R. 101.
[19] [1914] 3 K.B. 395.
[20] 142 L.T. 288.
[21] [1914] 3 K.B. 395.
[22] 142 L.T. 288, 290.

"of streets to particular classes of persons for every day of the "week."

The fourth case is *Etherington* v. *Carter*,[23] before Lord Hewart C.J., Humphreys and Singleton JJ. This case also, like the two preceding ones, concerned the making of an order under the section for the prohibition of sales by hawkers in certain streets. In this case the streets were in the immediate neighbourhood of Windsor Castle, and the order made differed from the orders in the two preceding cases in that its operation was not limited to specified hours during the day. The report of the case is in some respects defective, but there can be no doubt that on this occasion Lord Hewart C.J. did express his own personal opinion, which was in strong support of the earlier decisions. Indeed, he went so far as to cite at length the judgment of Shearman J. in *Teale* v. *Williams*,[24] and to express his own entire agreement with that judgment. As regards the absence of any limit as to hours, the Lord Chief Justice thought the point immaterial, since it would have no practical significance during the hours when the hawker would, in the ordinary course, be plying his trade. On the other hand, it may be added that Humphreys J. expressly reserved his view as to the validity of an order made without limitation as to times or hours in a case in which the evidence showed the obstruction to occur or to be likely to occur only during certain periods.

The last of the five cases is *Waring* v. *Wheatley*,[25] which came in 1951 before Lord Goddard C.J. and Slade and Devlin JJ. I need not, however, take time upon this case, for it turned solely upon the circumstance that the information had omitted the word "wilfully," and therefore did not disclose the offence named in section 21 of the Act of 1847. Though other points were taken in the argument, the judgment of the Lord Chief Justice (with which his two brethren agreed) is limited to the single one of the absence of the word "wilfully."

From these cases it is, to my mind, clear that *Teale* v. *Williams*[26] involved the rejection of any limitation in scope of the general words "in any case . . ." to specific occasions, and that that decision has since been followed and treated as binding by the Divisional Court in the few later cases in which the point has been raised.

The cases are not, of course, binding upon this court. But there is well-established authority for the view that a decision of long-standing on the basis of which many persons will in the course of time have arranged their affairs should not lightly be disturbed by a superior court not strictly bound itself by the decision. The matter was recently considered exhaustively in *Robinson Bros. (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*.[27] In that case the members of

[23] [1937] 2 All E.R. 528.
[24] [1914] 3 K.B. 395.
[25] [1951] W.N. 569.
[26] [1914] 3 K.B. 395.
[27] [1937] 2 K.B. 445; 53 T.L.R. 609; [1937] 2 All E.R. 298; (affirmed [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79).

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this court, having concluded that a decision upon a question of rating pronounced some 40 years previously by a Divisional Court was plainly wrong, overruled it accordingly: though the earlier decision had without doubt been frequently acted upon in rating matters in the meantime, and though no judicial doubt had previously been cast upon its correctness. Greer L.J. cited [28] in his judgment the well-known passage from the speech of Lord Loreburn in *West Ham Union* v. *Edmonton Union* [29]: "'Great importance is to be attached to old authorities, on the "'strength of which many transactions may have been adjusted "'and rights determined. But where they are plainly wrong, "'and especially where the subsequent course of judicial decisions "'has disclosed weakness in the reasoning on which they were "'based, and practical injustice in the consequences that must "'flow from them, I consider it is the duty of this House to "'overrule them, if it has not lost the right to do so by itself "'expressly affirming them.'" But Greer L.J. was not deterred from overruling the earlier Divisional Court case by reason of the absence of any "disclosure of weakness in the reasoning" of the Divisional Court decision in later judgments. Nor do I think that Lord Loreburn's language should be treated, or has in practice been treated, as laying it down that the power to overrule should never be exercised unless all the circumstances referred to by Lord Loreburn are present and their conditions satisfied.

In my judgment, and with all respect to the contrary opinions expressed in the cited cases, I think that in so far as those cases depended upon a conclusion that the words "in any "case," etc., are unlimited by the context in which they appear, they cannot be supported. Having given the matter my best consideration, I feel it my duty to state my own opinion that Shearman J.'s conclusion, adopted by Lord Hewart C.J., that the words quoted were used in the widest possible sense so as to authorize the making of general orders for traffic regulation wherever the ordinary traffic in a street makes such regulation necessary in the opinion of the local authority, is clearly wrong: and I am comforted and confirmed in this opinion by the similar view which clearly appealed to Rowlatt and Swift JJ.

But though I am unable to agree that the words "in any "case," etc., were intended or are apt to confer the widest possible powers upon the local authority, I must not be taken to be saying that the decisions in the cited cases cannot properly be otherwise supported. It was conceded both by Mr. Squibb and by Mr. Buckley that the powers contained in the latter part of the section are not necessarily limited by the language in the earlier part—in other words, that the local authority may by the section be empowered (in addition to the authority conferred by the earlier part of the section) to give directions to the local constables for keeping order and preventing obstruction of streets which would comprehend the subject-matters of the Divisional

[28] [1937] 2 K.B. 445, 462. [29] [1908] A.C. 1; 24 T.L.R. 108.

Court cases. The words "other places of public resort" are exceedingly wide, and plainly cannot, in my judgment, be confined to places of the same kind as "theatres," a word which, of itself, cannot form a category. It seems to me, therefore, that the decision in the fourth of the cited cases, namely, *Etherington* v. *Carter*,[30] could well have been supported in reliance upon this part of the section since, as was observed in the judgment of Lord Hewart C.J., the environs of Windsor Castle are places to which very large numbers of the public from distances far and near are apt to resort. The full circumstances relating to the relevant streets in Eastbourne and Herne Bay are not fully stated in *Teale* v. *Williams*[31] and *Edwards* v. *Wanstall*,[32] but it may well be that these decisions could be similarly supported on their facts under the second half of the section.

I have referred already to the fact that the second of the cases last mentioned, *Edwards* v. *Wanstall*,[32] of which the facts were almost identical with those in *Teale* v. *Williams*,[33] came before the Divisional Court 15½ years after the earlier case; from which it may not unreasonably be inferred that no great number of other similar orders had in the meantime been made. Further, since the year 1930 and the coming into operation of the Road Traffic Act of that year, the requisite police powers would appear to be covered by section 49 of that Act—if and to the extent that they cannot be supported (as I have suggested) by the terms of the second part of section 21 of the Act under consideration.

In the circumstances, I am not satisfied that either injustice or inconvenience would be caused by giving effect now to the conclusion which I have formed upon the words "and in any "case," etc., in section 21 of the Act of 1847. Mr. Buckley was not (and could not in the nature of things have been) fully instructed as to the extent to which the section had been invoked by other local authorities for the making of orders comparable to that in the present case. But I am not satisfied that the section has or can have been relied upon to any substantial extent for the making of "one-way street" orders for indefinite periods of time. The traffic conditions which today require or justify such measures of traffic regulation are recent phenomena. In making provision expressly directed to such a form of traffic regulation, Parliament in 1930 thought it right to require the safeguard of confirmation by the Minister. The court ought not, in my judgment, to arrive readily at a conclusion in conflict with this declared parliamentary intention, and certainly should not be inclined to regard the opposite view as unjust. Having regard particularly, therefore, to the views of Rowlatt and Swift JJ., and also to the fact that (1) the decision in *Teale* v. *Williams*,[34] so far as it rested on the Act of 1847, substantially lost its

[30] [1937] 2 All E.R. 528.
[31] [1914] 3 K.B. 395.
[32] 142 L.T. 288.
[33] [1914] 3 K.B. 395.
[34] Ibid.

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significance 16 years later with the passing of the Act of 1930, (2) that the decision cannot be regarded as one which has stood "for a long period of time" as that phrase was used, for example, by Lord Buckmaster in *Bourne* v. *Keane*,[35] (3) that the decision itself and those which followed it may be capable of being supported on other grounds, and (4) that the validity of the application of the section in the Act of 1847 to circumstances such as those in the present case has never in fact been previously considered by any court, I think that the Divisional Court decisions ought to be disapproved in so far as they rested upon the unlimited construction of the words "and in any case," etc.

The point was also suggested in argument by the plaintiffs that the defendants' order of March, 1957, fell outside the authority of section 21 on the ground that, after reciting the thronging and liability to obstruction of the relevant streets "during certain seasons of the year," it proceeded to apply the "one-way" traffic regulation for the period from April 19 to October 19, a period which was not shown to correspond with any of the "seasons of the year" previously mentioned; and also on the further ground that in any case the thronging or obstruction sought to be prevented was not shown to have occurred or to be apprehended for 24 hours of all the days and nights of the period of operation of the order. To this point, if open to the plaintiffs, the observations of Humphreys J. in *Etherington* v. *Carter*[36] are relevant. But Mr. Buckley took the objection that the point had not been taken before Vaisey J. and was not raised in the plaintiffs' notice under Ord. 58, and that (if it had been so taken or raised) evidence could have been directed to it. In the circumstances, I do not propose to say anything more upon the point. For the reasons which I have endeavoured to state, I think that this appeal should be dismissed.

ROMER L.J. I agree. As this appeal proceeded on its course it became quite apparent that Mr. Squibb's preliminary objection to Mr. Buckley's appearance on behalf of the corporation on the instructions of the Treasury Solicitor was altogether untenable. I am not prepared to hold, as Mr. Buckley at one stage of his argument invited us to do, that the mere ipse dixit of a Minister of the Crown that he or his department has an interest in legal proceedings to which neither he nor the Crown is a party precludes the court from inquiring whether that is so or not, when objection is taken to the intervention of the Treasury Solicitor. There is a passage in the judgment of Sir Richard Henn Collins M.R. in *Rex* v. *Archbishop of Canterbury*[37] which lends some support to that view, but as Sir Edward Carson S.-G. had not relied on the point in argument there is no reason to suppose that the Master of the Rolls was intending to decide it; and as a mere obiter dictum it was at variance with the observations

[35] [1919] A.C. 815, 874; 35 T.L.R. 560.
[36] [1937] 2 All E.R. 528.
[37] [1903] 1 K.B. 289, 298.

of Romer L.J. in the course of his judgment in that case. Nevertheless it is quite clear, in my opinion, that it is a matter of real concern to the Minister of Transport, and therefore to the Crown, if a question arises, as it does in the present case, as to the comparative powers of traffic control conferred by the Town Police Clauses Act, 1847, and the Road Traffic Act, 1930, respectively. Nor can I accept Mr. Squibb's contention that as the corporation's order, which is challenged in these proceedings, expired some time since, the only issue remaining is as to the costs of the hearing below, in which admittedly the Crown is in no way interested. The decision of Vaisey J. was that the order was ultra vires and void and he made a declaration to that effect; and the practical result of that decision, so long as it stands, is that the defendant corporation cannot make a similar order in the future. To say that they could do so in theory is to take an unrealistic view of the matter. The defendants want to know, for their future guidance, whether the judge was right or wrong in saying that they acted beyond their powers in making the order, and in my judgment they are entitled to come to this court for the purpose of finding out.

On the main issue the judge based his decision in favour of the plaintiffs on the view that, although section 21 of the Town Police Clauses Act, 1847, was not repealed by the Road Traffic Act, 1930, it was not open to the defendants to use the powers conferred by section 21, without any local inquiry or restriction, in an experimental way pending an order being made by the Minister under section 46 of the Act of 1930. At the hearing before this court, Mr. Squibb and Mr. Harman, whilst, of course, relying upon and supporting the basis of the judge's decision, put their case in the first instance in a somewhat different way. The defendants' order of March 5, 1957, has been stated by the Master of the Rolls and I will not repeat its terms; but the first point taken by the plaintiffs is that it was not an order " for the " route to be observed " by the traffic which was affected by it, and was therefore not such an order as is authorized by section 21 of the Act of 1847. " Route," they say, is a line between two termini; it may be a roadway or a sea way (Mr. Harman mentioned the short sea route by way of illustration) or an air way, but, whichever it is, it possesses the characteristics of linking two termini and being available to traffic proceeding in either direction. The plaintiffs say that neither of these characteristics is to be found in the route which the corporation purported to prescribe by their order and which is nothing more nor less than a one-way circuit. In my judgment, this is too narrow a construction of the relevant language of section 21. The plaintiffs' contemplation of a " route " within this language would be something in the nature of a by-pass. I quite agree that it would include a by-pass but I am unable to see why it should be limited to a by-pas or any other way in which traffic is permitted to move in both directions. Many by-passes have dual carriageways and

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I should have thought that each carriageway could fairly be described as a route to be observed by the traffic which wished to travel in the permitted direction. Section 21 is dealing with traffic obstruction and with means of preventing it; and in that context the words " route to be observed " postulate the diversion of traffic along a way or ways to be prescribed and the direction which the traffic is to take. So, in the order under consideration, the route to be observed by all traffic (for example, traffic from Bournemouth) wishing to get from the north-east junction of Banks Road and Panorama Road to the south-west junction is by way of Banks Road, and the route for all traffic wishing to get from the south-west junction to the north-east junction is by way of Panorama Road. The fact that these two routes, when taken together, constitute a one-way circuit and that all traffic entering the circuit by a side road must turn right or left as the case may be does not appear to me to be relevant. The truth of the matter is that unless the word " route " in the section excludes the idea of one-way traffic the plaintiffs' contention on this point cannot, as it seems to me, succeed; and in my judgment there is no sufficient ground for such exclusion.

The next question which I propose to consider is whether the words " and in any case " in section 21, following as they do upon a reference to " all times of public processions, rejoicings " or illuminations," are to be limited in some, and if so what, way or whether they should receive a general and uncontrolled construction. If the words had been " in any *other* case " it could scarcely be contended, I should have thought, that such a construction should be attributed to them, for the resulting universality would render wholly otiose the reference to public processions, etc.; and, indeed, it was largely upon the omission of the word " other " that Mr. Buckley founded his argument in favour of an unlimited construction. To justify, said Mr. Buckley, the cutting down of the normal meaning of words it is necessary to find some ambiguity in the language. Such an ambiguity arises, or may arise, from the word " other " when following upon specific examples of a genus, and in such instances the ejusdem generis principle will usually be applied, for otherwise the specific examples would be redundant. But, said Mr. Buckley, the word " other " does not appear in section 21; and this, said he, is not surprising, for " public processions, rejoicings " or illuminations " do not constitute a genus at all.

It is quite true that in most of the cases in which the ejusdem generis principle has been applied to statutory language the stated examples of a genus have been followed by the word " other." There are, however, cases to be found in the books where the principle has been applied notwithstanding the absence of the word " other "—see, for example, *Rex* v. *Wallis*,[38] where the Court of King's Bench applied it to the words " cities, towns " corporate, boroughs and places " in section 1 of the Statute

[38] 5 Durn. & East T.R. 375.

9 Anne c. 20 in relation to persons intruding into public offices. In the course of his judgment in that case, Lord Kenyon C.J. said [39]: " . . . the word 'places' in the Act only extends to " offices in places of the same kind with those before enumerated; " otherwise the legislature would have used only one compen- " dious word, which would have included places of every " denomination. In one of the cases cited [40] Foster J. observed " that the Statute of Anne was drawn by J. Powell J.; and that " accurate judge would not have introduced all these different " words, if the last alone would have been sufficient." The other members of the court took a similar view.

The doctrine of ejusdem generis is only a part of a wider principle of construction, namely, that, where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a written document. That being the object of the doctrine it is difficult to see what difference it can make whether the word " other " is or is not used, provided—and this is essential—that the examples which have been given are referable to a clearly ascertainable genus. It is, accordingly, vital to ascertain whether the three examples which precede the words " and in any case " in section 21 all possess a common characteristic or quality. In my opinion, and having regard to the context in which they appear, they plainly do. Whether or not the word " public " in the section governs not only " pro- " cessions " but " rejoicings " and " illuminations " as well, so that all three activities were envisaged as possessing a public element, it is not necessary to decide, though I think on the whole that it does. The object of section 21, as is stated by the introductory words of the section, is to confer " power to make " orders for preventing obstructions in the streets during public " processions, etc."; not generally, it is to be observed, but on particular occasions. The body of the section enumerates three such particular occasions and it is quite manifest that each of them is calculated to attract a crowd of persons who collect together; and a crowd of persons who collect together is, in turn, calculated to obstruct the streets in which it gathers. From this I deduce that the element which is common to all of the three instances enumerated in the section is that they only happen from time to time but when they do occur they are likely to attract a crowd of people whose presence will inevitably, in a great or lesser degree, obstruct the streets. I must confess that I entertain no doubt, having heard elaborate argument upon the point, that the words " and in any case " are limited to events which possess the common characteristics to which I have referred; that is to say, they are limited to special occasions which, by their nature, are likely to attract a crowd. They may be short (for example, a public oration) or they may be comparatively long (for example, coronation celebrations); but they must be

[39] 5 Durn. & East T.R. 375, 379.

[40] *Rex* v. *Williams* (1757) 1 Burr. 402, 409.

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occasions of a special kind as distinct from the everyday life of a town. The contrary argument which Mr. Buckley submitted to us substitutes (in effect) "whenever" for the words "in any "case when" and deprives the words "in all times of public "processions, rejoicings or illuminations" of any effect at all; and I must reject a contention which involves these results. Further than this, it appears to me that if the argument is sound there was very little object in empowering the commissioners (as the section does) to "give directions to the constables for . . . "preventing any obstruction of the streets in the neighbourhood "of theatres and other places of public resort"; for, on the corporation's contention, *all* streets (including these streets) where obstruction is ordinarily to be expected could be made the subject of an order under the earlier part of the section.

Thinking, as I clearly do, that the words "and in any case" should receive the limited interpretation which I have stated, the next question is whether effect can properly be given to this view having regard to the earlier decisions of the Divisional Court in which a contrary opinion was expressed. These authorities have been fully reviewed in the judgment of the Master of the Rolls, and I will not refer to them in any detail again. It cannot, of course, be disputed that in *Teale* v. *Williams*[41] the court declined to apply the ejusdem generis principle to the words now under consideration, or that this decision was followed in *Edwards* v. *Wanstall*[42] and in *Etherington* v. *Carter*.[43] These decisions are not binding upon this court but they are naturally entitled to the weight and respect which all decisions of the Divisional Court receive; and this court would normally be extremely hesitant to overrule them. I am, however, impressed by four considerations which in their totality are sufficient, in my judgment, to remove this case from the principle stare decisis. (1) Rowlatt J. in *Teale* v. *Williams*,[44] and Swift J. in *Edwards* v. *Wanstall*,[45] expressed themselves in terms which, as it seems to me, show that those cases would have been decided differently had those two judges been left to arrive at their own unaided conclusions. (2) Breaches of section 21 are visited with penal consequences. In my judgment, it is not right that persons should suffer such consequences for failing to observe orders which a local authority has no power to make; and if this court is of opinion that the powers conferred by section 21 of the Act of 1847 are in fact narrower than they have hitherto been held to be it is its bounden duty to say so. (3) The overruling of the previous decisions will in no way affect property rights or disturb titles. (4) The powers of making orders such as that now in dispute have been for many years and still are exercisable by local authorities by virtue of section 46 of the Road Traffic Act, 1930, subject only to ministerial approval. These considerations,

[41] [1914] 3 K.B. 395.
[42] 142 L.T. 288.
[43] [1937] 2 All E.R. 528.
[44] [1914] 3 K.B. 395.
[45] 142 L.T. 288.

when taken together, fully justify this court, in my judgment, in substituting its own view of the meaning of section 21 for that which commended itself to the majority, but not all, of the judges who decided the earlier cases. The stare decisis principle was much debated in the well-known case of *Bourne* v. *Keane*,[46] but I can find nothing in the speeches of any of their Lordships in that case, or in any other decision bearing upon this subject which, in view of the considerations which I have mentioned, render it either undesirable or improper for this court to give effect to its own conclusions.

On the footing, then, that (contrary to his contention) the ejusdem generis principle should be applied, Mr. Buckley next submitted that the six months' holiday season at Poole can fairly be regarded as an "event" comparable to public processions, rejoicings and illuminations. He said, quite rightly, that an event need not be limited in duration to one day but may well extend over several days, and he suggested that the summer season at a popular seaside resort may properly be regarded as a special event or occasion equally with a prolonged public holiday or a visit by units of the Home Fleet. In my opinion it would not be right to accept this contention. There is nothing special about the summer season except that it is the time when most people take their holiday, and I cannot agree that that constitutes a special event for any relevant purpose. It is a question of degree whether an occasion is so much outside the general run of affairs in the life of a seaside resort as to be regarded as beyond the ordinary; and I cannot think that the summer holiday period, recurring year after year and lasting from April to October, can reasonably be so regarded.

On the views above expressed, the appeal fails, and it is unnecessary to consider whether it fails also on the ground that the order which the defendants made was ultra vires as being of a merely experimental nature. I feel considerable sympathy with the judge's conclusions on this point, to which he was led by the comparative provisions of section 21 of the Act of 1847 and section 46 of the Road Traffic Act, 1930, respectively. However, it is the fact that whilst certain of the provisions of the earlier Act were repealed by the later one, section 21 was left undisturbed; and it is therefore a little difficult, perhaps, to say that the defendants could be acting ultra vires if they exercised statutory powers which remained vested in them under and by virtue of section 21. It is not necessary, however, to express any concluded opinion upon this matter because the appeal, in my judgment, fails for the other reasons which I have already indicated.

ORMEROD L.J. I agree that this appeal should be dismissed. I have had the opportunity of reading the judgments delivered by the Master of the Rolls and Romer L.J., and am in full

[46] [1919] A.C. 815.

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agreement with the reasons given by them for dismissing Mr. Squibb's preliminary objection. Nor do I wish to add anything to what has been said on the question whether an order made in pursuance of section 21 of the Town Police Clauses Act, 1847, prescribing the direction in which traffic shall move in certain streets, is within the power given to the authorities to make orders "for the route to be observed by all carts," etc. In my judgment, on the plain meaning of the words, the powers given by the section are amply wide enough to include such an order.

The important question in this appeal, as I see it, is whether, on the proper construction of the section, the words "and in any "case when the streets are thronged," etc., should bear an unrestricted meaning, or whether by reason of the ejusdem generis rule their meaning should be restricted by the preceding words "in all times of public processions, rejoicings or illumina- "tions." This question was the subject of judicial consideration as long ago as 1914, when in *Teale* v. *Williams* [47] it was decided by the Divisional Court that an order prohibiting hawkers from using certain streets during certain hours for the sale of certain specified goods from trucks or barrows was within the powers given by the section. The order made no reference to any special occasion, but merely recited that certain streets were thronged and liable to be obstructed on weekdays. Avory J. expressed the view that on the plain meaning of the words of the section the authorities were enabled to make an order applicable to any street which was thronged or liable to be obstructed. Rowlatt J. did not dissent from this view, although he expressed himself as feeling some difficulty in accepting it. Shearman J., on the other hand, went further than Avory J. and expressed the view that the words were amply wide enough to authorize the making of a general order for the regulation of traffic where the ordinary traffic of such a street made such a regulation necessary in the opinion of the local authority.

Teale v. *Williams* [47] was followed by other cases in the Divisional Court to which reference has been made in the judgments already delivered, and to which, therefore, I do not propose to refer, except to note that in *Edwards* v. *Wanstall*,[48] which came before Lord Hewart C.J., Swift and Branson JJ. in 1929, Swift J. expressed the view [49] that although he was bound by the decision in *Teale* v. *Williams* [50] he had "a good deal of "sympathy with the doubt expressed by Rowlatt J." It should also be noted that in *Etherington* v. *Carter* [51] Lord Hewart C.J. not only expressed the view that he was bound by the decision of *Teale* v. *Williams*,[52] but that he was in entire agreement with the view expressed by Shearman J.

The question which now falls to be considered is whether these cases can be considered to be rightly decided, depending,

[47] [1914] 3 K.B. 395.
[48] 142 L.T. 288.
[49] Ibid. 290.
[50] [1914] 3 K.B. 395.
[51] [1937] 2 All E.R. 528.
[52] [1914] 3 K.B. 395.

as they do, on the view that the words " in any case," etc., bear an unrestricted meaning. I have come to the conclusion that they cannot be so considered. In my view, in the context in which they appear in the section, the meaning of the words is limited by the preceding words " in all times of public proces- " sions, rejoicings or illuminations." It is a well-established rule of construction that if there are words in a section referring to particular instances from which a genus may properly be derived, then the generality of the words following will be restricted to that genus unless the context shows the contrary. Mr. Buckley has argued in this case that no genus can be derived from the particular instances given in this section. His contention is that the section deals with two classes of cases, the one being the class set out in the instances mentioned, the other the wider class implied in the words " in any case," etc. I find it difficult to accept this view. " Public processions, rejoicings, or illumina- " tions " may well be cases when the police require to have powers to regulate the traffic, for the very good reason that they are cases when the streets are liable to be thronged or obstructed. In my view, the type of case with which the section is intended to deal is something in the nature of an " occasion " when the streets, for reasons other than the normal day-to-day usage, are likely to contain more than the usual amount of traffic, whether on foot or otherwise. Such an occasion might well, of course, last more than a single day, but could not, in my view, be held to cover a substantial part of the year when the press of traffic, although heavy and liable from time to time to cause obstructions, is due to no more unusual a cause than the advent of summer.

In these circumstances, I agree that this appeal should be dismissed, even though it means overruling the decisions of the Divisional Court in *Teale* v. *Williams* [53] and the subsequent cases, always bearing in mind that this court will not lightly overrule decisions which have been standing for a number of years, and upon which many local authorities may have acted. It does appear that prior to the Road Traffic Act, 1930, the powers of the police for regulating traffic were mainly, if not wholly, derived from the section under consideration, and that in consequence many orders were made under the section which were, no doubt, for the benefit and convenience of the public. But the police now have ample powers under the Road Traffic Acts, and no inconvenience to the public is likely to be caused by the decision that the order in this case is ultra vires.

For these reasons, I, too, would dismiss this appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Treasury Solicitor; Cripps, Harries, Hall & Co.*

E. D.

[53] [1914] 3 K.B. 395.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1958
Jan. 13, 14.

Lord Goddard C.J., Hilbery and Salmon JJ.

REGINA *v.* SPRIGGS.

Criminal Law—Murder—Diminished responsibility—Direction to jury—Attention of jury drawn to exact terms of section 2 (1) *of the Homicide Act,* 1957—*Whether duty of judge to define diminished responsibility—Homicide Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

Parliament has enacted in section 2 (1) of the Homicide Act, 1957, what is to amount to diminished responsibility and, therefore, when such a defence is raised it is a sufficient direction if the judge draws the attention of the jury to the exact terms of the section, tells them that it contains the tests which they are to apply and leaves it to them to decide whether on the evidence the case comes within the section or not; it is not the duty of the judge to define or re-define the definition enacted by Parliament or to draw distinctions between intellect and emotion.

Diminished responsibility is an expression borrowed from the Scottish common law, which recognizes that a man might be not quite insane but a border-line case and that that amounted to diminished responsibility, and, in the same way as the question whether there is a disease of the mind in a case where defence of insanity is raised, the question of diminished responsibility is a question of fact for the jury.

H.M. Advocate v. *Braithwaite,* 1945 S.C.J. 55 applied.

APPEAL against conviction.

The appellant, John Francis Spriggs, was convicted at Birmingham Assizes before Jones J. of the capital murder by shooting of Harold Cuningham, a barman, and was sentenced to death. At the trial one of the defences put forward was that the appellant was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957.[1] In summing up the judge read section 2 of that Act to the jury, told them that it was for them to decide whether or not the appellant was suffering from such an abnormality of mind as to substantially impair his mental responsibility, and then reviewed the evidence on that issue.

The appellant appealed against his conviction on, inter alia, the following grounds: (1) that the judge had failed to give to the jury any or any sufficient direction as to the meaning of the expressions "abnormality of mind" or "mental responsibility" in section 2 (1) of the Act of 1957; (2) that the judge had failed to give the jury any or any sufficient direction that each of the following conditions came within the meaning of the expression "abnormality of mind" in section 2 (1), namely, emotional

[1] Homicide Act, 1957, s. 2: "(1) "Where a person kills or is a party "to the killing of another, he shall "not be convicted of murder if he "was suffering from such abnormality "of mind (whether arising from a "condition of arrested or retarded "development of mind or any in- "herent causes or induced by disease "or injury) as substantially impaired "his mental responsibility for his acts "and omissions in doing or being a "party to the killing. . . ."

instability, temperamental instability, gross personality disorder, psychopathic personality, emotional immaturity, abnormality of control of the emotions, and immature personality; and (3) that the judge had failed to rule sufficiently or at all upon the submissions of law made by counsel for the prosecution that none of the conditions set out above nor any combination of them came within the meaning of the expression "abnormality of "mind" in section 2 (1), but that "abnormality of mind" was limited to deficiency of intelligence.

Graham Swanwick Q.C. and *C. H. Durman* for the appellant. At the trial, counsel for the prosecution stressed in his speech to the jury that "abnormality of mind" in section 2 (1) of the Homicide Act, 1957, was limited to deficiency in intellect and could not include the various types of mental condition from which the appellant had suffered for a long time; it was put by the prosecution that the appellant had a high intelligence quotient and could not therefore be suffering from abnormality of mind. But there was medical evidence which showed that there was a lack of ability on the part of the appellant to control his emotions, and it is submitted that conditions of the kind from which he was suffering do come within the ambit of section 2 (1). The inference from the judgment of this court in *Reg.* v. *Dunbar* [2] is that evidence that a person is a psychopath, that is, a person unable to control his emotions, is evidence on which it can be found that that person is suffering from abnormality of mind. The jury should have been directed that it is not right to equate "mind" with intellect, which is only one of the functions of the mind.

[LORD GODDARD C.J.: Parliament has defined what is necessary to establish the defence of diminished responsibility. This doctrine has been borrowed from the law of Scotland. Their Lordships of the Judiciary have always had difficulty in explaining it to the jury.]

Had Parliament intended to limit the defence given by the section to cases where there was "defect of reason," they would have used the phraseology of the M'Naughten rules. The accepted view of modern thought is that the seat of the control of the emotions is in the mind: see the definition of "mind" in the Shorter Oxford English Dictionary, 3rd ed. (1944), Vol. 1, p. 1253: "III. 1. The seat of consciousness, thoughts, volitions, "and feelings; . . . 2. In the restricted sense: The intellectual powers, as dist. from the will and emotions. . . ."

The submission for the prosecution was that it is the restricted meaning which is intended by the section, but it is submitted that it is not that, but the first meaning, which is appropriate. "Abnormality of mind" postulates a standard of normality, and when rival submissions as to the standard to be applied have been made, the jury should have been given some

[2] [1957] 2 W.L.R. 330; [1957] 2 All E.R. 737.

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direction as to which standard they are to apply. There was evidence that a person might be normal intellectually, but thoroughly unstable emotionally, and all the medical witnesses agreed that the appellant was suffering from abnormality of mind to some degree; rival submissions as to the standard to be applied had been made and therefore the jury should have been given some guidance and direction as to which standard to apply.

It was indicated in the summing-up that the fact that the appellant was supposed to be an intelligent man was something which the jury had to remember in deciding whether it was his mind or his emotions which were affected; that indication was a misdirection, for, in view of the submissions made, it might have led the jury to conclude that "abnormality of mind" related to intellect only.

R. K. Brown for the Crown was not called upon.

LORD GODDARD C.J., giving the judgment of the court. The appellant was convicted before Jones J. at the last Birmingham Assizes of capital murder and sentenced to death.

The circumstances relating to the case were that the appellant, who certainly had a history showing that he was of a somewhat unstable character, on the day in question went to a public-house and was turned out by the barman because he was interfering with some of the barrels and fittings of the public-house. Later, after closing time, he came back and knocked at the door, and when the barman who had turned him out opened the door to him he drew a revolver and shot him. Then, when the man lay on the ground, he fired two further bullets into him. He ran away and was found suffering from an overdose of some barbiturate he had taken, but when he had recovered from the effects of this overdose he said to police officers who were watching him in hospital: "It was the way he shoved me about. I "was mad. I collected my gun and let him have it." He knew quite well what he had done and he gave the reason why he had done it.

The defence that was put forward on his behalf was that he was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957. The grounds of appeal put forward are that the judge did not give a sufficient direction as to the meaning of the expression "abnormality of mind" or "mental responsibility," and did not distinguish to the jury between emotional instability or gross personality disorder, and so forth.

Section 2 of the Homicide Act, 1957, provides: "(1) Where a "person kills or is a party to the killing of another, he shall not "be convicted of murder if he was suffering from such "abnormality of mind (whether arising from a condition of "arrested or retarded development of mind or any inherent "causes or induced by disease or injury) as substantially impaired

" his mental responsibility for his acts and omissions in doing or " being a party to the killing. . . ."

The course which the judge took in summing up this matter was this: There were prepared and handed to the jury the terms of the section so that they could see it, and the judge told the jury that it was for them to decide whether or not the appellant suffered from such an abnormality of mind as to substantially impair his mental responsibility, and to enable them to come to that decision the judge went meticulously and carefully through the evidence given on one side and the other. Let me say at once that he was quite right, and no one suggests otherwise, to leave that question to the jury because there was evidence which might have justified the jury in finding, if they had taken that view, that this was a case of diminished responsibility as it is called, and therefore finding in favour of the appellant. But the evidence was not such as to compel the jury to find that way; there was evidence on the other side and we cannot see that a judge dealing with this matter can do more than to call the attention of the jury to the exact terms of the section which Parliament has enacted and leave them to say whether upon the evidence they are satisfied that the case comes within the section or not. When Parliament has defined a particular state of things, as they have defined here what is to amount to diminished responsibility, it is not for judges to re-define or to attempt to define the definition. The definition has been laid down by Parliament and it is a question then for the jury. It is a question of fact in any particular case as to whether the jury find that the defendant's evidence brings him within the section or whether it does not.

This conception of diminished responsibility is a novelty in English law. It is borrowed from the Scottish law, where it has apparently always been part of the common law of Scotland. I see that I was reported yesterday [1] as having said, and no doubt I did, that the Lords of Justiciary in Scotland had always had difficulty in explaining this matter to a jury. Perhaps that might be thought to be not quite polite to the Scottish judges, but what I meant was that the Scottish judges have always found that it is a difficult matter to explain to the jury and a difficult matter for the jury to understand exactly what " diminished responsi- " bility " means. When I said that I had in mind *H.M. Advocate* v. *Braithwaite*,[2] where Lord Cooper, Lord Justice-Clerk, gave this charge to the jury with regard to diminished responsibility [3]: " Now, I have got to give you the most accurate instruction I " can on this delicate question. The Solicitor-General read to " you a passage from the charge of the Lord Justice-Clerk in the " case of *Savage*,[4] and I am going to read a sentence or two " again, because it seems to me to give as explicit and clear a

[1] The Times, January 14, 1958.
[2] 1945 S.C.J. 55.
[3] Ibid. 57.
[4] 1923 J.C. 49.

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" statement of the sort of thing which you have to look for as I " can find. He says [5]: ' It is very difficult to put it in a phrase '— " and I respectfully agree—' but it has been put in this way; " ' that there must be aberration or weakness of mind; that there " ' must be some form of mental unsoundness; that there must " ' be a state of mind which is bordering on, though not amount- " ' ing to, insanity; that there must be a mind so affected that " ' responsibility is diminished from full responsibility to partial " ' responsibility—in other words, the prisoner in question must " ' be only partially accountable for his actions.' And then he " adds: ' And I think one can see running through the cases that " ' there is implied . . . that there must be some form of mental " ' disease.' The matter has been put in different words by other " judges. I notice in a later case [6] that the condition was referred " to for short as ' partial insanity '; and that this was explained " as meaning ' that weakness of great peculiarity of mind which " ' the law has recognized as possibly differentiating a case of " ' murder from one of culpable homicide.' And, finally, to give " you one last test, the question as put by the late Lord Clyde " in the same case, quoting from a charge to a jury by Lord " Moncrieff, was stated thus [7]: ' Was he, owing to his mental " ' state, of such inferior responsibility that his act should have " ' attributed to it the quality not of murder but of culpable " ' homicide? ' You will see, ladies and gentlemen, the stress " that has been laid in all these formulations upon weakness of " intellect, aberration of mind, mental unsoundness, partial " insanity, great peculiarity of mind, and the like. I am " emphasising that just now because I shall have to revert to it " when I come to say a word about the evidence we have heard " today from Dr. Harrowes; but meantime, with those passages " in your mind, I can only say to you that that is the sort of " thing you have got to look for in the evidence led in support " of this defence. If you can find enough to justify such a con- " clusion, your verdict should be one of culpable homicide only. " If, on the other hand, you cannot find enough in the evidence " to justify such a conclusion, then I have to tell you that, so " far as this issue is concerned, you must steel yourselves to do " your sworn duty by returning a verdict of guilty of murder."

It will be seen there that the Lord Justice-Clerk is not going into nice distinctions between mind and emotion or intellect and emotion, and one has to remember after all that juries are not drawn from university professors or university dons. They are ordinary men and women, and would not it be only confusing them if one went into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort. The fact is that this section is borrowed from the Scottish law and the Scottish law, as the Lord Justice-Clerk

[5] 1923 J.C. 49, 51.
[6] *Muir* v. *H.M. Advocate*, 1933 J.C. 46, 49.
[7] Ibid. 48.

points out, recognizes that a man may be not quite mad but a border-line case, and that is the sort of thing which amounts to diminished responsibility. If a man sets up a defence of insanity, it has always been for the jury to find whether or not he is suffering from a disease of the mind. There is no test you can lay down other than the test laid down in the M'Naughten Rules, but first of all you have to find that there is a disease of the mind. That can only be done by listening to the medical evidence and the facts of the case and coming to a conclusion whether what the man did was the act of a sane man or insane man. So here it seems to the court that all that a judge can do is to read the section to the jury and say: "That is what Parliament has "said will amount to diminished responsibility and justify a "verdict of manslaughter and not a verdict of murder." We do not know of any better way of instructing the jury on this very difficult point than saying: "That is what Parliament has said. "Those are the tests you have to apply. You are to consider "whether he has abnormality of mind"—and how you are to define that I do not know because it is very difficult to say what is a normal person, where is the norm—"whether arising from a "condition of arrested or retarded development of mind or "any inherent causes or induced by disease or injury. If you "can find any of those matters in the evidence, then you will "find a verdict of manslaughter and not a verdict of murder." After all, in English law we are all very accustomed to the expression: "What would be the act of a reasonable man?" Has anyone ever attempted to define what is a reasonable man? We do not know of any definition of what is a reasonable man. The fact is that a jury have to decide for themselves whether the action in question is the action of what they would call a reasonable man. So here, we think the matter was entirely one for the jury. The judge put the case to the jury in the only way it can be put and it is not the duty of the judge to enter into metaphysical distinctions such as Mr. Swanwick in his very attractive address to us on behalf of the appellant sought to persuade us was the duty of the judge and, for the reasons I have endeavoured to give, this appeal fails and is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. F. L.

[CHANCERY DIVISION.]

1957
Nov. 27, 28;
Dec. 3.

Upjohn J.

GREY AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Stamp duty — Gifts inter vivos — Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees —Oral direction to trustees to hold shares as trusts of settlements— Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74.

In 1949 H. made five settlements, one in favour of each of his five grandchildren, and in 1950 he made a sixth settlement on his then existing and possible after-born grandchildren. The appellants were the trustees of each of these settlements. On February 1, 1955, H. transferred to the appellants, as his nominees, 18,000 ordinary £1 shares in a company. On February 18, 1955, H. orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each on the trusts respectively of the five settlements executed in 1949 and as to 3,000 shares on the trusts of the 1950 settlement, to the intent that such direction should result in the entire exclusion of H. from all future right title and benefit to or in the shares and the income thereof.

On March 25, 1955, the appellants executed six declarations of trust which H. although not expressed to be a party thereto executed. They were all in similar form and each recited that the appellants were the holders of 3,000 shares in the company, H.'s oral direction of February 18, the acceptance of the trust reposed in them by that oral direction and that the giving of the direction and its nature were testified by the execution by H. of the deed. The operative part of each deed declared that the appellants acknowledged and declared that they were holding the shares on the trusts of the settlement to the intent that the shares should form part of the trust fund.

On appeal from an assessment of the six declarations of trust to ad valorem stamp duty as voluntary dispositions within section 74 of the Finance (1909–10) Act, 1910:—

Held, (i) that the disposition of an equitable interest by direction to trustees operated as a disposition by way of trust and not by way of assignment and a disposition by way of trust was not within the intendment of section 53 (1) (*c*) of the Law of Property Act, 1925; accordingly, H.'s equitable interest passed to the appellants on February 18, 1955, and there being nothing left to pass under the subsequent declarations of trust, no ad valorem duty was thereby attracted.

(ii) That the court could not draw the inference that the oral direction of February 18, 1955, and the subsequent declarations were all part of the same transaction.

Cohen and Moore v. *Inland Revenue Commissioners* [1933] 2 K.B. 126 distinguished.

CASE STATED under section 13 of the Stamp Act, 1891.

The appellants appealed from an assessment of the Inland Revenue Commissioners who had assessed six declarations of trust dated March 25, 1957, by the appellants to ad valorem

stamp duty as voluntary dispositions within the meaning of section 74 of the Finance (1909–10) Act, 1910.

The facts appearing in the case stated were summarized by Upjohn J. as follows: During 1949 Edward William Hunter made five settlements, one in favour of each of his five young grandchildren, whereby he settled certain property on the particular grandchild if he should attain the age of 35 years, with trusts over on failure to attain that age. On May 1, 1950, he made a sixth settlement on his then existing and certain possible after-born grandchildren. The appellants were the trustees of all the six settlements.

On February 1, 1955, Mr. Hunter transferred to the appellants as his nominees 18,000 ordinary shares of £1 each in the Sun Engraving Co. Ltd. (hereinafter called "the company"). On February 18, 1955, at the offices of the company, Mr. Hunter orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each upon the trusts respectively of the five settlements executed in 1949 in favour of his respective grandchildren, and as to 3,000 shares on the trusts of the 1950 settlement, to the intent that such direction should result in the entire exclusion of Mr. Hunter from all future right, title or benefit to or in the said shares or any of them and the income thereof.

On March 25, 1955, the appellants executed six declarations of trust, all in similar form, and Mr. Hunter, although not expressed to be a party, executed each of them. They recited that the appellants were the holders of 3,000 ordinary shares in the company. They also recited Mr. Hunter's oral direction made on February 18, 1955, the acceptance by the appellants of the trust reposed in them by Mr. Hunter's direction; and that the giving of the direction and its nature were testified by the execution by Mr. Hunter of the deed. The operative part of each deed was as follows:—

"Now this deed witnesseth and the trustees hereby acknowledge and declare that they have been since the date of inception and are now holding the said shares specified in the said schedule hereto and the income thereof upon such trusts and with and subject to such powers and provisions as are by and in the said settlement declared and contained concerning the trust fund as therein defined or such of the same trusts powers and provisions as are now or may hereafter be subsisting or capable of taking effect to the intent that the said shares should since the date of inception form an addition to and be one fund with the said trust fund for all purposes."

It was agreed that the value of each ordinary £1 share in the company was £3 10s. on March 25, 1955.

The commissioners were of opinion that each declaration of trust was a conveyance or transfer by Mr. Hunter of his equitable interest in the shares referred to in that instrument and

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such conveyance or transfer operating as a voluntary disposition inter vivos within section 74 of the Finance (1909–10) Act, 1910, was liable to ad valorem duty accordingly. They accordingly assessed the duty with which each instrument was charged at £210 ad valorem duty. The appellants contended that each instrument was no more than a record under seal of what had already taken place; that it was not a conveyance or transfer operating as a voluntary disposition inter vivos, and that each was chargeable with a fixed duty of 10s. only under the head "Declaration of any use or trust" in the First Schedule to the Stamp Act, 1891.

Neville Gray Q.C. and *W. T. Elverston* for the taxpayers.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases in addition to those referred to in the judgment were cited in argument: *Fitzroy* v. *Cave* [1]; *Collinson* v. *Patrick* [2]; *Martin* v. *Inland Revenue Commissioners* [3]; *Richards* v. *Delbridge* [4]; *Edwards* v. *Jones* [5]; *Wheatley* v. *Purr* [6]; *Rycroft* v. *Christy* [7]; *Peterson* v. *Murphy*.[8]

Cur. adv. vult.

December 3. UPJOHN J. read the following judgment in which he stated the facts and continued: The real point at issue between the parties may be very shortly stated. The appellants concede, of course, that the equitable interest in the 18,000 shares in the company remained in Mr. Hunter until February 18 for the appellants were mere nominees for him, but they claim that upon the giving of the directions on that day the equitable interest passed from Mr. Hunter and vested as to each block of 3,000 shares upon the trusts declared respectively by the six settlements executed in 1949 and 1950. The trusts, it was argued, were then completely declared and nothing remained to be done. Therefore, no property passed in and by the declarations of trust when they were executed on March 25, 1955, and there was nothing to be stamped ad valorem.

The commissioners' reply to that argument is that nothing passed by virtue of the oral directions, for the reason that if an equitable owner gives directions to trustees in whom the legal estate is outstanding as to trusts concerning the equitable interest, that in terms is an equitable assignment and as such must be in writing having regard to section 53 (1) (*c*) of the Law of Property Act, 1925. If that be right then Mr. Neville Gray for the appellants concedes that the subsequent declarations of trust did operate to pass the equitable interest, and that he

[1] [1905] 2 K.B. 364; 21 T.L.R. 612.
[2] (1838) 2 Keen 123.
[3] (1930) 15 A.T.C. 631.
[4] (1874) L.R. 18 Eq. 11.
[5] (1836) 1 My. & Cr. 226.
[6] (1837) 1 Keen 551.
[7] (1840) 3 B. 238.
[8] (1853) 11 Hare 88.

is liable to the full ad valorem duty under section 74 of the Finance (1909–10) Act, 1910, and I have not been troubled with any arguments based on an alternative claim to settlement duty. The essential question is whether the commissioners' view that the oral directions given by Mr. Hunter were ineffectual to transfer any equitable estate from him is correct.

If their primary argument is wrong the commissioners have submitted an alternative argument to the effect that the oral directions on February 18 and the subsequent declarations on March 25 must be taken and read together. Thus it was said it was, in effect, all one transaction and the declarations must be stamped as the final operative documents as was done in *Cohen and Moore* v. *Inland Revenue Commissioners.*[1] This is primarily a question of fact. Whether without further evidence the commissioners could properly have drawn the inference that the oral directions and subsequent written declarations were all part of one transaction I do not decide, but apparently they did not do so for there is no finding of fact to that effect in the case stated. I doubt whether in the absence of such a finding of fact it is open to me to draw any such inference, but even if it is I do not think I ought to do so. Unlike *Cohen and Moore's* case,[2] there is no evidence that the six declarations were in draft at the time of the oral directions. It is at least possible that they were brought into existence as the result of second thoughts after February 18 when it was realized that these trusts were for very young grandchildren and would last a long time and that some written record was desirable. At all events I do not think that I can draw the required inference.

I turn to the main point. I propose to deal with the matter in the first place as though the relevant law concerning assignments was contained in section 9 of the Statute of Frauds. The section is in these terms: "And be it further enacted, that all "grants and assignments of any trust or confidence shall likewise "be in writing, signed by the party granting or assigning the "same, or by such last will or devise, or else shall likewise be "utterly void and of none effect." I am dealing in this case with the voluntary transfer of an equitable interest in pure personalty where the legal estate is already outstanding in nominees, and my observations are confined to that type of transaction. In such a case the donor may effect a transfer of the equitable interest to the donee in one of three ways. See authority, if authority be wanted for that proposition, Romer L.J. in *Timpsons Executors* v. *Yerbury.*[3] (1) The donor may assign his equitable interest to the donee directly. However informal the language used it must on its true interpretation amount to a transaction in essence of direct transfer of the equitable interest from donor to donee in contrast to a declaration of trust; that is something which in the ultimate analysis is of the

[1] [1933] 2 K.B. 126.
[2] Ibid.
[3] [1936] 1 K.B. 645, 664; [1936] 1 All E.R. 186.

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nature "I hereby assign or give to you." Having regard to the Statute of Frauds such an assignment to be effectual must be in writing. (2) The donor may declare himself a trustee of the equitable interest vested in him for the benefit of the donee. Such a declaration may be by parol or in writing. There are many authorities to that effect. Perhaps the best known is the classic judgment of Turner L.J. in *Milroy* v. *Lord*.[4] (3) The donor may direct the trustees to hold the whole or part of his equitable interest upon trust for a third person. That, said Sargant L.J. in *In re Chrimes*,[5] "operates as a complete and effectual transfer "of the interest to which the direction extends." Whichever of these methods of transfer is employed the result is the same; the equitable interest is effectually transferred from donor to donee. If done by way of assignment, however, it must be in writing; if by declaration of trust it may be by parol. And it is very familiar law that a purported assignment will not be construed as a declaration of trust to avoid the want of writing: *Milroy* v. *Lord*.[6] On which side of the line does a direction to the trustees lie? May it effectually be given by parol or not?

It has been strenuously urged upon me that the words of Sargant L.J. in *In re Chrimes*,[7] the classification of Romer L.J. in the *Timpsons Executors* case,[8] and some words of my own in *In re Wale*,[9] showed that a direction to trustees to hold on new trusts operated not by way of trust but by way of assignment; that such a direction was in fact an assignment. In none of those cases did the point that I have to consider arise, and I am quite unable to accept the argument that those authorities indicate that a direction to trustees is not merely equivalent to, but is an assignment. There are three different methods of effectuating the same result, i.e., a transfer of the equitable interest from donor to donee, and in that sense it is perfectly correct to say (where a precise analysis of each method is unnecessary as in the authorities I have just mentioned) that each method operated as an assignment from donor to donee. In fact, Sargant and Romer L.JJ. were both careful to employ rather different language, which lent no colour to the view that a direction to trustees *was* an assignment.

In my judgment a direction to trustees to hold trust property upon trust for a donee operates as a transfer of the equitable interest to the donee by way of trust and not by way of assignment. In the first place the element of assignment, that is of direct passing of the equitable interest from donor to donee by appropriate words of assignment or gift, are lacking. Secondly, the only person who can effectively declare new trusts concerning the equitable interest is the donor himself: *Tierney* v. *Wood*.[10] For myself I can see no real distinction between the two cases

[4] (1862) 4 De G.F. & J. 264.
[5] [1917] 1 Ch. 30, 36.
[6] 4 De G.F. & J. 264.
[7] [1917] 1 Ch. 30, 36.
[8] [1936] 1 K.B. 645, 664.
[9] [1956] 1 W.L.R. 1346; [1956] 3 All E.R. 280, 283.
[10] (1854) 19 Beav. 330.

that may be put: (1) the donor says: "I declare myself a trustee "of my equitable interest for the donee"; the legal effect of that is that the trustees become trustees of the equitable interest for the donee and the donor disappears from the picture; and (2) the donor says: "I direct you the trustees to hold upon "trust for the donee." Both seem to me to be really indistinguishable methods of operating to transfer the equitable title by way of declaration of trust in contrast to doing so by way of assignment. By giving directions to trustees as to new trusts it seems to me that the donor has deliberately chosen the path of declaring new trusts rather than the path of assignment.

For these reasons, in my judgment, a direction to trustees operates by way of trust and not for the purposes of section 9 of the Statute of Frauds by way of assignment. Accordingly, such a direction may be by parol. No decision directly in point has been cited to me, but I think some support for the view I have expressed is to be found in the observations of Lord Lyndhurst L.C. in *M'Fadden* v. *Jenkyns*,[11] and in *Bentley* v. *Mackay*.[12]

So far I have dealt with the matter on the footing that the law is contained in section 9 of the Statute of Frauds. Of course, that section has been repealed and replaced by section 53 (1) (*c*) of the Law of Property Act, in these terms: "a disposition of an "equitable interest or trust subsisting at the time of the "disposition, must be in writing signed by the person disposing "of the same, or by his agent thereunto lawfully authorized in "writing or by will." The section uses the word "disposition," normally a word of wide import, but if it is to be given a wide meaning so as to include a disposition by direction to trustees then surely it must include a disposition by way of declaration of trust on the part of the equitable owner. If that be so then for close on 32 years the law relating to the transfer of equitable interests by parol declaration of trust of equitable (as distinct from legal) interests was completely altered and no one has yet noticed it, and neither of those well-known books on trusts, Lewin and Underhill, have thought the possibility that such a change in the law may have been occasioned by the change of language even worthy of comment. In fairness to the commissioners this point was not pressed very hard. I am satisfied that section 53 (1) (*c*) was directed at precisely the type of disposition which fell within the old section 9, i.e., assignments in contradistinction to the transfer of equitable interests by way of declaration of trust. In my judgment dispositions by way of trust are not within the intendment of the section.

Accordingly, in my view, the equitable interest in the shares passed from Mr. Hunter on February 18, 1955, and there being nothing left to pass under the subsequent declaration of trust no ad valorem duty was thereby attracted.

[11] (1842) 1 Phillips 153, 157, 158. [12] (1851) 15 Beav. 12.

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The appeal is allowed, the ad valorem duty must be repaid and the commissioners must pay the appellants' costs of the appeal.

Appeal allowed.

Solicitors: *Soames, Edwards & Jones; Solicitor, Inland Revenue.*

P. P.

[CHANCERY DIVISION.]

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Nov. 28, 29;
Dec. 3.

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OUGHTRED *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Stamp duty — Gifts inter vivos — Settlement — Oral agreement for value for transfer of reversionary interest to tenant for life—Subsequent deed of transfer—Whether oral agreement effective to pass equitable reversionary interest—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*) (2)—*Stamp Act,* 1891 (54 *&* 55 *Vict., c.* 39), *s.* 54.

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, the appellant was the tenant for life of 100,000 preference shares and 100,000 ordinary shares in a company, and her son P. was absolutely entitled to the shares subject to the appellant's life interest. By an oral agreement made on June 18, 1956, it was agreed between the appellant and P. that P., on June 26, would exchange his interest under the settlement and subsequent deeds for certain shares in the same company then owned by the appellant to the intent that the appellant's life interest in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 26, by a deed of release between the appellant, P. and the trustees, the appellant and P. gave release to the trustees. The deed recited the oral agreement and that the trust fund, consisting of the shares, "is accordingly now held in trust "for [the appellant] absolutely," and that it was intended to transfer them to the appellant, such transfer being the consideration for the release. On the same day, by a deed made between the appellant, P. and the trustees, the trust fund of 100,000 preference shares and 100,000 ordinary shares was transferred to the appellant in consideration of ten shillings.

On appeal from an assessment on the deed of transfer to ad valorem duty on the value of P.'s reversionary interest:—

Held, (1) that on the making of the oral agreement for value on June 18, P. became a constructive trustee of his equitable reversionary interest in the trust fund for the appellant; no writing was necessary to achieve that result and section 53 of the Law of Property Act, 1925, was inapplicable to constructive trusts; accordingly, only the legal estate passed under the deed of transfer and ad valorem duty was not attracted.

(2) That the transfer was a transfer on the winding up of the trust and the release of the trustees, and was not a conveyance on sale within section 54 of the Stamp Act, 1891.

CASE STATED under section 13 of the Stamp Act, 1891.

The appellant appealed from an assessment of ad valorem

stamp duty on a deed of transfer dated June 26, 1956, whereby four transferors were expressed to transfer 100,000 preference shares and 100,000 ordinary shares of 10s. each to the appellant in consideration of 10s.

The case stated, so far as relevant, provided: The transferors were the trustees of a settlement (hereinafter called "the settlement") dated January 1, 1924, and made between George Jackson Bentham, of the one part, and William Edward Cooper, Norman Oughtred, John Alwyn Oughtred, the appellant, Phyllis Brown Oughtred, and Doris Strachan Oughtred, of the other part, whereby certain shares in William Jackson & Son Ltd. were settled upon trust for the appellant during her life, and after her death for such of her issue as she should by deed or will appoint, and subject to any such appointment for such of her children who attained the age of 21 years, and if more than one in equal shares, and subject thereto for the said Doris Strachan Oughtred. At all material times the property subject to the trusts of the settlement consisted of 100,000 ordinary shares and 100,000 preference shares in William Jackson & Son Ltd., which at all material times prior to the transfer to the appellant were held by the transferors. The appellant was married once and once only, and had one child and no more, namely, Peter Bentham Oughtred (hereinafter called "Peter"), who was living and of age on the date of the transfer to the appellant. By a deed of appointment dated June 18, 1956, and made by the appellant, the trust fund, subject to the trusts of the settlement, was appointed to Peter absolutely, subject to the life interest of the appellant and to the power of revocation reserved in the said deed of appointment. By a deed of release dated June 18, 1956, and made by the appellant, the said power of revocation was released. By an oral agreement made June 18, 1956, between the appellant and Peter it was agreed that Peter would on June 26, 1956, exchange his interest under the settlement and hereinbefore recited deed of appointment and deed of release for 28,510 fully paid preference shares of 10s. each, and 44,190 fully paid ordinary shares of 10s. each in the capital of William Jackson & Son Ltd., then owned by the appellant to the intent that the life interest of the appellant in the trust fund should be enlarged into absolute ownership thereof.

By a deed of release made June 26, 1956, between the appellant of the first part, Peter of the second part, and the transferors of the third part, after reciting (inter alia) the said oral agreement, that the trust fund consisting of the said 100,000 preference shares and 100,000 ordinary shares was "accordingly now held by the trustees in trust for" the appellant absolutely, that it was intended that the same should forthwith be transferred to the appellant or as she should direct and that the appellant and Peter, being satisfied with all matters and things relating to the execution of the trusts of the said settlement, had agreed to make the release thereinafter contained the appellant

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and Peter released and discharged the transferors from all actions, proceedings, claims and demands in respect of the execution of the said settlement. By the transfer to the appellant the transferors transferred to the appellant the said 100,000 ordinary shares and 100,000 preference shares, and on the same date the appellant, by the direction of her son Peter, transferred to Donald Miller Jones and Noel Oughtred Till 28,510 first preference shares of 10s. each and 44,190 ordinary shares of 10s. each in William Jackson & Son Ltd. Donald Miller Jones and Noel Oughtred Till were trustees of a trust deed dated June 26, 1956, to which they and the appellant's son Peter were parties, and according to the trusts declared by that deed held the said 28,510 preference shares and 44,190 ordinary shares as trustees or nominees for Peter.

The said deed of release dated June 26, 1956, and made between the appellant of the first part, Peter of the second part, and the transferors of the third part; the said transfer of 28,510 first preference shares and 44,190 ordinary shares of William Jackson & Son Ltd.; and the said trust deed dated June 26, 1956, were presented for adjudication with the transfer to the appellant, and the duty on each of them was assessed at 10s.

In paragraph 12 of the case stated the commissioners stated that they were of the opinion that the oral agreement made on June 18, 1956, between the appellant and her son Peter was, for the purposes of the Stamp Act, 1891, and particularly of section 55 thereof, an agreement for sale by Peter to the appellant of his equitable reversionary interest in the property comprised in the settlement of January 1, 1924 (namely, the 100,000 ordinary and 100,000 preference shares), in consideration of the said 28,510 preference and 44,190 ordinary shares. The commissioners were further of opinion that, having regard to paragraph (*c*) of subsection (1) of section 53 of the Law of Property Act, 1925, the recital in the said deed of release of June 26, 1956, that the trust fund consisting of the said 100,000 preference shares and 100,000 ordinary shares was "accordingly "now held by the trustees in trust for" the appellant absolutely was incorrect. Except for the transfer to the appellant no instrument in writing stamped with ad valorem duty transferring to the appellant Peter's equitable reversionary interest was produced to the commissioners. The commissioners were of the opinion that the transfer to the appellant of the said 100,000 preference shares and 100,000 ordinary shares was an instrument whereby the said equitable interest of Peter in such shares was upon the sale thereof to the appellant transferred to or vested in her and was accordingly a conveyance on sale of such equitable interest and liable to ad valorem duty on £33,140, being the agreed value at the date of the transfer to the appellant of the said 28,510 preference shares and 44,190 ordinary shares. The commissioners were also of opinion that the transfer to the appellant was a transfer not on sale to the appellant of the legal

interest in the said 100,000 preference shares and 100,000 ordinary shares.

The commissioners accordingly assessed the duty under the provisions of sections 1, 4 and 55 of the Stamp Act, 1891, and the heads of charge "Conveyance or Transfer on sale" and "Conveyance or Transfer of any kind not hereinbefore described" in the First Schedule to that Act and other relevant statutory provisions as follows:

Ad valorem transfer on sale duty on £33,140 ...	£663	0	0
and the fixed duty		10	0
Total duty on the transfer to the appellant ...	£663	10	0

No objection was made by the appellant to the assessment of 10s. duty on the transfer to the appellant, but the appellant contended that no ad valorem duty as a conveyance or transfer on sale was exigible on the transfer, and that it was liable to the duty of 10s. only under the head of charge "Conveyance or "Transfer of any kind not hereinbefore described" in the First Schedule to the Stamp Act, 1891, and being dissatisfied with the assessment made and having paid the duty in accordance therewith the appellant appealed against the said assessment to the High Court.

The questions for the opinion of the court were: (i) whether the transfer to the appellant is liable to duty as assessed by the commissioners; (ii) if not, to what duty it was liable.

Peter Whitworth for the taxpayer.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Bannister* v. *Bannister* [1]; *Shaw* v. *Foster* [2]; *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [3]; *Fleetwood-Hesketh* v. *Inland Revenue Commissioners* [4]; *Freeman* v. *Inland Revenue Commissioners* [5]; *Cohen and Moore* v. *Inland Revenue Commissioners* [6]; *Hadgett* v. *Inland Revenue Commissioners* [7]; *Drages Ltd.* v. *Inland Revenue Commissioners* [8]; *General Accident Assurance Corporation* v. *Inland Revenue Commissioners* [9]; *Coats* v. *Inland Revenue Commissioners* [10]; *Lord Portman* v. *Inland Revenue Commissioners* [11]; *Bristol (Marquess)* v. *Inland Revenue Commissioners* [12]; *Faber* v.

[1] [1948] W.N. 261; [1948] 2 All E.R. 133.
[2] (1872) 5 Eng. & Ir.App.Cas. 321.
[3] [1957] 1 W.L.R. 174; [1957] 1 All E.R. 291.
[4] [1936] 1 K.B. 351.
[5] (1871) L.R. 6 Ex.Cas. 101.
[6] [1933] 2 K.B. 126.
[7] (1877) L.R. 3 Ex.D. 46.
[8] (1927) 6 A.T.C. 727.
[9] [1906] 6 S.C. 8 Fraser 477.
[10] [1897] 2 Q.B. 423; 13 T.L.R. 548.
[11] (1956) 35 A.T.C. 349.
[12] [1901] 2 K.B. 336; 17 T.L.R. 488.

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Inland Revenue Commissioners [13]; *Horsfall* v. *Hey* [14]; *Garnett* v. *Inland Revenue Commissioners.*[15]

Cur. adv. vult.

December 3. UPJOHN J. read the following judgment. In this case the Inland Revenue claim ad valorem duty on a deed of transfer dated June 26, 1956 (which I shall call " the transfer "), whereby four transferors were expressed to transfer 100,000 preference shares of 10s. each and 100,000 ordinary shares of 10s. each in a company known as William Jackson & Son Ltd. (which I shall call " the company "), to the appellant in consideration of ten shillings. The facts are fully set out in the case stated and only a brief recital of them is necessary. The Crown relies in support of its claim principally upon section 53 of the Law of Property Act, 1925.

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, the appellant was the tenant for life of the shares, the subject-matter of the transfer, and her son Peter was absolutely and indefeasibly entitled to the said shares subject to his mother's life interest therein. The trustees of the settlement were the transferors named in the transfer. By an oral agreement made on the same day, June 18, it was agreed between the appellant and Peter that Peter would on June 26, 1956, exchange his interests under the settlement and subsequent deeds for 28,510 fully paid preference shares of 10s. each and 44,190 fully paid ordinary shares of 10s. each in the company then owned by the appellant to the intent that the life interest of the appellant in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 26, by a deed of release between the appellant of the first part, Peter of the second part, and the trustees of the third part, the parties of the first and second parts gave a release to the trustees. There were the usual ample recitals of the history of the trust and I need notice only recitals (F) and (G) and the consideration. Recital (F) of the release recited the oral agreement I have mentioned, and continued: " The trust fund which now consists of one hundred " thousand fully paid preference shares of ten shillings each in " the capital of William Jackson & Son Limited and one hundred " thousand fully paid ordinary shares of ten shillings each in the " said company is accordingly now held by the trustees in trust " for Mrs. Oughtred absolutely as the trustees hereby acknow- " ledge and it is intended that the same shall forthwith be trans- " ferred to Mrs. Oughtred or as she shall direct (G) Mrs. " Oughtred and Peter being satisfied with all matters and things " relating to the execution of the trusts of the settlement have " agreed to make the release hereinafter contained Now in " consideration of the premises and of the transfer to be made

[13] [1936] W.N. 112; [1936] 1 All E.R. 617.

[14] (1848) 2 Exch. 778.

[15] (1899) 81 L.T. 633.

" as aforesaid this deed witnesseth . . .", and then followed the usual common form words of release to the trustees on the termination of a trust. On the same day the transfer was executed and the consideration moving from the appellant satisfied. It is not disputed that it operated to convey or transfer the legal estate in the shares from the trustees to the appellant and as such must bear 10s. stamp duty, but the Commissioners of Inland Revenue claim that it must be stamped ad valorem with the value of Peter's reversionary interest which he orally agreed to sell to his mother on June 18, and on that footing a sum of £663 10s. 0d. has been exacted by them.

The principal argument of the commissioners in support of their claim is to be found in paragraph 12 of the case stated and is to this effect. The agreement of exchange on June 18 (and for this purpose it is conceded on both sides that it is on all fours with an agreement of sale and purchase for a money consideration) was oral, and therefore, having regard to section 53 (1) (*c*) of the Law of Property Act, 1925, no equitable interest passed to the appellant. As I have just dealt at length in *Grey* v. *Inland Revenue Commissioners* [1] with that section, I do not read it again. Accordingly, the recital in the deed of release that the trust fund was " accordingly now held by the trustees in trust " for " the appellant was incorrect. Therefore Peter's equitable interest in the reversion passed on the transfer, which was accordingly a conveyance on sale of such equitable interest.

In my judgment Mr. Whitworth has provided a complete answer to that argument. It is to be found in section 53 (2) of the Law of Property Act, 1925, which is in these terms: " This " section does not affect the creation or operation of resulting, " implied or constructive trusts." This was an oral agreement for value, and accordingly, on the making thereof, Peter, the vendor, became a constructive trustee of his equitable reversionary interest in the trust funds for the appellant. No writing to achieve that result was necessary, for an agreement of sale and purchase of an equitable interest in personalty (other than chattels real) may be made orally, and section 53 has no application to a trust arising by construction of law.

It was said that if Peter became a trustee of the equitable interest for the appellant that showed that something (some scintilla of something possibly) remained in Peter which had to be transferred to the appellant to complete her *equitable* title. I do not follow the argument. As I have been at pains to point out in *Grey* v. *Inland Revenue Commissioners*,[2] there are several modes of transferring equitable estates. One is by the transferor declaring himself a trustee for the transferee. The same result must surely follow where the transferor becomes a trustee by construction of law. True, an agreement to sell an equitable interest may not be precisely on all fours with a conveyance of

[1] Ante, p. 168.

[2] Ante, p. 168.

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Upjohn J.

it. In the last-mentioned case the transferee may have the benefit of covenants for title by the transferor: *Inland Revenue Commissioners* v. *G. Angus & Co.*[3] But it cannot be doubted that on the making of an agreement for sale the equitable title to the property agreed to be sold passes to the purchaser and the recital in the deed of release to the effect that the trustees held the trust fund in trust for the appellant absolutely was in fact correct for the exchange consideration was executed contemporaneously. I do not, therefore, propose to deal with the interesting arguments I have heard that even if the recital was erroneous the doctrine of estoppel precludes the claim for stamp duty. In my judgment nothing passed under the transfer except the legal estate, and the principal argument on the part of the commissioners falls to the ground.

Mr. Wilberforce advanced a further point, not taken or at all events not clearly taken in the case stated, to this effect. Even if the deed of transfer passed nothing except the legal estate yet the deed of transfer was a conveyance on sale within the meaning of section 54 of the Stamp Act. Section 54 is in these terms: "For the purposes of this Act the expression 'conveyance on "'sale' includes every instrument, and every decree or order "of any court or of any commissioners, whereby any property, "or any estate or interest in any property, upon the sale thereof "is transferred to or vested in a purchaser, or any other person "on his behalf or by his direction."

The test was said to be: was the deed of transfer a transfer on the sale; and it was argued that the appellant became owner by virtue of the sale and the transfer was a transfer upon that sale. You must look at the facts of each case. Plainly it is not essential that the vendor should be a party. For example, where shares are in the names of nominees the transfer from such nominees is plainly a conveyance on sale, and despite Mr. Whitworth's submission to the contrary in such a case it is not necessary to mention expressly the equitable interest in the deed of transfer. In this case, however, the appellant could not call on the trustees to convey the shares to her merely upon proof of the oral agreement. They were entitled to say, and in this case presumably did say: "Here is a subsisting trust, and we will "not part with the trust assets except with the assent of every-"one who is interested in them upon having a release in the "usual way not only from you but from Peter. We are not con-"cerned with dealings between beneficiaries." Although the transfer was executed as a direct result of the agreement for sale and really upon the occasion thereof, still it remains, in my judgment, incorrect in the particular circumstances of this case to describe it as a conveyance on sale. The transfer was, in my judgment, a transfer not on sale but on the winding up of the trust and upon the release of the trustees. This point also fails.

[3] (1889) 23 Q.B.D. 579, 595; 5 T.L.R. 697.

The appeal must be allowed. The ad valorem duty must be repaid. I fix the duty at ten shillings.

Appeal allowed.

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Solicitors: *Moeran Oughtred & Co. for Robinson, Sheffield & Till, Beverley, Yorkshire; Solicitor, Inland Revenue.*

P. P.

[CHANCERY DIVISION.]

In re WHITWORTH ART GALLERY TRUSTS. MANCHESTER WHITWORTH INSTITUTE *v.* VICTORIA UNIVERSITY OF MANCHESTER AND ANOTHER.

1957 *Dec.* 12, 20.

Vaisey J.

[1957 W. No. 440.]

Charity—Scheme—Jurisdiction to sanction—Royal Charter, body incorporated by—Insufficient funds to maintain activities—Scheme to transfer premises and funds to another body.

The Manchester Whitworth Institute was incorporated by Royal Charter on October 2, 1890, its objects being, inter alia, the management and conduct of the Whitworth Art Gallery which contained a permanent collection of pictures and exhibition of textiles which was open to the public. The freehold of the building, the contents thereof and the investments held for its purposes were the property of the institute. The income of the institute having become insufficient to maintain its activities, the governors now sought the approval of a scheme for the management and administration of the trusts of the charity relating to the gallery, its contents and the investments and for the transfer of the premises to the Victoria University of Manchester on condition that the university as sole trustee should take over the art gallery and be solely empowered to manage it, and although keeping it open to the public should have facilities for using it at certain times exclusively for purposes connected with the university:—

Held, that a charitable corporation founded by Royal Charter could be regulated or controlled by the court especially on financial grounds and the court was entitled to have regard to changed circumstances; accordingly, the court had full jurisdiction to sanction the scheme and would do so.

Attorney-General v. *Governors of Christ's Hospital* [1896] 1 Ch. 879; 12 T.L.R. 242; *Attorney-General* v. *Earl of Clarendon* (1810) 17 Ves.Jun. 491; *Attorney-General* v. *Governors of the Foundling Hospital* (1793) 2 Ves.Jun. 41 considered.

ADJOURNED SUMMONS.

By this summons, the Manchester Whitworth Institute applied to the court for the settlement of a scheme for the administration and management of the trusts of the charity relating to the freehold property known as the Whitworth Art Gallery in the city of Manchester, and the contents thereof and the investments of moneys held for the purposes thereof, and for the transfer of the said premises by the applicants to the Victoria University of

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Manchester, upon the trusts and subject to the terms and conditions to be contained in such scheme.

The facts are summarized from the judgment of Vaisey J.

The applicants (hereinafter called "the institute") were established in 1890 for certain charitable purposes in connexion with the city of Manchester in memory of the late Sir Joseph Whitworth, Bt., with endowments provided out of his estate and subsequently increased by contributions from other sources. The institute was incorporated by Royal Charter dated October 2, 1890, and its objects as therein set forth were various. Subsequently the activities of the institute were confined to only a few of its objects, which may be summarized as follows:—

The institute acquired and laid out a public park known as the Whitworth Park adjacent to the land on which now stood the Whitworth Gallery hereinafter referred to, and the said park was demised by the institute for a term of 999 years at a peppercorn rent to the Manchester city corporation who undertook to maintain the same and had ever since done so. Further the institute took over, managed and developed, two institutions respectively known as the Manchester School of Art and the Manchester Technical School, but these had been transferred to the Manchester city corporation and there remained as the only activity in which the institute was engaged, the management and conduct of the Whitworth Gallery, hereinafter called "the gallery," being the museum and art gallery, open to the general public, which was situate on the south side of Manchester and about two miles from the centre of the city.

The gallery contained a permanent collection of pictures and other works of art and of textiles and other miscellaneous exhibits. Special exhibitions of works of art and textiles were from time to time held in the gallery, the freehold of which and of the site on which it stood was held by the institute in fee simple. The institute also owned the permanent exhibits therein and the furnishings and fittings thereof. It was the practice of the institute from time to time to lend the pictures and other works for exhibitions elsewhere than in Manchester. The gallery enjoyed a high reputation and provided a centre for persons interested in the pictorial arts. It was visited by students and other interested persons from various parts of the world. It possessed a famous collection of water colours and drawings, and its collection of textiles was of great historical interest and was particularly appropriate to Manchester as the centre of the Lancashire textile industry. The institute and the gallery had many well-wishers and supporters in Manchester and the surrounding districts, and the gallery had in the past received and continued from time to time to receive many gifts of works of art for exhibition and substantial additions had been made to its collections by private benefactors. An unofficial group of persons known as "The Friends of the Whitworth" actively interested

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themselves in the gallery and subscribed annually to a fund for its support.

The financial position became unsatisfactory; its income from all sources became insufficient to maintain the activities of the institute, while its current expenditure showed a continuing tendency to increase with no visible prospect of augmentation of its income from any source. The governors of the institute had come to the conclusion that soon the institute would either have to be closed down or its activities reduced to a scale unworthy of its traditions. Consequently, the Victoria University of Manchester had been approached with proposals for the transfer of the gallery to the university along with its contents and endowments and to the taking over by the university of the gallery as a museum and art gallery open to the general public but having a special connexion with the university similar to the connexion which united the Ashmolean Museum to the University of Oxford, or the Fitzwilliam Museum to the University of Cambridge. There had been a provisional agreement in the terms of the scheme, for which the approval of the court was now sought, which involved the followings conditions: first, that the university itself should be the sole trustee of the gallery and solely empowered to exercise all the functions of management vested in the institute and, secondly, that the university, though accepting the obligation to keep the gallery open to the public, should have special facilities therein for its own purposes for the instruction of art students, and to hold examinations, receptions, musical concerts and recitals therein, and for those purposes, when necessary, temporarily to exclude the public from the gallery or some part or parts thereof. It was represented to the court that it was proper to accede to these conditions, and that the university might be trusted to maintain the reputation and tradition of the gallery and for that purpose from time to time, as need arose, to supplement the income from endowments out of its own revenues, availing itself of the assistance and support of former members of the council of the institute and of the "Friends of the Whitworth," and particularly the services of Miss Margaret Pilkington, who had for many years acted as an honorary director of the gallery, so long as she was able and willing to continue to act in that capacity. The draft scheme was now submitted to the court for approval.

K. J. Elphinstone for the Manchester Whitworth Institute.
D. S. Chetwood for the Victoria University of Manchester.
Denys Buckley for the Attorney-General.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

December 20. VAISEY J. read the following judgment in

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which he stated the facts and, having said that the scheme put before him received his full approval, continued: The only question upon which a doubt was felt is the one upon which I must now give my decision, that is to say, whether this charity, having been founded by Royal Charter, is one to which the cy-près application may be directed on the ground of the sufficiency of its revenues. This question is answered in the affirmative in the text-books, especially Tudor on Charities, 5th ed., pp. 178–9, and Halsbury's Laws of England, 3rd ed., vol. 4, pp. 416–7. In fact, however, the question cannot be answered either affirmatively or in the negative without qualification, and the proper principle and true test to be applied may, in my judgment, be stated somewhat as follows.

But I turn first to one of the latest cases on the subject, *Attorney-General* v. *Governors of Christ's Hospital*,[1] which, at first sight, seems to be contrary to the statements in the text-books. The difficulty of the decision is to discover whether it would have gone the other way if the existing governing body of the institution had supported the proposed scheme which was there sought to be sanctioned instead of opposing it, as they did. The following passage from the judgment of Chitty J. reads as follows[2]: "The extent and the limits of this jurisdiction [the "jurisdiction of the court] were fully discussed in the argument. "Many authorities bearing more or less on the present case "were cited, and reference was made to an able and useful "dissertation on the subject contained in the report of the Royal "Commissioners mentioned in the preamble of the Act of 1869, "and in great measure founded on the opinions given in evidence "before the commission of eminent lawyers, such as Lord "Westbury, Lord Hatherley, Sir Roundell Palmer, Mr. Wickens, "and others. For the purposes of this decision, however, I think "it unnecessary to examine critically the authorities cited or the "opinions referred to. I prefer to state my own opinion broadly. "I hold that it is beyond the jurisdiction of the court to sanction "the Attorney-General's scheme in the face of the opposition "of the existing governing body. Their title is founded on Royal "Charter, and is established by Act of Parliament. To whatever "lengths the court may have gone, it has never assumed legis-"lative authority; it has never by a stroke of the pen at one and "the same time revoked a Royal Charter and repealed an Act of "Parliament. It has never ousted from its rights of administer-"ing the charitable trusts such a body as the present governors "against their will, and that, too, in a case where no breach "of trust is charged. There is no authority in the books for any "such proposition. Yet such is the proposition which underlies "the Attorney-General's scheme. I consider that I am not at "liberty to deprive the existing governing body of their right of "control over the income of the funds vested in them, either

[1] [1896] 1 Ch. 879; 12 T.L.R. 242.

[2] [1896] 1 Ch. 879, 888, 889.

" permanently, as proposed by the scheme, or temporarily, as " suggested by the Attorney-General in his reply. In a word, " I cannot, under guise of executing the trusts cy-près, upset the " constitution of the present governing body, or, by transferring " their powers and duties of administering the trusts to another " body, reduce them to the position of being bare trustees of the " funds vested in them. To establish such a scheme as that " submitted by the Attorney-General, nothing less than an Act of " Parliament will suffice."

I have looked at some of the authorities cited in the *Christ's Hospital* case,[3] and the proposition which seems to me to emerge from them is that a charitable corporation founded by Royal Charter cannot be re-founded or re-established by the court, but can be regulated and controlled by the court, especially on financial grounds, and in that case the court is entitled to have regard to altered circumstances: see *Attorney-General* v. *Earl of Clarendon*,[4] which seems to illustrate the nature of the distinction to be drawn. It was held that the court could not interfere in the matter of the election or amotion of the corporators, but could give directions by scheme as to the application of the income having regard to the founder's directions on the one hand and on the other to the alteration of circumstances which might under a literal adherence to them be adverse to their general object and spirit. The following passage appears in the judgment of Sir William Grant M.R.[5]: " With regard to the " application of the income, it is alleged, that some of the pur- " poses, to which it ought to be applied, are neglected; and that " part of it is applied to purposes, not within the scope of the " charity. The purposes, to which, after providing for the sus- " tentation of the school, the surplus income is to be applied, are " partly specified by the founder's rules; and partly left to the " discretion of the governors. As it appears, that the application " of the income is not in all respects agreeable to the directions of " the founder, I think, it is fit, that it should for the future be " fixed and ascertained by a scheme; having due regard on the " one hand to the founder's directions, and on the other, to the " alteration of circumstances, that may have taken place since " his time; and which may be such as to render a literal adherence " to his rules adverse to their general object and spirit."

The same principle seems to be illustrated by two of the cases relating to Berkhamsted School, founded by King Henry VIII and refounded by Act of Parliament in the reign of Edward VI; the first, *In re Berkhamsted School*,[6] recites a scheme of 1855 dealing with the insufficiency of the revenue at the foundation. The second, *In re Berkhamsted Grammar School*,[7] dealt with a similar predicament by means of a further scheme.

In *Attorney-General* v. *The Governors of the Foundling*

[3] [1896] 1 Ch. 879.
[4] (1810) 17 Ves.Jun. 491.
[5] 17 Ves.Jun. 491, 500.
[6] (1865) L.R. 1 Eq. 102.
[7] [1908] 2 Ch. 25; 24 T.L.R. 514.

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Hospital [8] Lord Commissioner Eyre says this [9]: "I am satisfied, "that this court has a jurisdiction, that is, a limited jurisdiction, "with regard to all things of this nature: but I am also satisfied, "that it has no such jurisdiction as the counsel have proceeded "on. There is nothing better established, than that this court "does not entertain a general jurisdiction to regulate and controul "charities established by charter. There the establishment is "fixed and determined; and the court has no power to vary it. "If the governors, established for the regulation of it, are not "those, who have the management of the revenues, this court "has no jurisdiction; and, if it is ever so much abused, as far as "respects the jurisdiction of this court, it is without remedy: "but if those, established as governors, have also the manage-"ment of the revenues, this court does assume a jurisdiction of "necessity, so far as they are to be considered as trustees of the "revenue. That is stated in the book upon charitable uses; and "referred to in several authorities; particularly in *Attorney-"General* v. *Smart* [10] and *Attorney-General* v. *Middleton.*[11] "The result is, this court must not hastily take upon itself to "interfere with those, who have by charter, and in this case by "Act of Parliament, the whole controul over this charity. But "where, having also the management of the revenues, they are "abusing their trust, the court has jurisdiction."

Attorney-General v. *Smart* [12] and *Attorney-General* v. *Middleton,*[13] cited in the *Foundling Hospital* case,[14] are earlier authorities which appear to define the limits of the court's jurisdiction, both of these decided by Lord Hardwicke L.C.

The draft scheme, with some slight alterations suggested and approved during the hearing, is, in my judgment, a fit and proper scheme which I have full jurisdiction to sanction, and I make the necessary order for that purpose.

Declaration accordingly.

Solicitors: *Pritchard, Englefield & Co. for Boote, Edgar & Co., Manchester; Treasury Solicitor.*

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[8] (1793) 2 Ves.Jun. 42.
[9] 2 Ves.Jun. 42, 48.
[10] (1748) 1 Ves.Sen. 72.
[11] (1751) 2 Ves.Sen. 327.
[12] 1 Ves.Sen. 72.
[13] 2 Ves.Sen. 327.
[14] 2 Ves.Jun. 41.

[PROBATE, ETC., DIVISION.]

1957 *Dec.* 18.
1958 *Jan.* 15.

Karminski J.

In the Estate of LAST, DECD.

Probate — Administration — Administration cum testamento annexo— Application for grant by persons claiming as beneficiaries under ambiguous will—Power of Probate judge to construe will—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5. *c.* 49), *s.* 162.

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Will—Construction—Absolute or life interest—Gift over of "anything "that is left" at donee's death.

A testatrix sought to dispose of her estate by a will in the following terms: "I give and bequeath unto my brother . . . All "property and everything I have money and otherwise. At his "death anything that is left, that came from me to go to my late "husband's grandchildren . . ." The brother duly proved the will and died intestate leaving no persons interested on his intestacy. The husband's grandchildren then applied for a grant of letters of administration cum testamento annexo de bonis non administratis claiming that, upon the true construction of the will, they were entitled in equal shares to the estate of the testatrix. The application was opposed by the Treasury Solicitor, who contended that the gift to the brother was absolute and that the estate should go to the Crown as bona vacantia:—

Held, (1) that where a grant is sought, the making of which depends upon the construction of a will, the Probate Court is not bound to deal with the point of construction and, according to the modern practice, will lean heavily against so doing. But it may make a grant to such person as it thinks expedient under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, and leave the matter of construction to be referred to the Chancery Division. Annual Practice, 1957, p. 3338, to the effect that the Probate Court must determine the matter and construe the will disapproved.

The possible depletion of the assets of a small estate is a consideration which may induce the judge of the Probate Court to deal with the question of construction and make a grant, and such a course was appropriate in the present case.

(2) That upon the true construction reached by reading the will as a whole and then seeking that construction which would most effectively express the intentions of the testatrix, the words used being sufficiently clear to cut down the brother's interest from an absolute to a life interest, the applicants were entitled to the estate in equal shares and hence to the grant as sought.

Constable v. *Bull* (1849) 3 De G. & S. 411 and *In re Sanford* [1901] 1 Ch. 939 followed.

In re Gouk [1957] 1 W.L.R. 493; [1957] 1 All E.R. 469 distinguished.

PROBATE MOTION.

The testatrix, Bertha Mary Last, died in April, 1953, having duly executed a will on December 2, 1940, which was written out by the testatrix herself on a printed will form. It did not appear that in the preparation of this will she had the benefit of any skilled advice.

The will revoked all earlier wills and appointed her brother, Tom Goodman Cotton, as her executor. The testatrix then sought to dispose of her estate in the following terms: "I give and "bequeath unto my brother Tom Goodman Cotton. All property "and everything I have money and otherwise. At his death "anything that is left, that came from me to go to my late "husband's grandchildren Claude Frederick George Baker "Harold George Last." The will was duly proved by Tom Goodman Cotton on June 17, 1953. On April 22, 1957, he died intestate and without issue or relations entitled to share in his

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estate in the event of an intestacy, nor had he appointed trustees of the trusts (if any) created by the will.

The applicants in the motion by which a grant of letters of administration with the will of December, 1940, annexed de bonis non administratis to the estate of the testatrix was sought were the late husband's grandchildren as named in the will. They claimed that, upon the true construction of the will and in the events which had happened, they were entitled in equal shares to the estate of the testatrix and contended that, upon the correct construction of the will, Tom Goodman Cotton took a life interest only in the estate, and that after his death the applicants became absolutely entitled thereto. The opposite view was canvassed by the Treasury Solicitor, who contended that Tom Goodman Cotton took the whole of the estate of the testatrix absolutely, and that, in the events which had happened, the estate should go to the Crown as bona vacantia.

J. W. Bygott-Webb for the applicants.

Victor Russell (*R. F. Hannay* with him) for the Treasury Solicitor.

Upon the case for the applicants being opened, Karminski J. expressed doubt whether he ought to determine a matter which was in substance one of construction, the Chancery Division being the appropriate Division for that purpose.

J. W. Bygott-Webb. I am seeking a grant of letters of administration to the applicants as those interested in the estate. In order that a grant may be made it is, therefore, essential to ascertain the true construction of the will, and in these circumstances the Court of Probate must determine the meaning and should decide all questions in controversy when it has the material before it: see the Annual Practice, 1957, p. 3338, *In the Estate of Lupton*,[1] in which the Probate Court did determine the question of construction in circumstances very similar to those of the present application, and *In bonis Frogley*.[2] The application is for a grant to the applicants and it is impossible to argue the matter on their behalf without raising the question of construction.

[KARMINSKI J. This court is not bound by the Annual Practice, and *In re Lupton*[3] was decided some 50 years ago. During recent times this court has strongly leant against dealing with questions of construction: see *In the Estate of Heys*, *per* Sir Samuel Evans P.,[4] and *In the Estate of Fawcett*,[5] *per* Langton J. Would not the proper course be to make a grant to some suitable person or body in pursuance of the powers vested in the court under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended, leaving the applicants to

[1] [1905] P. 321.
[2] [1905] P. 137; 21 T.L.R. 341.
[3] [1905] P. 321.
[4] [1914] P. 192, 200; 30 T.L.R. 637.
[5] [1941] P. 85; 57 T.L.R. 541; [1941] 2 All E.R. 341.

obtain a decision on a constructive summons in the Chancery Division before determining the question of a grant issuing to them?]

After hearing a plea ad misericordiam by both counsel, Karminski J., remarking that the modern view as to the function of the Probate Court was that that court should interfere in questions of construction as little as possible, ruled that he would determine the question of the construction of the will as a matter of convenience in order to avoid any further depletion of the assets of a small estate if reference to the Chancery Division had to be made.

The question of the true construction of the will was then argued. Counsel cited the following cases on the point of construction in addition to those referred to in the judgment: *Sherratt* v. *Bentley*[6]; *Bibbens* v. *Potter*[7]; *Watkins* v. *Williams*[8]; *Bowes* v. *Goslett*[9]; *In re Dunstan.*[10]

Cur. adv. vult.

KARMINSKI J. referred to the facts, remarking that they had resulted in a question of construction which had caused him some difficulty, and continued: The testatrix has, in consecutive sentences, made what appears to be an absolute gift of all her estate to her brother, but then added words which indicate a gift over on his death to the present applicants. With the aid of a number of authorities (some of which are themselves difficult to reconcile) I have to try to ascertain first the true principles of construction, and then to apply them in order to ascertain what were the testamentary intentions of this unskilled testatrix.

In his clear and careful argument, Mr. Bygott-Webb submitted that effect must be given to the whole of the words used by the testatrix, and that the additional words bringing in the applicants cannot be without purpose and must indeed prevail over the earlier words purporting to make an absolute gift to T. G. Cotton. It was further submitted by Mr. Bygott-Webb that the testatrix was very unlikely to have wished to benefit the Crown by the will, and that, therefore, the court should lean against a construction which would produce a result wholly inconsistent with the testatrix's wishes. It may well be that the testatrix did not intend the Crown to be the object of her testamentary bounty. It may be even more likely that such a possibility never even entered her mind. But if the true construction of this will warrants the conclusion that it gave the whole estate to T. G. Cotton absolutely, I cannot avoid such a conclusion only because it may produce a result which the testatrix did not clearly foresee and may not at all have desired.

Mr. Victor Russell, for the Treasury Solicitor, argued that the

[6] (1834) 2 My. & K. 149.
[7] (1879) 10 Ch.D. 733.
[8] (1851) 3 Mac. & G. 622, 629.
[9] (1857) 27 L.J.Ch. 249.
[10] [1918] 2 Ch. 304.

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gift to T. G. Cotton was absolute, and that the second part of the will was repugnant to the first. Mr. Russell further argued that to reduce T. G. Cotton's absolute interest, very clear words must be used: that there were no such clear words used here, and that the introduction of the applicants into the will was no more than a pious hope expressed by the testatrix to T. G. Cotton.

It will be observed that the testatrix has used these words in her will: "At his death anything that is left that comes from "me to go to my late husband's grandchildren." I find the difficulty stems from the use of the words "anything that is left." But for the introduction of these words I should have felt little difficulty in deciding that the testatrix intended to give a life interest only to T. G. Cotton. But the introduction of these words does not prevent the cutting down of an absolute interest to a life interest if the will itself supports such a construction (see Theobald on Wills, 11th ed., p. 434).

In *Constable* v. *Bull*,[1] the words used were "whatever "remains of my said estate and effects." It was there held by Vice-Chancellor Knight-Bruce [2] that these words prevented the widow from disposing of the property and that the other legatees mentioned in the will had a substantial interest. I do not think that there is any real difference in meaning between the words "whatever remains" and "anything that is left." In *In re Sheldon and Kemble* [3] a testator bequeathed, in substance, all his real and personal estate to his wife, but added the desire that at her death what might remain of his property should be equally divided among his surviving children. Kay J. refused to treat the gift over to the children as void, saying [4] that the case could not be distinguished from *Constable* v. *Bull*,[5] and he also said [6]: "If there is any sort of ambiguity, the court ought to adopt that "construction, which most effectively regards the testator's "intention, reading the whole will together."

In *In re Thomson's Estate*,[7] a testator left all his property real and personal to his wife to be disposed of as she might think proper and, in the event of her decease should there be anything remaining of the said property or any part thereof, to certain named persons. Vice-Chancellor Hall held that the widow took only an estate for life with a power of disposition only during her life, and not a power to dispose by will and that, therefore, what the widow had not actually disposed of in her lifetime was subject to the gift over.

I have so far discussed only some of the cases which have resulted in the defeat of an absolute interest, and in the establishment of a gift over. Both Mr. Bygott-Webb and Mr. Russell referred me to a number of decisions in the contrary sense. Thus, in *Henderson* v. *Cross*,[8] a testatrix left all her property to her

[1] (1849) 3 De G. & S. 411.
[2] Ibid. 413.
[3] (1885) 53 L.T. 527.
[4] Ibid. 528.
[5] 3 De G. & S. 411.
[6] 53 L.T. 527, 528.
[7] (1879) 13 Ch.D. 144.
[8] (1861) 29 Beav. 216.

father, but added these words: "Should my dear father not "spend the property which I leave in trust for him, it to be "equally divided between my two sisters." Sir John Romilly M.R. held this to be an absolute gift to the father, on the principle that the gift over did not cut down the previous interest but left it in the same state as it was before. See also *Perry* v. *Merritt*,[9] where, after a bequest of residue to a wife for her absolute use and benefit, a will directed that all the money (if any) that should be remaining at her death be divided between a daughter and her three children. Vice-Chancellor Hall held that the widow took an absolute interest in the residuary personal estate.

Perhaps the strongest authority in favour of the Treasury Solicitor's contention is *In re Jones*.[10] There a testator gave all his property to his wife "for her absolute use and benefit so that "during her lifetime . . . she shall have the fullest power to sell "and dispose of my said estate absolutely. After her death, as "to such parts . . . as she shall not have sold or disposed of . . . "I give devise and bequeath unto my brother . . . and to my "wife's sister . . . upon trust to . . . divide . . . among certain persons. Byrne J. held that the widow took an absolute interest in the testator's real and personal estate. Discussing the rules of construction in cases of this kind, he said [11]: "It is clear that if a "gift is made in terms to a person absolutely, that can only be "reduced to a more limited interest by clear words cutting down "the first estate. There is a principle also . . . that although "the words are absolute in the first instance, you may find "subsequently occurring words sufficiently strong to cut down "the first apparent absolute interest to a life interest."

In re Jones [12] was distinguished by Joyce J. on the facts in *In re Sanford*.[13] In the latter case a will and codicil had to be construed together, and the facts there were wholly different from the present case. But in the course of his judgment Joyce J. used [14] the following words which are of general application: "The adoption of the construction which I prefer has the not "unimportant merit of effectuating the obvious and expressed "intention of the testator, and if the terms of the codicil be "ambiguous . . . there is not wanting authority to shew that in a "case of obscurity or ambiguity . . . weight may be given to the "consideration that it is better to effectuate than to frustrate "the testator's intention."

Lastly, I would refer briefly to the recent decision of *In re Gouk*.[15] There a testatrix gave all the remainder of her estate to her sister and, thereafter, to her sister's issue. Danckwerts J. had to consider the meaning of the words "and thereafter,"

[9] (1874) L.R. 18 Eq. 152.
[10] [1898] 1 Ch. 438.
[11] Ibid. 441.
[12] Ibid. 438.
[13] [1901] 1 Ch. 939.
[14] Ibid. 943–944.
[15] [1957] 1 W.L.R. 493; [1957] 1 All E.R. 469.

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In the Estate of LAST, DECD.

Karminski J.

which he held to be indistinguishable from the word "after-wards." He held that the sister took absolutely, since there was no express reference to her death. I must distinguish that case from the present where the words used by the testatrix were "at his death."

In a matter of construction of this kind it is clearly essential to pay particular attention to the terms of the instrument which is being construed and to avoid too close comparisons with words used in wills in other cases. In this case, looking at the will as a whole, I have come to the conclusion that the words used are sufficiently clear to cut down T. G. Cotton's interest from an absolute to a life interest. Clearly there is an ambiguity, but I have attempted to read the will as a whole, and then to reach that construction which most effectively, in my view, expresses the intentions of the testatrix. I remind myself of the words of Joyce J. in *In re Sanford* [16]: "Weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intentions."

In the result, I find that upon the true construction of this will, the applicants are entitled in equal shares to the estate of the testatrix and to a grant of letters of administration with the will of December 2, 1940, annexed de bonis non administratis of the estate of the testatrix.

Order accordingly.

Solicitors: *Tapp, Blackmore & Weston for Cousins, Burbidge & Connor, Portsmouth; The Treasury Solicitor.*

E. J.

[16] [1901] 1 Ch. 939, 944.

[CHANCERY DIVISION.]

1957
Dec. 6, 9, 20.

WESTERN UNITED INVESTMENT CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

Upjohn J.

Revenue—Stamp duty—Conveyance or transfer on sale—Transfer by two documents—Agreement to sell shares and deed of transfer—Consideration payable over 125 *years—Whole amount due if instalment not paid—Whether duty on agreement as "primary security "for . . . sums of money at stated periods"—Whether duty on transfer payable on whole amount ultimately transferable—Interest on stamp duty repaid—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 13 (1) (4), 56 (2) (4), *Sch. I, para.* 1—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3.

By an agreement of May 9, 1956, the owner of certain shares agreed to sell them to the appellant company, the consideration being payable by 125 yearly instalments of £44,000 without interest, and amounting in all to £5,500,000. The first instalment under the agreement was payable on June 1, 1956. Clause 3 of the agreement provided that if the company should make default in payment of

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any of the instalments "after the same shall become due the whole "of the unpaid instalments shall become immediately payable . . ." The deed of transfer was also executed on May 9, 1956, for the convenience of the parties, but it was conceded that it should be treated for the purposes of stamp duty as if it had been executed on June 1, 1956.

The Inland Revenue Commissioners assessed the agreement to stamp duty of £13,750 (namely 5s. per £100 on the whole amount ultimately payable), under paragraph 1 of the First Schedule to the Stamp Act, 1891,[1] as being the only or principal or primary security for the periodical payments therein. They assessed the transfer to ad valorem duty pursuant to section 56 (2) of the Act at the rate of £1 for every £50 of the sum of £5,500,000, which under clause 3 of the agreement might become payable within the next 20 years. The company disputed the assessments but paid the amounts assessed and asked the commissioners to state a case under section 13 of the Act.

The company contended that the agreement was a "separate "instrument" for the purpose of section 56 (4) of the Act, and therefore chargeable with a duty of 10s. only; and that according to the terms of the sale the total amount payable under the agreement during the next 20 years was only £880,000 (i.e., 20 × £44,000) and that ad valorem duty on the transfer was only payable therefore on that amount, namely the sum of £17,600:—

Held, (1) that the exemption in section 56 (4) of the Stamp Act, 1891, was only granted where there was first a conveyance on sale which was chargeable with duty and in that document or in a separate contemporaneous or subsequent instrument a security; and it was not sufficient to find that the parties had executed a security, even though they might intend thereafter to execute a conveyance on sale; the assessment of duty of £13,750 on the agreement was therefore correct.

[1] The Stamp Act, 1891, s. 13: "(1) Any person who is dissatisfied "with the assessment of the commissioners may, within 21 days "after the date of the assessment, "and on payment of duty in conformity therewith, appeal against "the assessment to the High Court "of the part of the United Kingdom "in which the case has arisen, and "may for that purpose require the "commissioners to state and sign a "case, setting forth the question upon "which their opinion was required, "and the assessment made by them. ". . . (4) If it is decided by the court "that the assessment of the commissioners is erroneous, any excess of "duty which may have been paid "in conformity with the erroneous "assessment, together with any fine "or penalty which may have been "paid in consequence thereof, shall be "ordered by the court to be repaid "to the appellant . . ."

S. 56: "(2) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically "for a definite period exceeding 20 "years or on perpetuity, or for any "indefinite period not terminable with "life, the conveyance is to be charged "in respect of that consideration with "ad valorem duty on the total amount "which will or may, according to the "terms of sale, be payable during "the period of 20 years next after "the day of the date of the instrument. . . . (4) Provided that no conveyance on sale chargeable with ad "valorem duty in respect of any "periodical payments, and containing "also provision for securing the payments, is to be charged with any "duty in respect of such provision, "and no separate instrument made in "that case for securing the payments "is to be charged with any higher "duty than ten shillings."

Sched. I. "Stamp Duties on Instruments . . . Bond, covenant, or "instrument of any kind whatsoever ". . . (1) Being the only or principal "or primary security for . . . any sum "or sums of money at stated periods. ". . . Mortgage, bond, debenture, "covenant. . . ." [5s. per £100.] "Conveyance or transfer on sale—of "any property . . ." [£1 for every £50].

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(2) That clause 3 was a term of the contract which only came into operation if the terms of the sale were broken; and the terms of the sale for the purpose of section 56 (2) were those on which the parties contemplated payment would be made for the property —i.e., 125 instalments of £44,000—and not those only coming into operation if the contract were broken; the duty payable was therefore £17,600, and the balance of the duty which had been paid under the assessment should be repaid.

Underground Electric Railways Co. of London Ltd. v. *Inland Revenue Commissioners* [1906] A.C. 21; 22 T.L.R. 160 distinguished.

(3) That the company was not entitled to interest on the duty repaid, since payment of duty under section 13 (1) of the Stamp Act was not payment of a debt within the meaning of section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934,[2] and the court had no jurisdiction to award interest on the duty wrongly paid under the assessment.

APPEAL from the Inland Revenue Commissioners.

By this appeal the court was asked to determine the stamp duty payable on two instruments presented to the Inland Revenue Commissioners on behalf of the appellant company, Western United Investment Co. Ltd., by its solicitors under section 12 of the Stamp Act, 1891, for their opinion as to the duty payable. The case stated by the commissioners pursuant to section 13 of the Act, so far as relevant, provided:

2. The instruments in question were (i) an agreement dated May 9, 1956, made between Edmund Hoyle Vestey of the one part and the appellant company of the other part and (ii) a deed of transfer also dated May 9, 1956, whereby certain shares were transferred by Vestey to the appellant company.

3. The agreement provided in clause 1 thereof that Vestey should sell and the appellant company should purchase, for the sum of £5,500,000, 29,800 ordinary shares of £10 each and 35,058 5 per cent. cumulative second preference shares of £10 each in the capital of Frederick Leyland & Co. Ltd. Clause 2 of the agreement provided that the purchase money should be paid without interest by 125 yearly instalments of £44,000 each to be paid on June 1 in each year, the first such instalment to be paid on June 1, 1956. Clause 3 provided that if the appellant company should make default in payment of any of the said instalments or any part thereof for 90 days after the same should have become due the whole of the unpaid instalments should become immediately payable and should carry interest at £4 per cent. per annum from the expiration of such 90 days until payment. Clause 4 provided (inter alia) that upon payment of the first of the said instalments Vestey should execute and the company should accept a transfer of all the said shares.

[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 3: "In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

4. Notwithstanding the provisions of clause 4 of the agreement the transfer of the said shares was executed by Vestey on May 9, 1956. The circumstances in which both the agreement and the transfer were executed by Vestey on May 9, 1956, were set out in the following extract from a letter dated September 4, 1956, from Messrs. Chas. H. Wright and Brown, solicitors for Vestey and for the appellant company respectively, to the Controller of Stamps:—

"... Mr. Edmund Vestey was in Australia and was not "expected back and did not, in fact, arrive in this country until "June 20. In order that the documents should be available in "time for the first payment to be made on June 1, both agree- "ment and transfer were sent out to him by airmail and signed "by him on May 9, were executed on behalf of the Western "United Investment Co. Ltd., as soon as they arrived back "in this country, and were both presented for stamping at "the same time. The first instalment of £44,000 was paid on "June 1."

5. The transfer of the said shares was expressed to be made "in consideration of the sum of £5,500,000, payable by instal- "ments of £44,000 per annum over 125 years in accordance with "agreement dated May 9, 1956."

6. There was annexed thereto a copy of a letter dated May 4, 1956, from Messrs. Price, Waterhouse & Co. to one R. A. Vestey in which a partner in that firm considered the problem "What "would be a fair value to place on the shares in Frederick Ley- "land & Co. Limited owned by Mr. Edmund Hoyle Vestey for "the purpose of a sale to the trustees of a settlement on the "basis that the purchase money should be payable over a long "period, say 125 years," and came to the conclusion that "it "would be fair and reasonable for the shares to be sold in "return for annual payments of £44,000 extending over 125 "years."

7. (a) The commissioners were of the opinion that the agreement was the only or principal or primary security for the periodical payments therein referred to and they therefore assessed it by reference to the headings "Bond, covenant, or instrument "of any kind whatsoever (1)" and "Mortgage, bond, deben- "ture, covenant," etc., in the First Schedule to the Stamp Act, 1891, and other relevant statutory provisions to duty at the rate of 5s. for each £100 of the total amount of £5,500,000 ultimately payable, viz., £13,750. The commissioners were also of the opinion that the agreement was not a "separate instrument" for the purpose of section 56 (4) of the Stamp Act, 1891.

(b) As to the transfer, the commissioners were of the opinion that it was chargeable by reference to the provisions of section 56 (2) of the Stamp Act, 1891, and that having regard to the provisions of the agreement and in particular clause 3 thereof the sum which might be payable during the period of 20 years next after the day of the date of that instrument was £5,500,000

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and they, therefore, pursuant to section 56 (2) of the Stamp Act, 1891, assessed it to duty by reference to the heading "Conveyance or transfer on sale" in the First Schedule to that Act and other relevant statutory provisions at the rate of £1 for every £50 of £5,500,000, viz., £110,000.

8. The appellant company contended: (a) that the agreement was a "separate instrument" for the purpose of section 56 (4) of the Stamp Act, 1891, and was therefore chargeable with a duty of ten shillings only; (b) that according to the terms of sale the total amount which might be payable during the period of 20 years next after the day of the date of the transfer was £880,000 (20 × £44,000) and that duty at the rate of £1 per £50 by reference to the said heading "Conveyance or transfer on sale" should, pursuant to section 56 (2) of the Stamp Act, 1891, be assessed thereon making the duty properly chargeable on the transfer equal to the sum of £17,600 and no more.

Sir Andrew Clark Q.C. and *E. I. Goulding* for the Western United Co. Ltd.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown.

Cases cited in argument not referred to in the judgment: *Reynolds* v. *Coleman* [3]; *Mortgage Insurance Corporation Ltd.* v. *Inland Revenue Commissioners* [4]; *Yeo* v. *Dawe* [5]; *Underground Electric Railways Co. of London Ltd.* v. *Inland Revenue Commissioners* [6]; *Kenmare* (*Countess*) v. *Inland Revenue Commissioners* [7]; *National Telephone Co.* v. *Inland Revenue Commissioners* [8]; *British Italian Corporation* v. *Inland Revenue Commissioners* [9]; *Underground Electric Railway Companies of London Ltd. and Glyn, Mills Currie & Co.* v. *Inland Revenue Commissioners* [10]; *International Power and Paper Co. of Newfoundland* v. *Inland Revenue Commissioners* [11]; *In re McGreavy* (*otherwise McGreavey*).[12]

Cur. adv. vult.

December 20. UPJOHN J., having stated the facts, read the following judgment: The agreement and transfer both bore date of May 9 because at that time E. H. Vestey was in Australia and he found it convenient to execute both together. Sir Andrew Clark, for the appellant company, very fairly concedes, however, that the problem of stamping these documents must be approached upon the footing that the agreement was executed on

[3] (1887) 36 Ch.D. 453.
[4] (1888) 21 Q.B.D. 352; 4 T.L.R. 710.
[5] (1885) 1 T.L.R. 506.
[6] [1904] 2 K.B. 198; [1905] 1 K.B. 174, C.A.; [1906] A.C. 21; 22 T.L.R. 160, H.L.
[7] [1957] 3 W.L.R. 461; [1957] 3 All E.R. 33.
[8] [1899] 1 Q.B. 250.
[9] [1921] W.N. 220.
[10] [1916] 1 K.B. 306.
[11] (1933) 12 A.T.C. 413.
[12] [1950] Ch. 269; 66 T.L.R. (Pt. 1) 389; [1950] 1 All E.R. 442.

May 9 and the transfer on or after the payment of the first instalment on June 1.

Those are the facts and I now turn to the issues of law. First, as to the proper stamp duty on the agreement.

The commissioners contend that the agreement ought to be stamped under the heading in the First Schedule to the Stamp Act, 1891, "Bond, covenant or instrument of any kind whatsoever," and under paragraph (1) thereof, "Being the only or "principal or primary security for . . . any sum or sums of money "at stated periods." The duty under that heading would be 5s. per £100 on the total amount ultimately payable, i.e., £13,750.

It was at one time suggested by the appellant company that the agreement ought to be stamped under paragraph (2) of the heading as "a collateral or auxiliary or additional or substituted "security" with the fixed duty of 10s., but as it was plain that the only other document in the case was the transfer which was not (for the purposes of argument) in existence at the time and did not in any event operate as a security, that contention was abandoned in his reply by Sir Andrew.

It is clearly settled by at least two decisions of the Court of Appeal that the agreement surprisingly enough ought prima facie to be stamped as a security under the heading in the schedule which I have mentioned and that is not disputed. It is said, however, and this is the whole point on this part of the case, that the agreement is exempt under the provisions of section 56 (4) of the Stamp Act.

If that section does so operate then it is clear from the terms of section 1 of the Stamp Act that it effectively overrules the provisions in the schedule.

[His Lordship read section 56 (4) of the Stamp Act, 1891.]

At first sight that seems to fit this case exactly. There is a conveyance on sale which admittedly must bear ad valorem duty, namely, the transfer, and there is a separate instrument, namely, the agreement, made for securing the payments.

Mr. Wilberforce for the Crown, however, submits that the effect of the subsection is to exempt the agreement only if it comes into existence after the conveyance on sale. He places much reliance on the rather curious words in the subsection, "in that case." The scheme of the section is this, he submits: You may find provision for securing the payments in the conveyance on sale itself or you may find a conveyance on sale, and in that case, a separate instrument for securing payments. But you must, he submits, first find a conveyance on sale so that the security must be either contemporaneous or subsequent in point of time, and therefore, it being agreed that for the purposes of stamp duty the transfer is to be taken as dated on or after June 1, the conditions of the section are not satisfied.

He points out that if the agreement had been submitted for stamping on its date of execution the commissioners would not know whether in fact a conveyance on sale would be executed

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and, he submits, it would not be possible to say that the conditions of the section were satisfied.

Sir Andrew submits that you can look at all the circumstances and that the phrase "in that case" merely indicates that the subsection is to operate where the parties intend that the security is to be followed by a conveyance on sale.

Upon the whole, I have come to the conclusion that the submissions on behalf of the Crown are correct. In my judgment the exemption is to be granted only where you find first a conveyance on sale which is chargeable with duty, and in that document or in a separate contemporaneous or subsequent instrument a security; and it is not sufficient to find that the parties have executed a security, although they may be intending to execute a conveyance on sale hereafter.

This part of the appeal fails and I assess the duty at £13,750.

Secondly, as to the deed of transfer: No one doubts that this document has to be stamped ad valorem as a conveyance on sale, and as the consideration is payable by instalments the relevant provision is section 56 of the Stamp Act which is concerned, as the sidenote indicates, with periodical payments.

Subsection (1) is concerned with periodical payments for a definite period of less than 20 years and the total amount payable is taxed. Subsection (2) is in these terms: "Where the "consideration, or any part of the consideration, for a conveyance "on sale consists of money payable periodically for a definite "period exceeding twenty years or in perpetuity, or for any "indefinite period not terminable with life, the conveyance is to "be charged in respect of that consideration with ad valorem "duty on the total amount which will or may, according to the "terms of sale, be payable during the period of twenty years "next after the day of the date of the instrument."

Subsection (3) is concerned with payments during a life or lives and tax is paid on the instalments which may, according to the terms of sale, be payable during 12 years after the execution of the deed.

So in these cases the general policy of the legislature is to tax the instalments which may become due. It has been decided by the House of Lords in *Underground Electric Railways* v. *Inland Revenue Commissioners* [1] that money payable under section 56 includes money payable on a contingency, and Lord Lindley said [2]: "But the words of section 56 appear to me to be wide "enough to cover all moneys which may become payable and the "latter part of clause 2"—that is clearly a reference to subsection (2)—"certainly favours this construction."

The appellant company says that duty should be levied in the terms of subsection (2) upon 20 instalments of £44,000, i.e., £17,600.

Upon this question the Crown, however, presents this attractively simple argument on the terms of subsection (2): You must

[1] [1906] A.C. 21; 22 T.L.R. 160. [2] [1906] A.C. 28.

look at the terms of sale and see what will or may, according to those terms, be payable in the first 20 years. One of the terms is clause 3. That " may " come into operation within the 20 years and thereupon the whole of the instalments will become payable. Accordingly, the whole number of instalments, aggregating £5,500,000, may become payable and ad valorem duty on that amounts to £110,000. The argument may be summarized thus: that in one contingency all the instalments may become payable; that is, if the contingency happens upon which clause 3 operates then there is an acceleration so that all the instalments may become payable within the 20 years.

I do not agree with that argument. Clause 3 is in a literal sense a term of the sale in that it is an undoubted term of the contract of sale. But it is a term of the contract which only comes into operation if the terms of sale be broken. The terms of sale for the purposes of section 56, in my judgment, are the terms of sale upon which the parties contemplate that the property will be paid for, i.e., 125 annual instalments of £44,000. The terms of sale do not, in my judgment, comprehend terms of the contract of sale which come into operation if, but only if, the agreed terms of sale are broken. You may call that a contingency; I do not think that Lord Lindley, in the passage I have quoted, had in mind for one moment as a contingency, a provision of the contract that would only come into operation if the agreed terms of sale were broken.

It seems to me that the whole structure of section 56 negatives the literal construction placed upon it by the Crown.

Each of the first three subsections seems to me to proceed upon the footing that the contract is going to be carried out according to the primary intention of the parties. Instalments may be paid over a period less than 20 years (subsection (1)), over 20 years or an indefinite period (subsection (2)), or for a life or lives (subsection (3)). The Act contemplates that the payments will go on throughout the period, whatever it may be, in accordance with the tenor of the agreement, and will not be brought to a sudden end by a breach of the terms of sale agreed and the operation of some provision wisely inserted to deal with such an eventuality.

I allow the appeal on this part of the case. I assess the duty at £17,600 and order the return of the balance of £92,400, which has been paid.

The final question is whether I can order interest to be paid on the sum ordered to be repaid by the Crown. In contrast to the Income Tax Acts there is no provision for payment of interest contained in section 13 of the Stamp Act, and the claim is based on section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, which by section 24 of the Crown Proceedings Act, 1947, binds the Crown. [His Lordship read section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934.]

The real question is whether this sum can be described as a debt, and these proceedings as proceedings for recovery of a debt.

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That must depend on the true construction of section 13 (1) and (4) of the Stamp Act. [His Lordship read section 13 (1) and (4) of the Stamp Act, 1891.]

As a condition precedent to an appeal the appellant has to pay the duty and the document is stamped accordingly. In my judgment that gives rise to no relation of debtor and creditor at all. Of course, subsection (4) in justice to the subject makes provision for repayment where there has been an overpayment in complying with subsection (1), but that cannot affect the fact that the original payment was a payment of stamp duty. In my judgment the payment under section 13 cannot be brought in as a debt under the umbrella of the Law Reform (Miscellaneous Provisions) Act, 1934, nor can these proceedings properly be described as proceedings for recovery of a debt. Accordingly there is, in my judgment, no jurisdiction to order payment of interest.

Appeal allowed as to one issue and dismissed on the others.

Solicitors: *Charles H. Wright & Brown; Solicitor of Inland Revenue.*

I. G. R. M.

[CHANCERY DIVISION.]

1957
Dec. 12, 13, 16.

Danckwerts J.

GRACE RYMER INVESTMENTS LTD. *v.* WAITE AND OTHERS.

[1957 G. 609.]

Landlord and Tenant — Rent restriction — Premium — Rent paid in advance—Three years' rent paid in advance by tenants—Whether such prepayment a premium—Flats let before mortgage—Whether tenancies invalidated—Right of mortgagee to possession—Whether "overriding interest" in occupants of flats—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 40), *s.* 2 (1) (5) (6).
Land Registration—Effect of registration—Mortgage—Land Registration Act, 1925 (15 & 16 *Geo.* 5, *c.* 21), *ss.* 20 (1), 27, 70 (*g*) (*k*).

By a legal charge dated December 30, 1955, certain freehold property was charged in favour of a company to secure the repayment of the principal sum of £1,700, and it was provided that, if default was made by the mortgagors in payment of two monthly instalments, the principal money should become due and the statutory rights of the company should become exercisable. The property and the legal charge were duly registered at the Land Registry.

The property had, at the date of the legal charge, been divided into three flats, which were, in the latter half of 1955, let to three tenants who had been required to pay three years' rent in advance. Default having, in July, 1956, been made by the mortgagors in payment of the instalments, proceedings were commenced by the company for payment of the principal and interest and (the

mortgagors having failed to comply with the order) proceedings were, on April 8, 1957, commenced for delivery of possession of the property.

The tenants of the flats claimed that, having paid to the mortgagors sums by way of rent in advance, they were entitled to remain in occupation of the flats, on the ground that they were protected by the Rent Restriction Acts:—

Held, that the payments were within the scope and object of section 2 of the Landlord and Tenant (Rent Control) Act, 1949,[1] and were premiums unlawfully demanded by the landlord; that the fact that the tenants were compelled unlawfully to pay a premium to the mortgagors did not affect the validity of their tenancies, for the Rent Acts do not treat the tenant as tainted by the offence committed by the landlord; and that they were entitled to remain in possession and to deduct from their rents the amounts which they had paid, unless they elected to attempt to recover from the mortgagors the proportion referable to the future.

City Permanent Building Society v. *Miller* [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621, and *Woods* v. *Wise* [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767 considered.

ADJOURNED SUMMONS.

By a legal charge dated December 30, 1955, and made between Peter William Waite, Derek Walter Waite and William Henry Waite (the mortgagors) of the one part, and the plaintiff company of the other part, the freehold property known as No. 8, Church Rise, Lewisham, registered at the Land Registry under title number 309940, was charged by way of legal mortgage in favour of the plaintiff company to secure the repayment of a principal sum of £1,700, and the payment in the meantime of interest thereon at the rate of 6 per cent. per annum with a proviso that, if the mortgagors should pay to the plaintiff company the said principal sum, together with interest by monthly instalments of £16 18s. on the first day of each month, the plaintiff company would accept payment of such instalments in satisfaction of the said principal moneys and interest thereby secured.

By clause 7 of the legal charge it was provided (inter alia) that if default should be made by the mortgagors in payment of any two consecutive monthly instalments, the whole of the said principal money and interest should become immediately due and payable and the statutory rights of the plaintiff company should forthwith become exercisable.

In July, 1956, default having been made by the mortgagors in payment of the instalments, the plaintiff company commenced

[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: "(1) A person "shall not, as a condition of the "grant, renewal or continuance of "a tenancy to which this section "applies, require the payment of any "premium in addition to the rent . . . "(6) A person requiring any pre- "mium in contravention of this sec- "tion shall be liable on summary "conviction to a fine not exceeding "one hundred pounds, and the court "by which he is convicted may order "the amount of the premium, or so "much thereof as cannot lawfully be "required under this section, to be "repaid to the person by whom it was "paid."

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proceedings for payment of the principal and interest due under the legal charge, and on October 10, 1956, judgment was given in favour of the plaintiff company for £1,655 10s. 10d. (which included £1,612 8s., the balance of the principal sum of £1,700 remaining unpaid). At the date of the commencement of the present proceedings the judgment remained wholly unsatisfied and the principal sum of £1,612 8s. remained outstanding on the security of the legal charge. The property comprised in the legal charge had been, at that date, divided into three flats, the ground floor flat being occupied by Terence Neill and his wife, Margaret Patricia Neill, the first floor flat by Frederick Spurling, and the second floor flat by Alexandrina Hitchen.

These proceedings were commenced on April 8, 1957, a summons being taken out by the company (the mortgagees under the legal charge) "for an order pursuant to Ord. 55, r. 5A of the "Rules of the Supreme Court for delivery to the plaintiffs of "possession of the property comprised in a legal charge dated "December 30, 1955, and made between the three first-named "defendants [Peter William Waite, Derek Walter Waite and "William Henry Waite (the mortgagors)] of the one part and "the plaintiffs of the other part." The remaining four defendants were the occupants of the three flats.

The plaintiff company claimed to be entitled to possession of the whole of the property as mortgagee and had called on the defendants who occupied the flats to give up possession thereof. Each of the tenants refused to give up possession and claimed to be entitled to remain in possession of the flats occupied by them respectively as tenants of the mortgagors.

By a contract dated December 30, 1955, the property was sold to the mortgagors, and they were duly registered as proprietors thereof at the Land Registry on January 9, 1956, on which date the legal charge was also registered.

With regard to the transactions between the tenants and the mortgagors, Terence Neill stated, in his affidavit, that he and his wife, on October 11, 1955, paid to the mortgagors a sum of £401 15s., purporting to be three years' rent in advance, of a flat at a property known as 183, Devonshire Road. They never went into possession of that flat, but in December, 1955, they took possession of the ground floor flat at 8, Church Rise, Lewisham. Neill submitted that he had a weekly tenancy of the flat protected by the Rent Restriction Acts which was binding on the plaintiffs.

Frederick Spurling claimed to have paid to the mortgagors by way of rent in advance in respect of the first floor flat an aggregate sum of £315 18s., and (mutatis mutandis) made the same submissions and denials as those made by Mr. Neill in his affidavit.

Alexandrina Hitchen, the tenant of the second floor flat, paid the sum of £315 18s. as rent in advance and to save repetition

also made, in her affidavit, the same submissions and denials (mutatis mutandis) as those made by Mr. Neill in his affidavit.

Further details regarding these transactions are fully stated in the judgment.

Peter Oliver for the plaintiff company.

Norman Stogdon for the defendant tenants of the flats.

In addition to the cases referred to in the judgment the following were cited in argument: *Rush* v. *Matthews* [2]; *Montagu* v. *Browning* [3]; *Mornington Permanent Building Society* v. *Kenway*.[4]

DANCKWERTS J. This is a summons by a mortgagee, asking for an order for possession of certain property known as 8, Church Rise, Lewisham, in the County of London. I am afraid it is another case of the kind of fraud perpetrated by the Waites (a father and two sons), who have been responsible for other litigation of a similar type. They are the mortgagors, but they have not appeared at the hearing before me. The pattern of these cases is that the Waites arrange to purchase properties with the aid of a mortgage, and then let off the properties in flats, obtaining some three years' rent in advance from the prospective tenants. When the Waites fall into arrears with their mortgage payments and the mortgagees seek to enforce their security and obtain possession of the mortgaged property, they find themselves faced with the claims of tenants to retain occupation of the property for which they have paid three years' rent in advance. The situation, therefore, is that either the mortgagees are deprived of the full benefit of their security or the unfortunate tenants will lose the benefit of the considerable sums which they have paid, representing a loss which they cannot easily replace.

In the present case, by a contract dated November 28, 1955, the Waites agreed to purchase the freehold property, 8, Church Rise, Lewisham, from Colonel George Sinclair (who is the manager of the plaintiff company) for the price of £2,300. By the terms of the contract the vendor agreed to leave on mortgage the sum of £1,700 repayable over a period of 12 years at 6 per cent. interest by monthly instalments of principal and interest of £16 18s., and the mortgage deed was to be in the form already agreed. The National Conditions of Sale were incorporated in the contract, and condition No. 7 provides that if the purchaser is let into occupation of the property before the actual completion of the purchase, then, as from the date of his going into occupation and until actual completion, the purchaser shall be the licensee and not the tenant of the vendor.

[2] [1926] 1 K.B. 492; 42 T.L.R. 287.

[3] [1954] 1 W.L.R. 1039; [1954] 2 All E.R. 601.

[4] [1953] 1 Ch. 382; [1953] 2 W.L.R. 859; [1953] 1 All E.R. 951.

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Completion was to be on or before December 19, 1955, but in fact completion took place on December 30, 1955. The property was registered with absolute title under the Land Registration Act, 1925. On December 30, 1955, a transfer in accordance with the requirements of the Act was executed by Colonel George Sinclair in favour of the Waites, and on the same day a registered charge was executed by the Waites in favour of the plaintiff company to secure the principal sum of £1,700 with interest at 6 per cent. per annum repayable by monthly instalments of £16 18s. over a period of 12 years. There was the usual provision making the whole balance secured immediately payable in case of default in payment of two consecutive instalments. The statutory powers of leasing were not excluded or limited by the charge. Both these transactions were completed by registration in accordance with sections 19 and 26 of the Land Registration Act, 1925, on January 9, 1956. In regard to all these matters the same solicitors acted for Colonel George Sinclair and the plaintiff company.

On July 12, 1956, instalments being in arrear, the plaintiff company started proceedings against the Waites, and on October 10, 1956, obtained judgment against them for £1,655 10s. 10d. and costs. On July 26, 1956, the plaintiff company appointed a receiver. As a result of the receiver's attempts to collect rents, the claims of the last four defendants, Mr. and Mrs. Neill, Frederick Spurling, and Mrs. Alexandrina Hitchen, came to the notice of the plaintiff company. Mrs. Neill does not claim to be a tenant.

There are three flats in the property, Mr. and Mrs. Neill are in the occupation of the ground floor flat. As a result of seeing an advertisement of unfurnished flats, Mrs. Neill went to the Waites' office and was taken to see a flat at 183, Devonshire Road, Forest Hill. She was told that the rent was £2 11s. 6d a week (inclusive of rates) and was asked for three years' rent in advance. Accordingly she paid by cheque to the Waites the sum of £401 15s., and received from them a receipt dated October 11, 1955, for that sum "as advance rent." The receipt stated that this was payable to the Waites as "stakeholders" and that moneys were deemed to be returnable in the event of non-acceptance of tenancy by either party. It was also stated that at the end of the advance term, rent was to be paid weekly or by mutual arrangement, and that the £10 10s. letting fee was not payable until the tenant was accepted and received the key. Some time later, however, Mrs. Neill was told by the Waites that she could not have the flat, and was offered the flat at 8, Church Rise. After considerable trouble with the Waites over the preparation of the flat for occupation, during which period Mrs. Neill had a baby, the Neills managed to get into occupation on December 17, 1955. The Neills were told that the rent of this flat would be 2s. a week more than the one previously seen, making a weekly rent of £2 13s. 6d. Neill

wanted some record of their tenancy and after a good deal of trouble he obtained from the Waites on January 30, 1956, a rent book containing receipts for weekly rents of £2 13s. 6d. for three years, but the last six entries were cancelled, as Mr. Neill refused to pay any more money down in respect of the increased amount of the rent due to the extra 2s. a week.

As a result also of an advertisement, Spurling called on the Waites on August 22, 1955, and was shown a flat at 6, Sydenham Park which was said to be available at a rent of 36s. per week. He paid a deposit of £25 and on August 26, 1955, he paid a further sum of £290 18s., making a total of £315 18s. All this was paid in cash, and he was given a receipt in similar terms to that given to the Neills. His wife, however, did not like the flat, and subsequently they were shown a number of other flats. Eventually they were shown a flat on the first floor of 8, Church Rise, Lewisham, for which they were told the rent would be higher. Spurling did not object to that, but said that he could not pay any more in advance and so the Waites agreed to reduce the period for which the rent was paid in advance. After completion of decorations Mr. and Mrs. Spurling managed to get into occupation on December 16, 1955. Subsequently they were given a rent book showing that Spurling had paid £315 18s. for rent in advance at the rate of 49s. 6d. per week inclusive of rates from December 16, 1955.

Mrs. Alexandrina Hitchen, as the result of the Waites' advertisement, telephoned and was given the Waites' address. Accordingly her sister, Mrs. Taylor, went there and was taken by one of the Waites to 8, Church Rise, and was shown a flat, the rent of which was to be £2 0s. 6d. per week inclusive, three years' rent being asked in advance. Mrs. Taylor paid £100 to the Waites as a "holding deposit" on behalf of her sister. Mrs. Hitchen called next day, October 19, and was shown the flat (which was on the top floor) and was told that she could occupy it when it was completed—in a month or six weeks. Accordingly she gave the Waites a cheque for £315 18s., and was told there would be a letting fee of £10 10s., when she received the key. She received the key about a month later by post, but she had considerable trouble in getting the Waites to complete the decorations. Finally, with the assent of the Waites as a result of an ultimatum from Mrs. Hitchen, it appears, Mrs. Hitchen moved her furniture into the flat on December 27, 1955, and on December 28 she went in and spent a night there. She then fell ill, however, and went to her sister to be looked after. When, later, she received a rent book, it contained receipts for a weekly rent of £2 0s. 6d., starting on December 31, 1955, and ending with an entry for December 24, 1958.

The question arises, therefore, whether these defendants have tenancies of their respective flats, which are effective against the claim of the plaintiff company to an order for possession of the property.

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Now, it is to be observed, first of all, that this is not a case where the question depends on the exercise by the mortgagors of the statutory powers of leasing conferred on mortgagors in possession by the Law of Property Act, 1925. In my view, it is clear that, in the case of each of the three tenants, there was an oral letting completed by entry on the part of the tenant before the date of the mortgage to the plaintiff company. This means, of course, that the letting was before the Waites' title was completed by the conveyance of the legal fee simple to them by Colonel George Sinclair on December 30, 1955, which was the date also of the mortgage. But, as the tenants were in possession before that date, there was a completion of their title, when the landlords received the legal estate, which preceded the mortgage to the plaintiff company: see *Woolwich Equitable Society* v. *Marshall* [1] and *Church of England Society* v. *Piskor*.[2] I am satisfied that the tenancies were, in each case, completed by entry before December 30, 1955. The facts that Mrs. Hitchen left the day after her entry because of her illness, and was charged no rent for the few days before December 31, 1955, seem to me to be immaterial.

Unless, therefore, the payment of the rent in advance created some objection, it seems to me that the tenancies were overriding interests prevailing over the plaintiff company's title under the Land Registration Act, 1925, as provided by section 20 (1) of that statute.

A point, however, has been taken on behalf of the plaintiff company on the terms of section 27 of the Land Registration Act, 1925. Section 19 (1) of the Act provides that the transfer of the registered estate in the land or part thereof shall be completed by the registrar entering on the register the transferee as the proprietor of the estate transferred, but until such entry the transferor shall be deemed to remain proprietor of the registered estate. Section 25 provides for the proprietor of any registered land creating a charge over the land by deed. Section 26 provides that the charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge. Section 27 provides that a registered charge shall, unless made or taking effect by demise or sub-demise, take effect as a charge by way of legal mortgage. Subsection (3) of this section provides that any such demise or sub-demise or charge by way of legal mortgage shall take effect from the date of the delivery of the deed containing the same, but subject to the estate or interest of any person (other than the proprietor of the land) whose estate or interest (whenever created) is registered or noted on the register before the date of registration of the charge.

The argument is, as I understand it, that the result produced by the subsection is that until registration the Waites had not

[1] [1952] Ch. 1; [1951] 2 T.L.R. 783; [1951] 2 All E.R. 769.

[2] [1954] Ch. 553; [1954] 2 W.L.R. 952; [1954] 2 All E.R. 85.

got the legal estate, but the plaintiff company, as mortgagees, had got a legal charge from the date of execution of the mortgage. This argument has not been put forward in any previous case, so far as I know, and it does not seem to me to be sound. I do not think that the subsection is dealing with the matter of legal estates or interests, but the form of a registered charge, and is simply designed to secure that the demise or sub-demise (or the equivalent rights in the case of a charge by way of legal mortgage) begin from the date when the charge is executed. In any case, the tenancies of the defendants in possession began prior to the date of the execution of the charge and so would, if not invalid, be effective against the plaintiff company under section 20 (1) of the Act.

To complete the references to the Land Registration Act, 1925, the enumeration of overriding interests in section 70 should be mentioned. This includes (section 70 (1) (*g*)): "The rights "of every person in actual occupation of the land or in receipt of "the rents and profits thereof, save where enquiry is made of "such person and the rights are not disclosed." There is also a reference in section 70 (1) (*k*) to "Leases for any term or interest "not exceeding twenty-one years, granted at a rent without "taking a fine." "Lease" includes a tenancy, but I think that this provision must be aimed at terms created by a document, as an oral letting completed by possession appears to be covered more appropriately by the previous provision (*g*) which I have mentioned.

The principal argument on behalf of the plaintiff company was that the payment of the large sums, supposed to represent rent in advance, were, in fact, premiums and were rendered illegal by the provisions of the Rent Acts. Therefore, it is said the tenancies of the defendants were unlawful and cannot prevail as the defendants who are in occupation are parties to the illegality. There are two propositions therefore: (1) the payments were premiums, and (2) being unlawful exactions by the landlords (the Waites) the tenants have no lawful tenancies.

It should be observed that there is no evidence that the weekly rents of £2 13s. 6d., £2 9s. 6d., and £2 0s. 6d., were in excess of the amounts recoverable as rent in view of the restrictions of the Rent Acts. In this case, at any rate, therefore, it would appear that the Waites were not attempting to recover excessive rents. They were, presumably, desirous of anticipating the rents payable over a period, with the object of producing lump sums, either in order to finance their purchase operations, or with the object of making a quick fortune and a departure with their gains.

It is necessary now to examine the authorities, some of which involve other operations of the Waites.

In *City Permanent Building Society* v. *Miller*[3] the Court of Appeal had to consider a case where a landlord (who purchased

[3] [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

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and mortgaged registered land) extracted three years' rent in advance from a prospective tenant. The circumstances, however, were not similar in certain important respects to those of the present case. By a document of October 15, 1950, the landlord acknowledged the receipt of £228, being three years' rent at 30s. per week in advance, and also agreed to grant to the tenant an unfurnished tenancy of the premises "for three years from "October 16, 1950, and thereafter on a weekly basis, at a rental "of 30s. per week." The tenant, however, did not go into occupation of the premises until January 15, 1951. By that time the landlord had completed his purchase of the premises, and a mortgage of them to the society. The mortgage was dated January 4, 1951, and the landlord was registered as proprietor of the premises and the society were registered as owner of a charge on January 11, 1951. In order to claim the benefit of an "overriding interest," it is plain that the tenant was compelled to rely on section 70 (1) (*k*) as a lessee at a rent without a fine. The decision of the Court of Appeal was against the tenant on the ground that at best the tenant had merely an executory agreement for a lease and not anything effective to create a term. It was unnecessary to decide whether the sum of £228 was a premium. Lord Evershed M.R. and Jenkins L.J. therefore expressed no opinion on the point. Lord Evershed M.R. said [4] (after referring to certain statutory definitions): "when regard "is also had to the ordinary sense of the words, there is much "to be said for the view that this sum, expressed to be an "advance payment of 30s. a week rent over three years, is "neither a 'fine' nor a 'premium.' On the other hand, it was "obviously a device, expressed in a particular way, on the "mortgagor's part to get a lump sum, and to substitute a lump "sum for a recurring weekly payment during the period from "October 16, 1950, to October 16, 1953. I do not wish to lend "any encouragement to the consequences which might flow from "a decision of this court that a lump sum paid like this, so as to "cover the financial obligations of the tenant for three years, was "not capable of being regarded as a fine or premium and thereby "to encourage persons of the mortgagor's calibre to enter into "transactions of this sort. I prefer for myself, therefore, to "express no view one way or the other upon the particular point "which commended itself to the judge, for I do not think it "necessary that I should." Jenkins L.J. also reserved his opinion on the point. Hodson L.J. expressed [5] an opinion more favourable to the view that the payment was a premium or fine, and added that "the tenant then could never have an 'overriding "'interest' consisting of an equitable right to specific perform- "ance, because the exaction of a premium by the mortgagor "would itself be a criminal offence, and the tenant would be a "party to the crime (see the Landlord and Tenant (Rent Control) "Act, 1949, s. 2)."

[4] [1952] Ch. 840, 847. [5] Ibid. 855.

The question whether the tenant was affected by the illegality was not argued, it would seem, and I infer that the Lord Justice assumed that the illegality would affect the tenant as well as the landlord, without having considered the matter more fully. I have had, however, the advantage of Mr. Stogdon's careful argument on this point.

Woods v. *Wise* [6] is a decision of the Court of Appeal, on a different kind of case, but it incidentally brings in the question of what is a premium. The standard rent of a flat was £263 10s. a year. The tenant did not want to pay so high an annual sum and preferred to pay an annual rent of £190 and a sum of £850 (described as "commuted rent") which represented the balance of the standard rent, discounted for payment in advance, and was granted a lease for 14 years. The tenant then attempted to recover the £850 as a premium paid contrary to the provisions of the Act of 1949. The action failed because the tenant failed to show that the landlord had "required" payment of the sum as a "condition" of the granting of the lease. Romer L.J.[7] made some observations indicating his view that, while in certain circumstances and to a limited extent the demand of some pre-payment of rent might be lawfully made by a landlord, the requirement of payment of substantially the whole of the standard rent in advance as a condition of granting a 14 or 21 years' lease or some other term of years would be within the scope and object of section 2 of the Act of 1949 and unlawful.

Hughes v. *Waite* [8] was a case before Harman J. concerning the operations of the same Waites, two of whom were stated to have fled the country and the third to be ill. The circumstances of this case differed from those of the present case, in that (1) the bargains were made before the Waites acquired any interest in the property and there was no evidence of any contract by the Waites to purchase before the date of completion which was October 26, 1955, when a registered land charge was also executed; (2) though the agreements with the alleged tenants were made before the date of the charge, they were not let into occupation until October 31, 1955, which was after the date of the charge, though before its registration on November 14, 1955. The rights of the parties, therefore, depended on the provisions of section 99 (6) of the Law of Property Act, 1925, which authorizes a mortgagor in possession to make leases "at the best rent that "can reasonably be obtained, regard being had of the circum-"stances of the case, but without any fine being taken." Harman J. held that the alleged tenants were mere occupiers on sufferance, and also that they had no valid tenancies at a rent as required by section 99 of the Law of Property Act, 1925, since, although the amounts were calculated by reference to so

[6] [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.

[7] [1955] 2 Q.B. 29, 55.

[8] [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

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many weeks' or years' rent, no periodical payment of rent was prescribed; and the payments were foregifts or fines.

Hitchcock v. *Waite*,[9] before Vaisey J., was another example of the methods of these Waites. Unfortunately the case appears only to have been reported (and, of course, in an abbreviated form) in *The Times* newspaper of May 30. It is difficult to discover the exact facts and the precise reasons which led to the conclusion reached by the judge. It appears that in November, 1955, the plaintiffs agreed to sell to the Waites the property for £2,000, of which £1,330 was to be left on mortgage. The transaction was completed in February, 1956. Meanwhile the Waites agreed to let the three flats in the property to three persons who paid sums equivalent to three years' rent in advance. Apparently, unlike the situation in the present case, the rents must have been calculated at rates above the standard or recoverable rents, as one of the three occupiers obtained a judgment in the county court for the recovery of a portion of the sum paid by him, though this judgment was never satisfied. Vaisey J. held that the rent paid in advance was plainly a premium and so unlawful under the provisions of the Rent Acts. He is reported as saying that its exaction, moreover, was a criminal offence by the Waites to which each of the so-called tenants would be a party, although he added that he could not fairly attach any moral blame to them. In this I infer that the judge was merely following the assumption made by Hodson L.J. in *City Permanent Building Society* v. *Miller*,[10] and I think it is probable that no argument was addressed to him on this point.

These are the most relevant cases, but I should add that the Court of Appeal seem to have been loth to lay down any firm principles in cases of this character, and have indicated that each case may well depend on the particular facts: see, for instance, *Rush* v. *Matthews* [11] and *Samrose Properties* v. *Gibbard*.[12]

I now turn to consideration of the two questions which I have mentioned, in regard to the facts of this case. The first is—were the sums paid premiums?

I think that it cannot be a premium or unlawful to require payment of rent in advance in every case. After all, it is well known that rents are often required to be paid in advance where the circumstances suggest that the tenant is not a very stable character. But it may well be that the demand of several years' rent in advance cannot be justified on any such ground. At what point is the line to be drawn? I apprehend that one test may be that if the demand is obviously a device to get over some provision of the law, and not merely a bona fide attempt to prevent the landlord being deprived of the ability to recover his rent, the transaction may be scrutinized and be shown to be something other than what it is called. In the circumstances of

[9] *The Times*, May 30, 1957, at p. 15.
[10] [1952] Ch. 840.
[11] [1926] 1 K.B. 492.
[12] Unreported, May 3, 1957.

the present case I am prepared to come to the conclusion that the payments were, as Romer J. said in *Woods* v. *Wise*,[13] within the scope and object of section 2 of the Rent Act of 1949, and premiums unlawfully demanded by the landlords.

If that is so, then it is plain that the landlords have committed an offence under the Rent Acts. But does it follow that the tenancies of the tenants are thereby rendered invalid, so that they can be turned out and be deprived of the property which they had expected to enjoy? In my view, a consideration of the terms of the Rent Acts leads to a different conclusion. First of all, I should state what I find to be the true effect of the dealings between the Waites and the tenants in the present case. In my view, the effect was that the Waites were saying: "We have "unfurnished flats to offer at weekly rents, inclusive of rates, "but you will have to pay three years' rents in advance." The prospective tenants, desperate to obtain accommodation, accepted this demand and handed over lump sums of money to the Waites. Eventually they were let into occupation of flats, but not until then, or just before, were the weekly rent, the date of commencement of the tenancy, and the other terms of the tenancies settled. By that time the Waites had an interest in the property under their contract to purchase. Neill and Spruling actually paid down their sums of money in regard to other flats, and only Mrs. Hitchen had the same flat in view all along, but I do not think that there is any materiality in this difference.

Secondly, I would observe that the Rent Acts are indubitably Acts passed for the protection of tenants and to restrain the demands of landlords. The material provisions of the Acts appear to be these. Section 2 (1) of the Act of 1949 (which replaced the repealed provisions of section 8 (1) of the Act of 1920), provides as follows: [His Lordship read subsections (1) and (6) and continued:]

It is clear that it is the act of the landlord which is forbidden and is an offence under these provisions. But the Acts treat the tenant as a victim, as the above-mentioned subsection, as well as the following provisions, show.

Subsection (5) of section 2 of the Act of 1949 gives the tenant the right to recover the amount of a premium which could not lawfully have been required.

Section 14 (1) of the Act of 1920 makes sums unlawfully obtained by a landlord recoverable from the landlord, and provides that any such sum may, without prejudice to any other method of recovery, be deducted by the tenant from any rent payable by him to the landlord. There is a similar provision in the Act of 1939. And it has been held that a tenant may recover a premium payment which he has made to a landlord, although he was aware that the payment of a premium was unlawful: *Gray* v. *Southouse*,[14] in which Devlin J. considered the matter very fully.

[13] [1955] 2 Q.B. 29.

[14] [1949] 2 All E.R. 1019.

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It is clear that these Acts do not treat the tenant as tainted by the offence committed by the landlord, and regard him as a person to be protected.

In the result, in my view, if the tenants in the present case were compelled unlawfully to pay a premium to the Waites, this does not affect the validity of their tenancies, and they are entitled to deduct from their rents the amounts which they have paid, unless they elect to attempt to recover from the Waites the proportion referable to the future (which presumably is unlikely).

Accordingly, I am unable to make an order for possession in favour of the plaintiff company.

Judgment for the defendants.

Solicitors: *A. Kramer & Co.; Humphrey Razzall & Co.*

J. L. D.

[QUEEN'S BENCH DIVISION.]

1957
Nov. 22, 23;
Dec. 5.
1958
Jan. 13.

Ashworth J.

WARNER *v.* SAMPSON AND ANOTHER.

[1955 W. No. 1371.]

Landlord and Tenant—Forfeiture of lease—Repudiation of landlord's title—Action by landlord for possession—General denial of statement of claim in defence—Denial of landlord's title by one of two executors — No defence by other executor — Reply by landlord forfeiting lease—Denial of title binding on both executors—Administration of Estates Act, 1925 (15 & 16 *Geo.* 5, *c.* 23), *ss.* 2 (2), 55.

Landlord and Tenant — Forfeiture of lease — Relief from forfeiture — Forfeiture by operation of law—Whether section applicable—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 146.

Barrister—Authority to bind client—Pleading—General denial effecting forfeiture of lease — No disregard of specific instructions — "Mistake"—Effect of forgetfulness binding on client.

Executor and Administrator—Executor—"Conveyance"—Lease—Disclaimer — Denial of landlord's title in defence of one of two personal representatives—Denial in defence not a "disclaimer"—Administration of Estates Act, 1925, *ss.* 2 (2), 55.

Practice—Pleadings—Action for possession—General denial—Whether amounting to forfeiture of lease.

By section 2 (2) of the Administration of Estates Act, 1925: "Where as respects real estate there are two or more personal "representatives, a conveyance of real estate devolving under this "Part of this Act shall not . . . be made without the concurrence "therein of all such representatives . . ." By section 55 "'con- "veyance' includes a mortgage, charge by way of legal mortgage, "lease, assent, vesting, declaration, vesting instrument, disclaimer, "release and every other assurance of property or of an interest "therein by any instrument . . ."

On April 27, 1955, a landlord issued a writ against two defendants, suing them as the legal personal representatives of the lessee and claiming possession of the demised property on the grounds of

non-payment of rent and breaches of covenant contained in the lease. The statement of claim, inter alia, referred to the lease, set out the title of the landlord and specified the breaches of covenant alleged. On May 27, 1955, judgment in default of appearance was entered against the first defendant. On June 14 the solicitors for the second defendant instructed counsel to draft a defence if only to stay the landlord's hand while efforts were made to remedy the breaches of covenants, and on June 15 a defence, signed by counsel, was delivered on behalf of the second defendant, in which she admitted that she was appointed executrix of the will of the lessee, and denied the alleged breaches of covenant; by paragraph 3: "Save and except for the admission herein contained this defen- "dant denies each and every allegation in the statement of claim "as if the same were specifically set out and traversed seriatim." On June 29 the landlord delivered a reply alleging that by that defence the second defendant had disclaimed and disputed the landlord's title as landlord and that she (the landlord) was entitled, and thereby exercised her right, to forfeit the term. On August 26 the judgment against the first defendant was set aside and, after an appeal by the landlord, the second defendant was given leave to amend, but not to withdraw, her defence. Thereafter a defence by the first defendant and the amended defence of the second defendant, both of which admitted the lease and the title of the landlord and contained a counterclaim asking for relief from forfeiture under section 146 of the Law of Property Act, 1925, were delivered, but the landlord contended that there was no jurisdiction to grant relief from the forfeiture resulting from the pleadings:—

Held, (1) that, on the construction of the pleading, the comprehensive denial in paragraph 3 of the second defendant's defence was a denial of the lease.

(2) That the denial was binding on the second defendant; it was due to a lapse or to forgetfulness on the part of counsel and was neither a mistake nor unintentional (in the sense that the mind of counsel did not go with his signature), nor was there any misunderstanding or disregard by counsel of specific instructions.

Neale v. *Gordon Lennox* [1902] A.C. 465; 18 T.L.R. 791 and *Lewis's* v. *Lewis* (1890) 45 Ch.D. 281 distinguished.

Barrow v. *Isaacs & Son* [1891] 1 Q.B. 417; 7 T.L.R. 175 considered.

(3) That it followed that had the second defendant been the sole lessee when her defence was delivered the lease would have been forfeited as soon as the landlord's reply was delivered.

Kisch v. *Hawes Brothers Ltd.* [1935] Ch. 102 applied.

(4) That the fact that the lease was vested in both defendants as executors did not prevent the denial from effecting a forfeiture, for the consequences of the denial of the title of a landlord in a defence by one of two executors were, in the absence of a defence admitting the title by the other, binding on them both, and such a denial was in essence a repudiation of the tenancy and not a "conveyance" within sections 2 (2) and 55 of the Administration of Estates Act, 1925. The "disclaimer" contemplated by the definition of conveyance in section 55 of the Act of 1925 is a document recognizable and identifiable as a disclaimer which would in the normal course start with the words "This disclaimer . . ." or contain the word disclaim; and, therefore, the definition does not include a denial of the title of a landlord contained in a pleading.

Simpson v. *Gutteridge* (1816) 1 Maddocks 609 and *Doe* d. *Ellerbrock* v. *Flynn* (1834) 1 C.M. & R. 137 applied.

(5) That the forfeiture arose by operation of law and not under any proviso or stipulation in the lease within the meaning of

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section 146 of the Law of Property Act, 1925, and that, therefore, the section had no application and the defendants were not entitled to ask for relief.

Held, further, that it was immaterial that the judgment against the first defendant was set aside in August, 1955, and that a defence admitting the title of the landlord was subsequently delivered on his behalf, because it was then too late as the landlord's right to forfeit had already accrued.

ACTION.

By a lease, dated February 23, 1905, a house, No. 18, Park Avenue South, Hornsey, was let by the plaintiff's predecessors in title for a term of 99 years from June 24, 1900, at a yearly rent of £8 8s. The lease contained covenants on the part of the lessee to repair, to paint both the inside and outside of the house, to register with the lessor's solicitors any change resulting from assignment on the death of the lessee or assignee and to keep the property adequately insured against fire. In 1931 the plaintiff's interest in the house became vested in her and at some date before the year 1947 the term became vested in Mrs. Gertrude Annie Sampson. Mrs. Sampson died on June 23, 1949, having by her will appointed the defendants, Arthur Cecil Sampson and Esther Mary Gandy, her executors and trustees. By clause 4 of her will Mrs. Sampson bequeathed the house to her trustees upon trust to permit the first defendant to use and occupy it or to receive the rents, profits and income thereof, he being responsible for all outgoings and for repairs and for insurance, and after his death in trust for her son and daughter; by clause 5 she directed her trustees to set aside out of the estate a sum of £200 as a fund to meet out of the capital and income thereof the cost of any claim for dilapidations at or near the expiration of the lease. On February 16, 1950, the will was proved.

For a few years after Mrs. Sampson's death the rent due under the lease was paid but no payment was made at Michaelmas, 1953 or 1954, or at Lady Day, 1954 or 1955. In January, 1955, the plaintiff served on each of the defendants notice of breaches of covenant. The second defendant was anxious about the position and in fact interviewed the plaintiff's solicitors, but the first defendant would not respond to persuasion or pressure by her and others that he should perform the covenants in the lease. As a result, on April 27, 1955, the plaintiff issued a writ against the defendants, suing them as the legal personal representatives of Mrs. Sampson, and claiming possession of the house, damages and mesne profits. In her statement of claim the plaintiff referred to the lease, stated that the lessor's interest in and title to the premises was vested in her, and alleged non-payment of rent and breaches of certain of the covenants in the lease. On May 27, 1955, judgment was entered against the first defendant in default of appearance.

On June 14 the solicitors then acting for the second defendant instructed counsel to draft a defence in order to stay the

landlord's hand while efforts were made to induce the first defendant to do something to remedy the matter, and counsel duly drafted and signed a defence which was delivered on June 15, 1955. That defence, by paragraph 1, admitted that the second defendant was appointed an executrix of the will, and by paragraph 2 denied that she had committed any breach of covenant; by paragraph 3: "Save and except for the admission "herein contained this defendant denies each and every allega- "tion in the statement of claim as if the same were specifically "set out and traversed seriatim."

On June 29, 1955, the plaintiff delivered a reply joining issue with the second defendant on her defence, and alleging that "2. By her said defence the second defendant has disclaimed "and disputed the plaintiff's title as her landlord, and the plain- "tiff is thereby entitled to forfeit the same term created by the "said lease referred to in paragraph 2 of the statement of claim. "3. The plaintiff hereby exercises her said right to forfeit the "said term, and claims to be thereby entitled to re-enter upon "the said premises."

On August 26, 1955, an order was made by Master Grundy setting aside the judgment against the first defendant and giving leave to the second defendant to withdraw her defence. The plaintiff appealed, and on October 6 Pearson J. varied the order by giving leave to the second defendant to amend (but not withdraw) her defence. On February 14, 1956, the defence of the first defendant and the amended defence of the second defendant were delivered, both of which defences, inter alia, admitted the lease and the title of the plaintiff and, having made certain other admissions, contained a counterclaim for relief from forfeiture under section 146 of the Law of Property Act, 1925. The plaintiff's reply alleged that the second defendant by her defence delivered on June 15, 1955, had denied the plaintiff's title "whereby the said term became and is forfeited to the "plaintiff and wherefor the plaintiff claims possession of the "said premises and mesne profits from date of forfeiture."

On November 8, 1956, the plaintiff died and the proceedings were by order continued as between her administratrices and the defendants.

L. G. Scarman Q.C. for the landlord.
J. H. Hames for the defendants.

The following cases were cited in argument: *Wisbech St. Mary Parish Council* v. *Lilley* [1]; *Gill* v. *Lewis* [2]; *In re Schar, decd.* [3]; *Scheyer* v. *Wontner* [4]; *Matthews* v. *Munster* [5]; *Leek and Moorlands Building Society* v. *Clark* [6]; *Lewis's* v. *Lewis* [7]; *Kisch*

[1] [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.
[2] [1956] 2 Q.B. 1; [1956] 2 W.L.R. 962; [1956] 1 All E.R. 844.
[3] 66 T.L.R. (Pt. 2) 1131; [1950] 2 All E.R. 1009.
[4] (1890) 90 L.T.J. 116.
[5] (1887) 20 Q.B.D. 141; 4 T.L.R. 102.
[6] [1952] 2 Q.B. 788; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492.
[7] (1890) 45 Ch.D. 281.

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v. *Hawes Brothers Ltd.*[8]; *Harvey* v. *Croyden Union Rural Sanitary Authority*[9]; *Neale* v. *Gordon Lennox*[10]; *Barton* v. *Reed*[11]; *Simpson* v. *Gutteridge*[12]; *Doe* d. *Ellerbrock* v. *Flynn*[13]; *Doe* d. *Graves, Downe* v. *Wells*[14]; *Midgley* v. *Midgley*[15]; *Peachey* v. *Duke of Somerset*[16]; *Barrow* v. *Isaacs & Son*[17]; and *Clifton Securities Ltd.* v. *Huntley.*[18]

Cur. adv. vult.

December 5. ASHWORTH J. read the following judgment, in which he stated the facts and continued: Shortly after the writ had been served on him, the first defendant attempted to make good his default in payment of rent, and there is included both in his defence and in the second defendant's amended defence a plea of tender. In the course of the hearing before me, Mr. Hames conceded on behalf of the defendants that this plea could not be maintained and I need not discuss it further.

Some of the breaches of covenant referred to in the statement of claim were admitted in the defence of the first defendant and the amended defence of the second defendant. In so far as they were not admitted, they were proved to my satisfaction by the plaintiff's surveyor, but he added that, when he visited the house six weeks ago, the breaches had in substance been remedied except for the renewal of a dilapidated boundary fence and the treatment of rot, which was visible by the window of the lower ground floor kitchen. It appears that in the course of the spring and summer of this present year a sum of £217 has been spent on paintwork and repairs.

It is to be noted that the pleading delivered on behalf of the second defendant in June, 1955, was a defence and nothing else: there was no counterclaim for relief against forfeiture. The amended pleading delivered in February, 1956, and the pleading then delivered on behalf of the first defendant, both included such a counterclaim. On behalf of the plaintiff it was contended that, having regard to the nature of the original defence delivered on behalf of the second defendant and the reply thereto, there was no jurisdiction to grant relief against the forfeiture resulting from those pleadings, and, with the assent of counsel on both sides, the argument was limited to that issue, on the understanding that if I decided it in favour of the defendants, I should then hear argument on the question whether relief should be granted in respect of the forfeiture related to the breaches of the express covenants contained in the lease.

For the purposes of the issue now under consideration, the

[8] [1935] Ch. 102.
[9] (1884) 26 Ch.D. 249.
[10] [1902] A.C. 465; 18 T.L.R. 791.
[11] [1932] 1 Ch. 362.
[12] (1816) 1 Madd. 609.
[13] (1834) 1 C.M. & R. 137.
[14] (1839) 10 Ad. & E. 427.
[15] [1893] 3 Ch. 282; 9 T.L.R. 505.
[16] (1721) 1 Strange 447.
[17] [1891] 1 Q.B. 417; 7 T.L.R. 175.
[18] 64 T.L.R. 413; [1948] 2 All E.R. 283.

terms of the defence delivered on behalf of the second defendant in June, 1955, are of crucial importance, and as the pleading is short, I quote it in full: "Defence of the second defendant: "1. This defendant admits that she was appointed an executrix "of the will of Gertrude Annie Sampson, deceased. as alleged in "paragraph 8 in the statement of claim. 2. This defendant "denies that she has committed the breaches of covenant speci- "fied in paragraph 9 of the statement of claim or any breach of "any covenant. 3. Save and except for the admission herein "contained this defendant denies each and every allegation in "the statement of claim as if the same were specifically set out "and traversed seriatim."

I expressly refrain from mentioning the name of counsel who drafted and signed this pleading. Mr. Hames, who conducted the defendants' case before me with tenacity and ability, was not responsible for it, and the solicitors who are now acting for both defendants were not then acting for the second defendant.

The first point may be described as a question of construction. Relying on the decision of the Court of Appeal in *Wisbech St. Mary Parish Council* v. *Lilley*,[1] Mr. Hames contended that denial by a tenant of his landlord's title must be clear and unambiguous if it was to be the basis of a claim for forfeiture, and that the pleading in question did not satisfy that condition. It was argued that the form of the denial contained in paragraph 2 impliedly admits the existence of the lease and of the covenants, the breaches of which are denied, and that the comprehensive denial contained in paragraph 3 must be construed in such a way as not to conflict with the admission implied in paragraph 2. In my judgment, however, the wording of paragraph 3 is too clear and too specific. Only one admission is excluded from the general denial, and that admission must obviously be the admission contained in paragraph 1. To give effect to Mr. Hames' contention would involve adding the letter "s" to the word "admission" in paragraph 3 or substituting some such expression as "save as aforesaid." In my judgment, the denial of the lessor's title contained in paragraph 3 is in clearer and more direct form than the denial held in *Kisch* v. *Hawes Brothers Ltd.*,[2] to be involved in the plea that the defendants were in possession.

Apart from the view which, for my part, I hold as to the meaning of the defence, there is another reason why I cannot give effect to Mr. Hames' contention. Those advising the defendants in August, 1955, no doubt realized the danger created by the pleading delivered on June 15, 1955, and they accordingly sought leave to withdraw it. If Master Grundy's order giving them such leave had not been varied, there would be much force in an argument to the effect that the damage (if any) had been undone. But Pearson J. did vary the order and his refusal to allow the second defendant to withdraw her defence indicates.

[1] [1956] 1 W.L.R. 161.

[2] [1935] Ch. 102.

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in my opinion, an intention on his part not to allow the plaintiff to be deprived of a right which had already crystallized, namely, to treat that defence as containing a denial of the lease. If I were now to hold that the defence did not involve a denial of the lease, I should be giving a decision which would be contrary to the spirit, if not the letter, of the decision of Pearson J., and I decline to do so.

Logically, the next point to consider is Mr. Hames' contention that the denial of the lease contained in the pleading was made by mistake or, alternatively, was not intended, and that in the circumstances the second defendant should not be regarded as bound by it. For the plaintiff, Mr. Scarman was prepared to accept that the denial was a mistake by counsel, by which he meant that counsel unfortunately overlooked the possible consequence of a pleading in the form drafted by him. There is, in my view, a risk of confusion in the use of the word "mistake" in this connexion. So far as the evidence goes, there is nothing to show that counsel did not intend to draft the pleading in the form in which it was delivered, or that he was in any way misled. The instructions sent to him were produced at the hearing before me by the solicitor who then acted for the second defendant, and it is clear from them that in the solicitor's view there was no defence to the claim that the covenants in the lease had been broken. Counsel was asked to draft a defence "if only to stay the hand of the ground landlord whilst efforts "are made to induce Sampson to do something in the matter." The defence certainly achieved the object of keeping the plaintiff out of possession but, as already stated, counsel overlooked the fact that, if and when the day of reckoning came, the pleading which he drafted might prove fatal. To avoid confusion, I should prefer to call this a lapse rather than a mistake on the part of counsel, and I cannot accept Mr. Hames' submission that "counsel's mind did not go with his signature." In this connexion reference was made on behalf of the plaintiff to the decision of the Court of Appeal in *Barrow* v. *Isaacs & Son*,[3] in which Lord Esher M.R. emphasized[4] the difference between mere forgetfulness and mistake. In my view, counsel's lapse was an instance of the former and not of mistake.

Alternatively, it was contended that the form of the defence was given to it "in the teeth of the second defendant's express instructions" that the asset in question forming part of Mrs. Sampson's estate was to be preserved for the benefit of her children. In support of this contention I was referred to *Neale* v. *Gordon Lennox*.[5] In that case the plaintiff was only prepared to consent to a proposed order if a certain condition were satisfied. Counsel appearing for her omitted to have this condition included when agreeing to the proposed order, and the House of Lords held that in the circumstances the plaintiff was

[3] [1891] 1 Q.B. 417.
[4] Ibid. 420.
[5] [1902] A.C. 465.

not bound by the agreement which her counsel had made. In my judgment, that case is plainly distinguishable from the present case, and I am quite unable to hold that counsel who drafted the second defendant's defence was disregarding specific instructions. I am not satisfied that any specific instructions beyond those which I have referred to were given to counsel; still less that any specific instructions were given by the second defendant herself. I was also referred to the decision of the Court of Appeal in *Matthews* v. *Munster*,[6] and of Kekewich J. in *Lewis's* v. *Lewis*.[7] Of these two decisions the former does not, in my opinion, assist the defendants in the present case, and the latter was expressly based on the existence of a misunderstanding. For the reasons already given, I am of opinion that there was no misunderstanding in the present case and, accordingly, the decision of Kekewich J.[7] is not applicable.

Before I deal with the complications arising out of the fact that the two defendants are the executors of Mrs. Sampson, I should perhaps state that if the second defendant had been in the position of a sole lessee in June, 1955, when her defence was delivered, there would have been no answer to the plaintiff's claim as soon as the reply was delivered. Apart from the decision in *Kisch* v. *Hawes Brothers Ltd.*,[8] reference may be made to *Barton* v. *Reed*,[9] and a discussion of that case in an article in 76 Solicitors' Journal, p. 73.

The proposition in regard to executors put forward on behalf of the plaintiff was that when one of two executors by his defence disputes the landlord's title, the other executor is bound by the consequences unless he has himself put in a defence admitting the title, in which event the principle contained in *Midgley* v. *Midgley* [10] would be applicable, namely, that the court will have regard to the plea most favourable to the deceased's estate. It was argued that in June, 1955, when the second defendant delivered a defence in which the plaintiff's title as landlord was denied, the first defendant having entered no appearance and indeed having suffered judgment to be entered by default, the plaintiff was entitled to forfeit the term and did so by her reply delivered on June 29.

In Bacon's Abridgment, 6th ed. (1807), Vol. 3, p. 30, there appears this passage: "Hence it hath been adjudged, that if "the testator dies possessed of a lease for years, and having made "two executors, one of them grants all his interest to a stranger, "that the whole term passes, for each had an entire authority "and interest different from other joint-tenants." In *Simpson* v. *Gutteridge* [11] the Vice-Chancellor said [12]: "Where one of the "several joint tenants, or tenants in common, executes a deed, "it passes only the share of the party so executing; but several

[6] (1880) 20 Q.B.D. 141.
[7] (1890) 45 Ch.D. 281.
[8] [1935] Ch. 102.
[9] [1932] 1 Ch. 362.
[10] [1893] 3 Ch. 282.
[11] (1816) 1 Madd. 609.
[12] Ibid. 616.

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" executors are considered only as one, and a gift, sale, surrender, " payment, release, or judgment confessed by one executor, is " as effectual as if all of them had joined. In *Dyer* [23b] it is " said, ' If two executors have a term, and one grants to a " ' stranger all that belongs to him, the whole term passes, " ' inasmuch as each of them has an entire authority and interest " ' in the term as executor; but of other joint-tenants of a term " ' it is otherwise; so there is a diversity.' This doctrine has " been constantly recognized. Each executor has an entire " interest in the term."

Mr. Scarman did not concede that two executors of a lessee are to be regarded as joint tenants, but he went on to contend that in any event, if such executors are in any sense joint tenants, they are, so to speak, joint tenants sui generis as indicated in the passages which I have just quoted.

On the other hand, Mr. Hames argued that for a denial of title to give rise to forfeiture the denial must be made by a lessee and that one of two executors could not be treated as the lessee for this purpose. In his submission, two executors of a lessee are joint tenants and accordingly a denial or disclaimer can only effectively be given by them both. In regard to joint tenants who are not executors of a lessee, it is no doubt true that " in the absence of express words in the lease, or of " authority, one of two joint lessees cannot surrender rights held " jointly before the full period of the lease has run ": see *Leek and Moorlands Building Society* v. *Clark*.[13] The same principle has been applied in a case relating to a disclaimer under a will: *In re Schar*.[14] But no case was cited to me in which the decision in *Simpson* v. *Gutteridge* [15] was questioned or overruled, and unless the Administration of Estates Act, 1925, has had that effect, I am of opinion that the proposition put forward by Mr. Scarman is correct.

Section 2 (2) of the Act of 1925 provides (so far as material) as follows: " Where as respects real estate there are two or more " personal representatives, a conveyance of real estate devolving " under this Part of this Act shall not . . . be made without the " concurrence therein of all such representatives or an order of " the court." Real estate is defined in section 3, and plainly includes an interest in a term. The definition of " conveyance " in section 55 is of importance, and is in the following terms: " ' Conveyance ' includes a mortgage, charge by way of legal " mortgage, lease, assent, vesting, declaration, vesting instru- " ment, disclaimer, release and every other assurance of property " or of an interest therein by any instrument, except a will."

On behalf of the defendants it was argued that if, contrary to their contentions, the second defendant's defence delivered on June 15, 1955, involved a denial of the plaintiff's title, it was a disclaimer and therefore within the definition of " conveyance "

[13] [1952] 2 Q.B. 788.
[14] [1951] Ch. 280.
[15] 1 Maddocks 609.

set out above. It is true that the denial by a tenant of his landlord's title is often referred to as a disclaimer, and, indeed, in the reply of the plaintiff delivered on June 29 it was alleged that the second defendant had by her defence disclaimed and disputed the plaintiff's title as her landlord. On this point I was referred to *Doe* d. *Ellerbrock* v. *Flynn* [16] and *Doe* d. *Graves*, *Downe* v. *Wells*.[17]

In my judgment, the type of disclaimer contemplated in section 55 of the Act of 1925 is one which is, so to speak, recognizable and identifiable as a disclaimer. In other words, the definition contemplates a document which would in normal course either start with the words "This disclaimer . . ." or at least contain the word "disclaim." It would, in my view, be a misuse of language to describe a defence delivered in an action as a disclaimer merely because that defence contained a denial of the landlord's title. Moreover, there is force in Mr. Scarman's argument that all the instruments included in the definition of "conveyance" are instruments which can properly and lawfully be executed, provided that they have the concurrence of all the personal representatives. Assuming that a lessee's denial of his landlord's title can be described as a disclaimer, it is not a disclaimer which can properly or lawfully be executed, even if all the executors concur in it, since a disclaimer of that type involves a breach of the condition which the law "tacitly "annexes" to every lease "that, if the lessee do any thing "which may affect the interest of his lessor, the lease shall be "void, and the lessor may re-enter": see *Doe* d. *Ellerbrock* v. *Flynn*.[18] In my view, this so-called disclaimer is in essence a repudiation of the tenancy and I hold that the defence of the second defendant delivered on June 15, 1955, was not a conveyance within the meaning of section 2 (2) and section 55 of the Act of 1925.

I have not yet referred to the effect (if any) of the judgment obtained by default against the first defendant on May 27, 1955. In *Gill* v. *Lewis* [19] it was held that to obtain an effective judgment for possession against joint tenants judgment must be obtained against both of them, and Mr. Hames relied on that decision as showing that the judgment entered against the first defendant in the present case was of no effect. But assuming this point in his favour, it does not, in my view, affect the position which resulted from the second defendant's defence and the plaintiff's reply. Although the judgment against the first defendant was set aside in August, it was then too late, and the plaintiff's rights had accrued. It is only right to add that Mr. Scarman did not rely on the judgment against the first defendant as an essential element in the establishment of his case.

In my judgment, therefore, the claim for possession succeeds. There is also a claim for mesne profits and damages, based on

[16] (1834) 1 C.M. & R. 137.
[17] (1839) 10 Ad. & E. 427.
[18] 1 C.M. & R. 137, 139.
[19] [1956] 2 Q.B. 1.

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the footing that forfeiture occurred on June 29, 1955, since which date the defendants have wrongfully remained in possession of the house. The period involved is nearly two and a half years, and on the evidence before me I think that a reasonable sum in respect of mesne profits would be £350. As regards damages, most of the disrepair has been made good, but the boundary fence and the internal rot still require attention and in respect of them I award a further sum of £50. There will, accordingly, be judgment for the plaintiff for possession and for the sum of £400.

Application was then made on behalf of the defendants to argue that they were entitled to apply for relief from forfeiture under section 146 of the Law of Property Act, 1925,[20] and the action was listed for further argument on that point. On January 13, 1958, the case came before the court again when the application was granted and the following cases were cited in argument: *In re Viscount Portman*[21]; *Driscoll* v. *Church Commissioners for England*[22]; and *Doe* d. *Ellerbrock* v. *Flynn*.[23]

ASHWORTH J. In this case I gave judgment in December last on what at that time I believed to be in effect the only issue before me on the assumption that my decision was to be actually embodied in my judgment. In other words, I was under the impression that if I decided that by the defence delivered on behalf of the second defendant there had been a denial of the landlord's title, neither defendant would seek to persuade me to grant relief against the forfeiture thereby arising. Mr. Hames has applied today for relief against forfeiture, and I am indebted to him for the frankness with which he has conceded that by inadvertence, possibly on his part, he did not make it clear at the previous hearing that he still hoped to obtain relief against forfeiture even if the court should be against him on the issue then under discussion. My own recollection is fortified by the fact that Mr. Scarman, for the plaintiff, agrees with the statement of that recollection which I have just made.

However, I thought it right to hear the application notwithstanding opposition on behalf of the plaintiff, though in doing so I was conscious that possibly I was stretching the discretion of

[20] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or "forfeiture under any proviso or "stipulation in a lease for a breach "of any covenant or condition in the "lease shall not be enforceable by "action or otherwise, unless and until "the lessor serves on the lessee a "notice—(*a*) specifying the particular "breach complained of; and (*b*) if "the breach is capable of remedy, "requiring the lessee to remedy the "breach; and (*c*) in any case, requiring the lessee to make compensation "in money for the breach; and the "lessee fails, within a reasonable "time thereafter, to remedy the "breach, if it is capable of remedy, "and to make reasonable compensation in money . . . (2) Where a "lessor is proceeding, by action or "otherwise, to enforce such a right "of re-entry or forfeiture, the lessee "may . . . apply to the court for "relief . . ."

[21] [1925] Ch. 294.

[22] [1957] 1 Q.B. 330; [1956] 3 W.L.R. 996; [1956] 3 All E.R. 802.

[23] 1 C.M. & R. 137.

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the court beyond normal limits. But I confess that I had in mind that the defendants in this case may well feel that they have been distinctly unlucky in their experience of courts of law, and I should not like them to feel that one further nail was driven into the coffin of their case because of some misunderstanding which occurred at the previous hearing; and I have therefore heard Mr. Hames on this matter.

He applies under section 146 of the Law of Property Act, 1925, for relief from forfeiture, and he fairly stated that his researches have not disclosed to him any case in which, in similar circumstances, relief has indeed been sought, let alone granted. He prays in aid the fact that there is no express decision to the effect that the court will not grant relief in such circumstances. I feel, however, that there is a weighty counter to that last contention because this issue came before the courts in the 1920s and again in the 1930s in *Barton* v. *Reed*[24] and in *Kisch* v. *Hawes Brothers Ltd.*,[25] to both of which cases I referred in my previous judgment; and it would seem to me astonishing if this remedy had been open, for example, in *Barton* v. *Reed*,[26] where counsel for the plaintiff expressly conceded that the defendants should be at liberty to withdraw their defence rather than to amend it, because otherwise the defendants were in a hopeless position. If relief for forfeiture could have been granted in those circumstances, that would have been a far less oblique way of reaching the desired object.

But in my view, apart from those features of the case, section 146 does not apply. The facts must be borne in mind. In this action the plaintiff brought proceedings for breaches of covenant and for non-payment of rent. In the defence delivered by the second defendant the landlord's title, as I have held, was put in issue by denial. The result was that the landlord, as I have held, was entitled by way of reply to say that the plea amounted to a disclaimer or denial of the landlord's title, and that thereupon there arose a forfeiture. The sidenote to section 146 is " Restrictions on and relief against forfeiture of leases " and under-leases," and it is quite apparent that this is a section dealing with the procedure for forfeiture arising in cases where a landlord is seeking a right of re-entry or forfeiture under a proviso or stipulation in a lease for a breach of any covenant or condition in the lease, and that the section is saying that that right shall not be enforceable unless certain preliminary conditions are satisfied. It appears to me plain beyond argument that it would have been quite impossible for the landlord in this case to comply with those conditions—nor does the section contemplate the application of those conditions to such a situation as happened here. In my judgment, this is not a forfeiture under any proviso or stipulation in a lease at all; it is a forfeiture which arises by operation of law; and I think that some of the earlier

[24] [1932] 1 Ch. 362.
[25] [1935] Ch. 102.
[26] [1932] 1 Ch. 362.

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cases—in particular *Doe* d. *Ellerbrock* v. *Flynn* [27]—cited in my earlier judgment justify this view.

If the forfeiture does occur (as I have held it did) by reason of the denial of the lease and the title, it seems to me strange to suggest that a lessee may come to the court notwithstanding that denial, and ask for relief on the footing that the lease does exist. While not an impossible one, it appears to me a strange result; and, having regard to the fact that on no previous occasion (so far as the researches of counsel go) has any successful application for relief in this type of case been made, I am not prepared to be the pioneer in the matter or to grant relief in this case. The application, therefore, is refused.

Judgment for the plaintiff.

Solicitors: *Murray, Hutchins & Co.; Wilders & Sorrell.*

J. F. L.

[27] 1 C.M. & R. 137.

[QUEEN'S BENCH DIVISION.]

1958
Jan. 16, 17.

Donovan J.

GRAHAM *v.* C. E. HEINKE & CO. LTD.

[1956 No. G. 2130.]

Practice and Procedure—Payment into court—Notice—Form—Factories Act and common law claims—Whether causes of action must be specified—R.S.C., Ord. 22, *r.* 1 (2).

Legal Aid—Costs—Means of assisted person—Whether damages awarded to him to be taken into consideration.

R.S.C., Ord. 22, r. 1 (2), provides: "Where . . . money is paid "into court in satisfaction of one or more of several causes of "action the notice shall specify the cause or causes of action in "respect of which payment is made . . ."

The plaintiff claimed damages for personal injuries incurred due to the defendants' negligence at common law and breach of statutory duty. Before the defence was delivered the defendants made a general payment of £1,000 into court without specifying the cause of action in respect of which the payment was made. The plaintiff did not take the money out, the action proceeded to trial and the judge awarded the plaintiff £760 damages. The defendants then applied for the costs of the action after the date of payment in; the plaintiff resisted the application on the ground that the payment in had to be regarded as a nullity as it did not comply with Ord. 22, r. 1 (2):—

Held, (1) that Ord. 22, r. 1 (2), contemplated cases where there were several causes of action giving rise to several independent claims for damages, and not a case, such as the present, where although there might be two causes of action, they were really alternative in that only one award of damages was possible under either cause of action, and, therefore, the defendants were not

required by Ord. 22, r. 1 (2), to specify the cause of action in the notice of payment into court.

(2) That, accordingly, the defendants should have the costs after the date of payment in; and, further, that in the circumstances any excess thereof over the costs up to that date should be paid to the defendants out of the £1,000 in court notwithstanding that the plaintiff was legally aided.

Nolan v. *C. & C. Marshall Ltd.* [1954] 2 Q.B. 42 applied.

ACTION.

On December 5, 1956, the plaintiff, Rueben Graham, issued a writ claiming damages against the defendants, C. E. Heinke & Co. Ltd., for personal injuries sustained while in the defendants' employment, due to their negligence and/or breach of statutory duty. The statement of claim was delivered on the same day and alleged that the plaintiff's finger-tips were crushed in the rollers of a rubber processing machine which he was operating, and that the injuries were due to the negligence and/or breach of statutory duty on the part of the defendants and the particulars alleged, inter alia, a breach of section 14 of the Factories Act, 1937, and an unsafe system of work.

On December 28, 1956, before the delivery of the defence, the defendants paid into court £1,000 and their notice of payment in read: "Take notice that the defendants, Heinke & Co. Ltd., "have paid into court £1,000 and say that that sum is enough to "satisfy the plaintiff's claim." The plaintiff did not take out that sum.

By their defence, the defendants denied that they were negligent or in breach of statutory duty, and alleged that the accident was caused by the plaintiff's own negligence or, alternatively, that the plaintiff's negligence contributed to the accident.

At the trial of the action it was conceded on behalf of the defendants that there was a breach of section 14 of the Factories Act, 1937, and the case proceeded solely on the issues of contributory negligence and damages. Donovan J. found in the plaintiff's favour on the claim, held that he was not guilty of any contributory negligence, and awarded him £760 damages.

The defendants applied for the costs of the action from the date of payment in. The plaintiff, who was legally aided, resisted the application on the ground that the notice of payment in should be regarded as a nullity, as it did not comply with the terms of R.S.C., Ord. 22,[1] since it did not specify the cause of action in respect of which the payment was made.

[1] R.S.C., Ord. 22, r. 1: "(1) In any "action for a debt or damages . . . "the defendant may at any time after "appearance upon notice to the plain- "tiff pay into court a sum of money "in satisfaction of the claim or "(where several causes of action are "joined in one action) in satisfaction "of one or more of the causes of "action; . . ."

Ord. 22, r. 1: "(2) Where the "money is paid into court in satis- "faction of one or more of several "causes of action the notice shall "specify the cause or causes of action "in respect of which payment is made "and the sum paid in respect of each "such cause of action unless the court "or a judge otherwise order."

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Leonard Halpern for the plaintiff.
John Stocker for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[2] and *Findlay* v. *Railway Executive.*[3]

Cur. adv. vult.

January 17. DONOVAN J. read the following judgment: Consequent on my award of £760 damages as compared with a payment into court by the defendants of £1,000 the defendants ask that they shall have the costs of the action as from the date of such payment in.

The application is resisted on behalf of the plaintiff on the ground that the payment in must be regarded as a nullity, since it did not comply with the terms of R.S.C., Ord. 22.

[His Lordship read sub-rules (1) and (2) of Ord. 22, r. 1, and continued:] The plaintiff's claim in the present case was for damages for injury suffered by him through a breach of statutory duty on the part of the defendants, or through their negligence at common law. The notice of payment in is dated December 28, 1956, and reads as follows: "Take notice that the defendants, "Heinke & Co. Ltd., have paid into court £1,000 and say that "that sum is enough to satisfy the plaintiff's claim."

The plaintiff did not take out this sum and the action proceeded to trial with the result already stated. It is now said for the plaintiff that the notice should have specified the cause of action in respect of which the payment was made, that is, either breach of statutory duty or negligence at common law, or partly the one and partly the other, and that in the absence of such specification the payment in must be disregarded, so as to entitle the plaintiff to his full costs.

One view of this matter is that there are not two causes of action at all but only one, namely, damages suffered through the defendants' negligence, that negligence being the failure to take reasonable steps for the safety of the plaintiff while working for the defendants; and that this cause of action remains one such cause and not two, whether the negligence be the non-observance of the statute passed to protect a workman or the non-observance of the common law obligation to the like effect.

Reference may be made in this connexion to Lord Macmillan's speech in *Lochgelly Iron and Coal Co.* v. *McMullan.*[1]

On the other hand, one knows that in practice a defendant may be acquitted altogether of negligence at common law and yet commit a breach of statutory duty sounding in damages towards a workman. This supports the view that for practical purposes there are two causes of action and not one.

[2] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[3] [1950] W.N. 570; 66 T.L.R. 836; [1950] 2 All E.R. 969.

[1] [1934] A.C. 1, 18; 49 T.L.R. 566.

I need not go into the matter at length because Lord Wright said in *London Passenger Transport Board* v. *Upson*[2] that the two causes of action were different; and distinctions between claims for breach of statutory duty and for negligence at common law were also pointed out by the Court of Appeal in *Murfin* v. *United Steel Companies Ltd.*[3]

On the footing, therefore, that there are two causes of action in the present case the problem remains: are there two such causes of action as Ord. 22, r. 1 (2), contemplates; and this is purely a question of construction. The purpose of the rule is tolerably clear. For example, in a claim for damages for slander, false imprisonment and malicious prosecution there is a separate claim for damages under each head, and a lump sum paid in generally, not specifying to which claim it related, would obviously embarrass the plaintiff in deciding whether to go on with the whole of his action or not, or which part of it to drop.

No such situation arises in the present case. There is one and one only head of damage, namely, personal injuries suffered through the defendants' neglect either of their statutory or common law duty, so that that payment in left the plaintiff in no doubt at all what it was for, and this he frankly admits.

It is said that perhaps in some other case a plaintiff would be embarrassed if different defences were raised against the claim for breach of statutory duty and the claim for negligence at common law unless the payment in were appropriated to one or other claim or apportioned between the two. Since the question is one of construction the argument is legitimate but I must say that I have a difficulty in envisaging such a case. The present is certainly not one, for the payment in was made before any defence was delivered.

Looking at the matter from the point of view of a defendant, if he pays a sum into court and specifies that it is in satisfaction of the plaintiff's claim in respect of a breach of statutory duty, nothing is really gained by anybody, because if the sum is taken out, then automatically the claim for damages for common law negligence will go. No additional damages are payable under that head. The converse is true if the notice of payment in specifies the claim for common law negligence as the claim or the cause of action which is being satisfied, and if the notice appropriates part of the payment to each of the two claims the process is quite unreal and the defendant would be doing something which never has to be done at the trial.

Alternatively, if the sum is left in court and the action proceeds, only one of the two causes of action fructifies in damages, and there is no difference in the amount which ever one it is.

The plaintiff in the present case says that any difficulties can be resolved by an application under the rule itself for exemption

[2] [1949] A.C. 155, 169; 65 T.L.R. 9; [1949] 1 All E.R. 60.

[3] [1957] 1 W.L.R. 104; [1957] 1 All E.R. 23.

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from specifying the causes of action; but this does not solve the problem here posed, which is one of construction, namely: is there any duty at all from which exemption could be sought?

In my opinion there is not. I think the rule contemplates cases where there are several causes of action giving rise to several independent claims for damages; not a case where although there may be two causes of action, they are really alternative in that only one award of damages is possible; so that satisfaction of one cause of action ends the whole claim. Such is the present case, and no purpose at all would be served by making the defendant in such a case specify that his payment in was in respect of a breach of statutory duty or in respect of common law negligence.

Accordingly, to deprive such a defendant of his costs for failure to make such a specification would be wholly unjust, and I ought to avoid such a result if some other construction of Ord. 22, r. 1 (2), is reasonably possible. I think it clearly is, being the one I have stated. I therefore reject the plaintiff's argument on this point.

I am next urged to exercise my discretion in favour of the plaintiff in the matter of costs, either by giving him the whole of his costs or making an order for no costs after the date of payment in. It should be remembered that the writ in this case was issued on December 5, 1956, and the statement of claim was delivered on the same day. The payment in of £1,000 was made on the 28th of the same month, before any defence was delivered.

The plaintiff considered it was not enough. Rightly or wrongly I have held that it was more than enough. So the whole costs of the action since December 28, 1956, have been occasioned by the plaintiff's view, now held to be wrong. In these circumstances I can see no ground for making the defendants pay the expense of the proceedings after payment in, or to deprive them of their own costs of resisting such proceedings.

Next I am asked not to order that any balance of costs found to be due to the defendants should come out of the damages now awarded to the plaintiff, since he is legally assisted. *Nolan* v. *C. & C. Marshall Ltd.*,[4] where such an order was made and upheld, was cited to me, though no doubt in a proper case a judge still has a discretion to do otherwise. But I can see no reason to do otherwise in this case.

Where a litigant is assisted by public funds, a particular duty lies on him not to refuse a reasonable offer, and certainly not to trade on his privileged position in the matter of costs to decline to accept a payment in which he might well accept if not so privileged. I am not saying that this is such a case, but if I were to treat the award of damages in the present case as inviolate, as I am asked to do, I think I should be setting an unfortunate

[4] [1954] 2 Q.B. 42; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389.

precedent because there are no special facts about the present case to justify such special treatment.

Having said that, I hope I may still say that I am very sorry for this particular plaintiff. Through not accepting the £1,000, he gets £760 less costs, which will substantially diminish the award; but I can see no ground on which I can give him relief. If the defendants feel it right not to enforce the order regarding costs, or to make some concession regarding that, that, of course, is a matter entirely for them.

My order must be that the plaintiff have the costs of the action up to the date of payment in, and the defendants have the costs thereafter, and that any excess of the latter costs over the former be paid to the defendants out of the £1,000 in court; the balance to be paid out to the plaintiff. I make the usual order for taxation of the plaintiff's costs under the legal aid scheme.

Order accordingly.

Solicitors: *King-Hamilton & Green; Kingsbury & Turner.*

C. J. E.

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[CHANCERY DIVISION.]

In re UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES LTD.

1957 *Oct.* 8, 9, 10, 11, 22, 23, 24, 25, 28, 29, 30; *Nov.* 4, 19.

WYNN-PARRY J.

Conflict of Laws—Contract—Discharge—Debt payable under contract—Whether discharged—Whether proper law of contract or lex situs of debt applicable.

Conflict of Laws—Chose in action or debt—Discharge.

Conflict of Laws—Contract—Proper law—Lease of moveables—Lease entered into "in accordance with the provisions of the laws" of Cuba—Whether conclusive of proper law.

The U. Company, a company incorporated in England in 1898, conducted a railway undertaking in Cuba. In 1921 it bought rolling stock worth $14,000,000 and decided to raise part of that sum in the U.S.A. under a scheme whereby 15-year 7½ per cent. trust certificates should be issued to the public through a trust company, which was a corporation of the Commonwealth of Pennsylvania. In February, 1921, the U. Company caused to be incorporated in the U.S.A. a subsidiary company to which on March 25, 1921, it sold the rolling stock. By a lease dated April 18, 1921, and executed in New York, the subsidiary company as lessor leased to the U. Company as lessee, the rolling stock for a period of 15 years for a rental payable twice yearly at the office of the trust company in Philadelphia. The rentals payable under the lease were to provide principal and interest reserved by the trust certificates, the lease forming security for those payments.

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By an agreement executed in New York contemporaneously with the lease, the subsidiary company assigned all its rights under the lease and interest in the rolling stock to the trust company as trustee for the certificate holders. By a further agreement dated April 27, 1922, the subsidiary company resold the rolling stock to the U. Company "subject to and with the benefit of the lease and "the agreement." From February 14, 1931, the U. Company ceased to pay the instalments due under the lease.

Between 1934 and 1949 the Cuban State passed moratorium laws which extended to railway companies, and in 1953 the Cuban Government, acting under those laws, acquired the management and control of the U. Company's undertaking and assets by way of sale and purchase. By an agreement dated September 5, 1953, the Cuban Government released the U. Company from all responsibility in respect of liabilities arising under the trust certificates. On March 4, 1954, the U. Company went into voluntary liquidation and the successors of the trust company as trustee for the certificate holders lodged a proof, claiming the instalments that were payable under the lease. On appeal from the liquidators' rejection of the proof:—

Held, (1) that, even though the debt claimed had emerged from the contract and achieved a separate existence situate in Cuba, the proper law to apply in determining whether the obligation of the company under the lease was still subsisting or had been discharged was the proper law of the contract and not the lex situs of the debt due and payable arising under it.

In re Claim by Helbert Wagg & Co. Ltd. [1956] 1 Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129 considered.

F. & K. Jabbour v. *Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145 distinguished.

Dictum of Lord Esher M.R. in *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399, 405; 6 T.L.R. 393 applied.

(2) That the proper law of the lease and the contemporaneous agreement was that of Pennsylvania; that, since according to the law of Pennsylvania the obligations of the U. Company under the lease were continuing, the trust company could prove in the liquidation for a sum sufficient to satisfy the proper claims of the certificate holders.

ADJOURNED SUMMONS.

By this summons, the Pennsylvania Co. of Banking and Trusts, claiming to be a creditor of the United Railways of the Havana and Regla Warehouses Ltd. (in voluntary liquidation), applied for an order that the liquidators' rejection of the applicant's proof be reversed and that the proof be admitted in full. The facts appear in the judgment of Wynn-Parry J.

R. O. Wilberforce Q.C. and *T. D. Divine* for the applicant.

John Megaw Q.C., *Richard Hunt* and *K. W. Mackinnon* for the liquidators.

The following cases, in addition to those referred to in the judgment, were cited in argument: *New York Life Insurance Co.* v. *Public Trustee* [1]; *N. V. Kwik Hoo Tong Handel Maatschappij*

[1] [1924] 2 Ch. 101; 40 T.L.R. 430.

v. *James Finlay & Co. Ltd.*[2]; *Hamlyn & Co.* v. *Talisker Distillery and Others*[3]; *The Fehmarn.*[4]

Cur. adv. vult.

November 19. WYNN-PARRY J. read the following judgment: United Railways of the Havana and Regla Warehouses Ltd., to which I will refer as "the company," was incorporated in England on August 2, 1898. It conducted a railway undertaking in Cuba, and owned assets in Cuba in connexion therewith. Prior to and during 1921 the company purchased rolling stock, consisting of locomotives and cars to an aggregate amount of over $14,000,000. For the purpose of financing part of this amount it was decided to raise $6,000,000 in the United States of America under what is known as the Philadelphia Plan, which, as the name suggests, is an essentially American scheme for financing a project. A variation from or addition to the procedure normally followed in carrying out the Philadelphia Plan was, however, adopted. What was done was this. In February, 1921, the company caused to be incorporated in the State of Delaware a corporation under the name of Cuba Rolling Stock Co. (to which I will refer as "the car company"). The car company was a subsidiary of the company. It is the use of this company in the manner which I will describe, which constitutes the variation from or addition to the Philadelphia Plan to which I have referred. On March 25, 1921, the company sold to the car company the whole of the rolling stock, and assigned the contracts for future delivery of so much thereof as had not been delivered. The purchase price was the actual cost of the rolling stock delivered in Cuba. By way of confirming the sale and carrying it into effect, the company and the car company executed a document dated April 11, 1921, which is described as a bill of sale before a notary public in New York. On April 18, 1921, a document, described therein as a lease and agreement, to which I shall refer as "the lease," was executed between the car company as lessor and the company as lessee. The lease was executed in New York before a notary public by attorneys in fact for the car company and the company respectively. The attorney in fact for the company was appointed by resolution of a board meeting held in New York pursuant to a power given at a board meeting in London held on February 3, 1921.

The recitals to the lease, so far as material, read as follows: "Whereas, the lessee has power under its charter and the laws "of the Republic of Cuba and the Acts of the United Kingdom "of Great Britain and Ireland to enter into and perform this "agreement, and has taken all necessary corporate action to "authorize the execution and delivery hereof. And whereas, "at the time of the execution hereof the lessor holds contracts "for the construction and acquisition of, or is the absolute owner

[2] [1927] A.C. 604; 44 T.L.R. 643.
[3] [1894] A.C. 202; 10 T.L.R. 479.
[4] [1957] 1 W.L.R. 815; [1957] 2 All E.R. 707.

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" of, the railroad equipment and/or rolling stock hereinafter " described, and has agreed to deliver forthwith or as soon as the " same shall be completed, such railroad equipment and/or " rolling stock to the lessee, which agrees to receive the same, " such delivery by the lessor and acceptance hereof by the lessee " to be upon the terms and under the conditions herein set forth: " And whereas, the lessor desires, upon the execution hereof, and " in the manner hereinafter set forth, to assign, transfer and set " over to the Commercial Trust Company of Philadelphia, as trus- " tee all the lessor's right, title and interest in and to this " lease and the rents reserved hereunder, and in and to the rail- " road equipment and/or rolling stock hereby demised. And " whereas the lessee, in consideration of certain rights given to " it to pay rentals in United Railways of Havana 15-year 7½ per " cent. Equipment Trust certificates, and within six months after " certain payments of rental to tender additional certificates and " receive cash in exchange therefor, all as hereinafter specifically " set forth, consents to said contemplated assignment."

Then the lease witnesses: " That for and in consideration of " the sum of one dollar ($1) paid by the lessee to the lessor, as " well as of the rentals and covenants hereinafter mentioned, the " lessor has let and leased and by these presents does let and " lease to the lessee, for the term of fifteen years from the fif- " teenth day of February, 1921, unless sooner terminated as here- " inafter provided, the following described railroad equipment " and/or rolling stock, to wit . . ."; and there follows a detailed list of the rolling stock. It is then provided that the rolling stock is leased " at and for the rental hereinafter set out, and upon the " terms, conditions, and covenants following, to wit:

" First. The lessee shall and will pay to the lessor or its " assigns at the office of Commercial Trust Company, hereinafter " called ' the trustee,' in the City of Philadelphia, Pennsylvania, " or at the office of Central Union Trust Company of New York, " in the City of New York when payment in New York is herein- " after specifically required, as rental for the said railroad " equipment and/or rolling stock without deduction for any taxes, " duties, charges or assessments, which the lessee may be required " to pay or withhold under the laws of the United States of " America or of any other country ": Pausing there, it is made clear that the primary place of payment is Philadelphia. New York is only used for the payment of interest, as emerges from the provisions of paragraph I (a), which follows, and which, so far as material, reads as follows:

" I. Half-yearly on the fourteenth day of February, and on " the fourteenth day of August in each year, the first payment to " be made on August 14, 1921. (a) A sum payable in New York " equal to 3¾ per cent. of the par value of certain certificates not " exceeding $6,000,000 issued under an agreement bearing even " date herewith between Cuban Rolling Stock Company, and " Commercial Trust Company, trustee, and outstanding and

" unpaid on the fourteenth day of February and the fourteenth " day of August, respectively in each year, during the term of " this lease, and an amount equal to the accrued dividends on the " certificates purchased by the trustee during the preceding six " months under the provisions of the said agreement; less such " sums derived from investments by the trustee of undistributed " rentals in its hands, as reported from time to time by it to the " lessee as applicable to the payment of dividend warrants on " the aforesaid certificates."

I shall have to deal with these certificates when I come to consider the next document, which was brought into existence in order to carry out the scheme in accordance with the Philadelphia Plan. Sub-paragraphs (b) and (c) deal with the reasonable expenses of the car company and taxes on the property leased or the income therefrom which are to be paid by the company and would be payable in Philadelphia. By paragraph II provision is made for bi-annual payments on August 14 and February 14 in each year covering the period from August 14, 1921, to February 14, 1936, of sums which are treated as rentals. The payments of interest under paragraph I (a) and the bi-annual payments under paragraph II are calculated to cover the interest and capital and premium payable in respect of the certificates referred to in paragraph I (a). It is then provided that all the bi-annual payments mentioned in paragraph II are to be made in gold coin of the United States of America of the 1921 standard of weight and fineness; and there follows a provision allowing, under certain conditions, payment by delivery up of certificates purchased by the company. The last provision of clause first allows the company to pay on any rental day a lump sum sufficient to " enable the trustee to call for retirement and to " retire on the dividend date next ensuing all outstanding United " Railways of Havana 15-year 7½ per cent. Equipment Trust " certificates by the payment of the par value thereof and a " premium of 10 per cent. thereon and accrued dividends thereon " to the date of retirement." This provision serves to emphasize that the payments under the lease are designed to provide the principal and interest reserved by the certificates, the lease, as will later be seen, forming the security for those payments.

Clause second provides that all the rolling stock and replacements, the subject of the lease are " to be plainly marked and " kept marked on both sides thereof with the words: ' Commer- " ' cial Trust Company, Trustee, Phila., Pa., Owner and Lessor, " ' U. H. Equipt. Trust No. . . . '." Clause fourth requires the company " to keep the said railroad equipment and/or rolling " stock insured in some incorporated insurance company or com- " panies of good standing, organized under the laws of the " United States of America or of the United Kingdom of Great " Britain and Ireland, to be approved by the trustee, assignee of " the lessor. . . ." Clause fifth, so far as material, reads as follows: " The lessee further covenants that there shall be no

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" assignment or transfer of its rights or interest in said railroad " equipment and/or rolling stock under this lease, or any under- " letting of said leased property, without the consent of the " lessor and its assigns endorsed hereon." Clause sixth provides that in case of default in the payment of any of the rentals, the car company may declare the lease terminated and may take possession of the rolling stock. Clause eighth is of importance, and, so far as material, reads as follows: " It is understood and " agreed by and between the lessor and the lessee, that the lessor " may forthwith, upon the execution hereof, assign, transfer, and " set over unto Commercial Trust Company, of Philadelphia, as " trustee, all the lessor's right, title, and interest in and to said " railroad equipment and/or rolling stock hereby leased unto the " lessee, and as well all of the lessor's claims, demands, and " remedies, under this lease accruing or to accrue . . . and that " when it, the lessee, shall have fully paid all the rents, which it " has herein covenanted to pay, the said railroad equipment " and/or rolling stock may be re-assigned by said Commercial " Trust Company, of Philadelphia, trustee, to the lessor, and " upon such re-assignment and the expiration of the term of this " lease, all said railroad equipment and/or rolling stock shall " revert to the lessor." Clauses eleventh and twelfth are also important and I proposed to read them in full.

" Eleventh. It is the intention of the parties to this lease " to enter into and execute this lease in accordance with the " provisions of the laws of the Republic of Cuba to the end that " this lease may be deposited or filed and/or registered there- " under, and the railway company agrees to so deposit and/or " register or file the same, and to record the same in such state " or territories of the United States as may be required by law, " and to perform any other act required by law that may be " necessary to protect the trustee's title. In case it becomes " necessary that this lease be translated into the Spanish " language in order that it may be filed and/or registered in the " proper offices in the Republic of Cuba, then and in that event " it is understood and agreed that the English text shall govern " in case of any conflict between the English and Spanish texts.

" Twelfth. The parties hereto submit themselves to the juris- " diction of the tribunals of the City of Havana, in the Republic " of Cuba, for all notifications, summonses and other judicial or " extra judicial formalities to which this lease shall give rise, with " express renunciation of their own jurisdiction if different."

At the same time as the lease was executed, there was also executed in New York an agreement, to which I will refer as " the agreement," between the car company and Commercial Trust Co., of Philadelphia, a corporation of the Commonwealth of Pennsylvania, to which, and to whose successors as such trustee, I will refer as " the trustee." The agreement recites the lease, and the second recital, so far as material, is: " And " whereas, the car company has purchased the said railroad

" equipment and/or rolling stock particularly mentioned in the " lease and has agreed to apply in part payment therefor the " proceeds of six million dollars ($6,000,000) par value of equip- " ment trust certificates, to be issued under the terms of this " agreement, and known as certificates of the United Railways of " Havana 15-year 7½ per cent. Equipment Trust." Then by clause first the car company assigns to the trustee as trustee for the certificate holders, the lease and all its interest in the rolling stock. By clause second the trustee covenants " that it will " from time to time execute and deliver to the car company or " upon its order in writing United Railways of Havana 15-year " 7½ per cent. Equipment Trust certificates " [which I will call " the certificates "] " aggregating in par value $6,000,000." Then the clause sets out the intended form of the certificates. It is unnecessary to read the form in full, but it is to be noted that it is framed to fit in with the payment provisions of the lease. For instance, the due date of payment is February 15, 1936, the day after the day fixed for payment of the last rental under the lease. Payment is to be made at the office of the trustee in Philadelphia in gold coin of the United States of America, as provided in the lease, " but only from and out of the rentals when " paid as provided for in the lease . . . which rentals are payable " to the trustee for the benefit of " the certificate holders. Clause fourth deals with the issue of the certificates. It it not, I think, necessary to consider the terms of this clause. The money which the company required and which the certificates secured, to use the word in a loose sense, was provided pursuant to an underwriting agreement consisting of a letter dated February 9, 1921, written by Dillon Read & Co. of New York, as underwriters, to the then chairman of the company, and accepted by him. Clause seventh is of importance. It opens thus: " In the event of default by the railway company, as afore- " said, if it be thought necessary or convenient for the purpose " of enforcing and carrying out all the terms and stipulations of " the lease and this agreement under the laws and statutes of the " Republic of Cuba "—then provision is made for the assignment of the lease and all rights thereunder, " to any person or other " corporation as substituted trustee authorized to act or doing " business in the Republic of Cuba." Clauses eleventh and twelfth are similar in terms to clauses eleventh and twelfth in the lease, except that this last paragraph of clause twelfth appears in the lease as the last paragraph of clause eleventh. By an agreement dated April 27, 1922, the car company resold the rolling stock to the company, " subject to and with the " benefit of the lease and the agreement."

The position, therefore, at this point (without prejudice to any question of Cuban law) was that the company had received the net proceeds of the sale of the certificates to the public. It had the right, subject to performing its obligations under the lease, to have the property in the rolling stock revested in it. In

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the meantime its only right to the rolling stock was as lessee under the lease. The benefit of the company's obligations under the lease was vested in the trustee as trustee for the certificate holders. Finally, as a result of the resale by the car company to the company, the car company dropped out of the picture and was later dissolved.

Prior to February 14, 1931, the company redeemed certificates to the face value of $3,800,000. Further, it purchased, as it was entitled to do, certificates to the face value of $1,867,000. It defaulted in paying the instalment of $205,000 due on February 14, 1931, and all subsequent instalments. It has thus defaulted in respect of the last eleven instalments of capital, a total of $331,000. In this connexion it is important to bear in mind that the certificates themselves impose no liability on the company. The company's liability, assuming that it still exists, arises solely under the lease. Its liability is to pay to the trustee the proper sum in United States of America dollars necessary to discharge its obligations under that document. The certificates, in effect, do no more than evidence the amount which the holders thereof are entitled inter se to receive from the trustee, in so far as the trustee receives payment from the company.

Although defaulting as regards principal, the company continued to pay interest as provided by the lease down to and including August 14, 1934. The trustee took no step under clause sixth of the lease to declare the lease terminated. Apart, therefore, from any impact on the continued existence of the lease which Cuban law may have, assuming that it applies in this case, the lease must be treated as continuing, the company being in default thereunder. The trustee took no step under the same clause to take possession of the rolling stock; but this circumstance I regard as colourless. Further, I take the view that it would not have been possible for the trustee to have obtained possession of the rolling stock for reasons which will appear when I come to consider the effect of the relevant provision of Cuban law, namely, Military Order No. 34 of 1902.

In 1934, 1940 and 1941 legislation was brought in force in Cuba establishing a moratorium owing to the economic depression which had developed during the early 1930s. The benefit of the moratorium laws extended to public service railroad companies. I shall have to consider the provisions of these laws in some detail, but I propose to defer any reference to their contents until I come to consider the questions of Cuban law which have been debated. On June 6, 1949, an interventor was appointed by the Cuban Government, who took over the management and control of the company's undertaking. By 1952 it had become clear that the company's financial position was so acute that the only solution was that the whole of its undertaking and assets should be sold to the Cuban Government, if that could be effected. To facilitate this a scheme of arrangement between the holders of the company's various classes of debenture stock

and shares was prepared, brought before the court, and sanctioned by Vaisey J. on December 15, 1952. Neither the holders of the certificates nor the trustee on their behalf were parties to the scheme, but the certificates are mentioned in Part IV, paragraph 13, of the Preliminary to the Scheme, where there is a statement that the certificates are not affected by the scheme. Negotiations for the acquisition of the company's undertaking and assets in Cuba took place and a number of documents were brought into existence, to which I must now refer. The first is Law-Decree No. 980, dated July 24, 1953. Article 1 opens thus: "This Law-Decree is entitled 'Law-Decree on the acquisition, "'operation and rehabilitation of the United Railways of "'Havana and subsidiary companies.'" Article 3 authorizes the Minister of the Treasury to initiate and conduct negotiations for the acquisition by voluntary agreement, or, failing that, by expropriation, with the object of conveying the undertakings and property acquired to a company to be incorporated for the purpose. Chapter III, article 6, deals with the incorporation of this company, to which I shall hereafter refer as "Occidentales." Article 8 provides that the State will convey the properties acquired from the company to Occidentales, "and the latter shall "assume the liabilities, which the State shall have contracted "by the acquisition of the properties." Article 13 provides that Occidentales "cannot sell the real estate they acquire as con-"veyed by the State except" as specifically provided in that article. Article 14 opens with the words "The State on making "the conveyance . . ." I mention these provisions because, as I construe this Law-Decree according to the principles of construction of English law (and it is agreed that there is no or no material difference between the principles of construction of English law and those of Cuban law), what is envisaged is, first, a sale by the company to the Cuban State, and then a resale by the State to Occidentales. The matter becomes material when one comes to consider the Cuban law in this regard, because the two experts on Cuban law differed as to the effect of the transaction as carried out by this Law-Decree and the three documents to which I am about to refer. Dr. Gorrin, for the applicants, regarded the transaction as a sale to the State and then a resale by the State to Occidentales. On the other hand, Dr. de Cubas, for the liquidator, expressed the view that a Cuban court would treat the matter as being one in which only one sale was involved.

The next document to which I must refer is called "Pre-"liminary Agreement." It is dated September 5, 1953. It concerns the company and a wholly-owned subsidiary of the company, to which I will refer as "Terminal," as vendors and the Cuban State as purchasers, and provides, in effect, for the sale of the respective undertakings and assets of the two companies to the Cuban State for $13,000,000, "which amount will "be received . . . at the moment of signing the public deeds, "by virtue of which there shall be transferred to the State in

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" full and absolute dominion the assets and properties described " in Annex A." Clause Fourth (B) is important, and I read it: " The price agreed upon shall be received by ' The Uniteds ' and " ' The Terminal ' free from all responsibility with respect to " liabilities outstanding in Cuba, represented by debts, obligations " and responsibilities arising out of the operations of the pro- " perties which are to be acquired by the State, whether involving " operations prior to June 10, 1949, on which date said properties " passed to the management of the Interventors of the Govern- " ment of Cuba, or subsequent to that date." Included in annex A as assets is this item: " $1,867,000 of nominal value, " amount of the company's holding of the 7½ per cent. Equip- " ment Certificates." On the same day, namely, September 5, 1953, as the preliminary agreement was executed, another agreement—to which I will refer as " the confidential agreement "—was executed, the parties being the Cuban State, the National Bank of Cuba and the company. It is of importance, and I propose to read parts of it. It states that the parties have agreed: " First: That among the liabilities in respect of which " the State liberates ' The Uniteds ' from all responsibility, in " accordance with letter B of clause fourth of the preliminary " agreement signed on this same date between the same parties, " it is understood to be included the responsibilities that may " derive from the 7½ per cent. Equipment Trust Certificates " which were issued under agreement dated February 15, 1921, " between the Cuban Rolling Stock Company and Commercial " Trust Company, as trustees."

" Second: That what is established by this agreement does " not signify that the State or ' The Uniteds ' acknowledge or " admit that there can exist legal merit in any claim, demand " or proceedings that may be established as a result of the " referred to 7½ per cent. Equipment Trust Certificates, but that " it is exclusively established what is mentioned in this agree- " ment in respect thereof for the supposed case that a sentence " may be handed down as a result of any claim, demand or pro- " ceedings derived from said 7½ per cent. Equipment Trust " Certificates, whether it be before courts of justice of the " republic or in foreign courts."

And, finally, in clause fifth, it is provided: " That the con- " tents of the present confidential agreement cannot be revealed " by any of the signing parties, but it will be understood that it " binds them just as if it had been stipulated in the preliminary " agreement referred to in paragraph first."

I shall have to consider the effect of the confidential agreement and its impact on clause fourth (B) of the preliminary agreement when I come to deal with the questions of Cuban law which have been debated.

I pass now to Law-Decree 1197, dated November 26, 1953. The second recital is of importance. It states: " Whereas: In " accordance with the provisions of Military Order No. 34 of

" 1902, it was agreed in section (B) of clause fourth of the " preliminary agreement executed between the Government and " the " company and two other companies " that the said com- " panies as vendors would receive the agreed price free from all " responsibility with respect to liabilities outstanding in Cuba, " represented by debts, obligations and responsibilities arising out " of the operations of the properties to be acquired by the State, " and it is therefore appropriate to declare that the provisions " of section (u), article 1, of Chapter V of the aforesaid Military " Order are inapplicable to the liquidation of the three selling " companies, since upon the passing of such liabilities to the " Cuban Government the latter shall adopt such measures as it " may deem appropriate for the liquidation thereof." Article second provides that: " Section (u), article 1, chapter V, of " Military Order No. 34 of 1902 is declared inapplicable to the " liquidation and dissolution of the " company and two other companies.

I come now to the deed of purchase, which is dated December 1, 1953. By this deed the sale by the company of its undertaking and assets to the Cuban State was completed, the sale being " in a real and effective manner absolutely free from " encumbrances." The seventeenth clause provides: " That in " consequence of the sale hereby accomplished, they transfer in " favour of the Cuban State the full and absolute dominion and " possession, with such further rights and equities, real and " personal, without any exception, as the vendors have or hold " in the properties before mentioned, the Cuban State receiving " them as its own, acquired by a just and legitimate title, as is " the present deed, which at all times shall be considered as " symbol of real delivery and possession and leaving the Cuban " State subrogated in the same place and stead of the vendors." The twentieth clause reads as follows: " That in the purchase- " sale are included all the assets and any other properties situated " in the Republic of Cuba, without exception whatsoever, which " comprise and constitute the railroad system which the vendors " have been operating." On the same date as the deed of sale was executed, namely, December 12, 1953, a document, which is not in evidence and the precise terms of which are not known, was executed, the parties being the Cuban State and Occidentales, by which the Cuban State sold to Occidentales the undertakings which it had acquired from the Cuban State. It was thought at first that this sale comprised all the assets acquired, but it emerged in evidence during the hearing that certain property was retained by the State. The details do not matter: the important circumstance is that not all the property acquired by the State was resold by it, a matter which obviously has a bearing on the question whether under Cuban law there was a sale to the State and then, as a separate step, a resale by the State, or only one sale from the company to Occidentales. The purchase price was duly paid by the Cuban State in United

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States Treasury Bonds. These were then sold for sterling, the proceeds being applied in effect in accordance with the provision of the scheme of arrangement. On March 4, 1954, the company went into voluntary liquidation.

On June 18, 1954, the applicant, who is the present trustee for the certificate holders, lodged a proof. The basis of the claim appears in paragraph 4 of the proof, which reads as follows: "The claimant is the present trustee for the holders of the said "certificates, being the successor in office of Commercial Trust "Company of Philadelphia the original trustee thereof. The "liability of the company to the claimant which is the subject-"matter of this proof arises under or by virtue of a covenant by "the company with Cuban Rolling Stock Company contained in "an agreement dated February 15, 1921, but executed on "April 18, 1921, between the said Cuban Rolling Stock Company "of the one part and the company of the other part the benefit "whereof including the ownership of the said railway equipment "was by a trust agreement dated February 15, 1921, but executed "on April 18, 1921, assigned by the said Cuban Rolling Stock "Company to the said original trustee of whom the claimant is "the successor in title." Paragraph 2 (a) of the proof seeks to quantify the claim of the applicant as trustee in respect of the last eleven instalments payable under clause first II of the lease and the premium of 2½ per cent. on their face value and interest [viz., (i) £264,076 0s. 1d. sterling equivalent converted at $2·81 to the £ of $739,412·81 in respect of $333,000 face value of the certificates. (ii) A sum made up of $333,000 face value of the certificates premium of 2½ per cent. on face value = $8,325. (iii) Interest at 7½ per cent. on face value from August 15, 1934, to February 11, 1936 = $37,462·50. (iv) Interest at 6 per cent. on face value from February 15, 1936, to March 4, 1954 = $360,625·31]. Paragraph 2 (b) quantifies a claim for reasonable expenses under clause first I (b) of the lease. Paragraph 2 (c) deals with a claim for expenses incurred or to be incurred by the applicant as trustee since March 4, 1954. Paragraph 2 (d) quantifies a claim in respect of the certificates of the face value of $1,867,000, which had been purchased by the company. I am not concerned with this claim, because any claim in respect of these certificates was renounced, and on that basis Roxburgh J., by an order of December 4, 1956, in effect upheld the rejection of the proof so far as regards the claim in respect of these certificates. The main claim is a claim in contract under the lease. Two alternative claims in paragraph 4 were abandoned at this hearing, but the applicant pursues, as alternative to his main claim and as alternative to each other, two further claims, the first for damages for breach of the covenant in the lease not to assign the rolling stock without the consent of the trustee, and the second for damages for conversion of the rolling stock by the company. In connexion with the last two items, it is relevant to mention that in a letter dated July 2, 1953, from the secretary

of the company to the trustee, it was stated that for financial reasons the insurances effected by the company were being reduced in amount, and, in pursuance of that policy, the insurance of the rolling stock had been reduced to a value of $2,000,000, "being the estimate of the present day value of this "rolling stock calculated by reference to an inventory made in "June, 1948, subject to depreciation since then." On November 19 the liquidators rejected the proof. From this rejection the applicant has appealed to this court, and on the hearing of the summons a number of difficult and complicated questions of law have emerged with which I must now proceed to deal.

The first question to which I propose to address myself is whether the obligation of the company under the lease is still subsisting or whether it has been discharged. The answer to this question depends in the first instance on ascertaining which law is the correct law to apply. Only two systems of law were really canvassed, the law of Pennsylvania and the law of Cuba. If it is correct to apply the law of Pennsylvania, it is because the correct law to apply is the proper law of the contract, and the proper law of the contract is the law of Pennsylvania. If it is correct to apply the law of Cuba, it is either because the correct law to apply is the proper law of the contract and the proper law of the contract is Cuban law, or because the effect of a debt emerging from the contract and achieving a separate existence is that the correct law to apply is the lex situs and the debt is situate in Cuba. If the law of Pennsylvania applies, then there is no ground for saying that the company's obligations under the lease have been discharged. If the law of Cuba applies, then one is faced with a volume of very conflicting evidence from the two distinguished Cuban lawyers who have given evidence.

I propose to deal first with the question whether the correct law to apply is the proper law of the contract or the lex situs. Mr. Megaw's proposition is to this effect: the proper law of a contract is not relevant on the question whether or not a debt arising out of the contract and due and payable has been extinguished, except in so far as the ascertainment of the proper law may throw some light on the situs of the debt. The fact that a debt arises out of a contract is purely history. Once it is due and payable it is a chose in action with a separate existence; and the circumstance that there may be other terms of the contract which are executory is irrelevant. The proposition then is as simple as this: if the debt can be sued for, then the lex situs must be applied in order to see whether it has been discharged or not: if, however, the debt is still a future debt, in the sense that it is not presently payable, then it is the proper law of the contract which is to be applied.

The first case on which Mr. Megaw relied was *Ellis* v.

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M'Henry.[1] In that case, which was a bankruptcy case, Bovill C.J. said[2]:

"In the first place, there is no doubt that a debt or "liability arising in any country may be discharged by the laws "of that country, and that such a discharge, if it extinguishes "the debt or liability, and does not merely interfere with the "remedies or course of procedure to enforce it, will be an effec- "tual answer to the claim, not only in the courts of that country, "but in every other country. This is the law of England, and "is a principle of private international law adopted in other "countries." He then cites a number of authorities to which I need not refer. He then goes on[3]: "Secondly, as a general "proposition, it is also true that the discharge of a debt or "liability by the law of a country other than that in which "the debt arises, does not relieve the debtor in any other "country"—for which proposition again he cites authority. In my view this case does not support the proposition contended for. As is pointed out in Dicey, Conflict of Laws, 6th ed., p. 653, the reference to the country in which a debt or liability arises is, in modern parlance, a reference to the proper law of the contract. In Cheshire on Private International Law, 5th ed., p. 499, this case is treated as one which was concerned with the proper law of the contract, and certainly not as one in which the lex situs was involved: and this is the view which for myself I take of this case. The next case cited by Mr. Megaw was *Swiss Bank Corporation* v. *Boehmische Industrial Bank.*[4] The headnote reads as follows: "Judgment having been recovered against "a foreign corporation, who submitted to the jurisdiction, a "garnishee summons was issued to attach a debt due from a "London bank to the foreign corporation:—*Held*, that the judg- "ment creditors were entitled to have an order nisi made "absolute, inasmuch as payment under a garnishee order "operates as a discharge of the amount paid and is recognized "by international law as having that effect, and consequently "there was no real risk of the garnishees being obliged to pay "the debt over again to the foreign corporation, and there was "therefore nothing inequitable in making the order absolute." What I am concerned with here is whether or not a contractual obligation has been discharged or not, and I do not consider that cases relating to title are of much assistance. Further, it should be observed that in this case the debt owing by the bank was not only situate in England but was governed by English law. Cheshire, 5th ed., p. 246, treats this case as one governed by the proper law of the contract. The next case on which Mr. Megaw relied was *In re Claim by Helbert Wagg & Co. Ltd.*[5] In the course of his judgment Upjohn J. said[6]: "The first

[1] (1871) L.R. 6 C.P. 228.
[2] Ibid. 234.
[3] Ibid.
[4] [1923] 1 K.B. 673; 39 T.L.R. 179.
[5] [1956] 1 Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.
[6] [1956] 1 Ch. 323, 339.

"question that I must determine is whether the applicability "of the moratorium law is to be tested by reference to the "local situation of the debt or by the proper law of the contract. "I am concerned with the effect of a law passed in 1933 upon a "series of debts which, although accrued, only became payable "on or after September 3, 1939. In my judgment, the question "whether a liability to pay a debt payable on a future date has "become modified or annulled by legislation must depend upon "the question whether such legislation affects the contractual "obligation, for the matter still rests in contract. Indeed, it does "not seem appropriate to speak of a debt having a local situation "until it is payable and can be recovered by suit, for its situs "primarily depends upon the residence of the debtor when it is "recoverable. I think that distinction was recognized by "Pearson J. in *Jabbour* v. *Custodian of Israeli Absentee Pro-"perty*,[7] where he was concerned with debts or choses in action "such as a claim for unliquidated damages which could be sued "for at the date of the modifying legislation. The power of "legislation to affect a contract by modifying or annulling some "term thereof is a question of discharge of the contract which, "in general, is governed by the proper law." Mr. Megaw seeks to use that passage in this way. He says first that it shows that the reason for looking at the proper law is that if the liability is a liability to pay on a date after the relevant legislation, then it is correct to apply the proper law of the contract. On that basis, he says, it follows by necessary inference that if the debt can be sued for before the date of the legislation, then the debt has a situs and it is the lex situs which should be applied. I am unable to follow Mr. Megaw in drawing the inference which he seeks to draw. I regard that passage from the judgment of Upjohn J. as recognizing that the questions regarding the discharge of a contract are in general governed by the proper law of that contract, and that cases where the obligation is a debt payable in the future are a fortiori cases which must be governed by the proper law.

In *In re Russian Bank for Foreign Trade*[8] on which Mr. Megaw relied, no question was raised which involved a choice between the proper law of the contract and the lex situs. Apart from the question of jurisdiction to make an order winding up the bank, which Maugham J. held that he had, the dispute between the parties was as to whether or not the debt, on which the petition was founded, existed or not. If it was situated in Russia, Maugham J.'s view was that it must be taken to have been destroyed by the Russian legislation. If, on the other hand, it was situate in England, the Russian legislation, being of a confiscatory nature, could not operate to extinguish the debt. Maugham J. took the view that he had insufficient evidence to resolve that dispute, but ordered the company to be wound up,

[7] [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.

[8] [1933] Ch. 745; 49 T.L.R. 253.

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notwithstanding that the debt was disputed. On that analysis, and assuming it to be correct, I do not see how that case supports the proposition contended for.

Taking the cases in the order in which Mr. Megaw cited them, the next case to be considered is *In re Banque des Marchands de Moscou.*[9] Here again no conflict was raised between the proper law and the lex situs. In the course of his judgment Vaisey J. said[10]: "It is not and cannot be, I think, "disputed that according to our law the debt is situate where "the debtor is, and I do not think that it can really be disputed "that these claims have to be regulated by Russian law; English "law does not come into this matter at all."

Later he said[11]: "Mr. Gwyn Rees, who appeared for the "Royal Exchange Assurance, frankly admitted that if the case "was governed by the principle laid down by Maugham J. in "*In re Russian Bank for Foreign Trade*,[12] the claim of his "client must necessarily fail. I think that it does fail, and I "think that it fails on that comparatively short and simple "ground. It seems to me that the claim of the Royal Exchange "Assurance is governed by Russian law. I think that that was "the proper law of the contract between those claimants and "the bank."

It was suggested by Mr. Megaw that Vaisey J.'s reference to the proper law of the contract was per incuriam: but I find it difficult to accept this view because of the sentence which follows[13]: "I think that that claim can be, and could have "been, discharged according to the provisions and, I think, only "according to the provisions of Russian law; and that the "rights and remedies of the claimants were all put an end to "by one or other of the decrees applicable in this case."

As I read it, Vaisey J. was saying that under the proper law of the contract, which would be the correct law to apply when considering whether an effective discharge of the obligation had been effected, the obligation had been discharged. For myself I should have thought that on the facts disclosed in the report the proper law of the contract was Russian law. If that be so there was a coincidence of proper law and lex situs. Apart from this consideration, the case can be regarded as covered by Maugham J.'s decision in *In re Russian Bank for Foreign Trade.*[14]

The next authority cited was *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property.*[15] In that case Pearson J. having held that an indemnity claim under an insurance policy was a chose in action, proceeded to consider the situation of the particular chose in action. It is I think important to bear in mind that this case involved simply a consideration of the title to

[9] [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.
[10] [1952] 1 T.L.R. 740–741.
[11] Ibid. 744.
[12] [1933] Ch. 745.
[13] [1952] 1 T.L.R. 739, 744.
[14] [1933] Ch. 745.
[15] [1954] 1 W.L.R. 139.

the chose in action. It did not involve the question what is the correct law to apply to the discharge of a contract. Pearson J. had to consider the effect, in connexion with the question of title, of the Emergency Regulations concerning Properties of Absentees made by the Israeli Finance Minister in 1948 and the Absentee Property Law, 1950. As regards the effect of the regulations his finding was as follows [16]: "Having regard to the ordinary "scope of the word 'movables' and to the inherent improba- "bility that debts and choses in action would be left unaffected "by such regulations, and to the language of regulation 7 and "regulation 22 (a) (2), I hold, after taking into account Mr. "Megaw's argument, that the chose in action—the claim against "the insurance company—was a 'movable' and therefore "'property' for the purposes of the regulations." [His Lordship referred to further provisions in the regulations and continued:] "I hold that under these regulations the chose in action—the "claim against the insurance company—became vested in the "custodian." He then proceeded to consider whether the position had been altered by the Absentee Property Law, 1950. His conclusion on that question is thus expressed [17]: "It follows, "in my opinion, that the provision for continued vesting, con- "tained in regulation 5 (d) of the regulations and carried on with "only minor alterations by section 4 (*c*) of the law, has the effect "of keeping the chose in action continuously vested in the "custodian notwithstanding the replacement of the regulations "by the law. That is a proper extraterritorial operation of the "law. Personal property, which has become vested in a state "department, or official of some country by legislation of that "country, while the property was situated in that country, does "not cease to be so vested by reason of its subsequent removal "to another country: *Princess Paley Olga* v. *Weisz*.[18] I should "add that in the present case it is not proved that the chose in "action had ceased to be situated in Israel by March 31, 1950, "or at any time. I therefore hold that the defendant succeeds "in this issue, because the chose in action became vested in the "defendant under the regulations of 1948 and remained vested "in the defendant under the law of 1950." So that the ground of his decision is that the title to the chose in action was in the custodian because it had become vested in him by virtue of the legislation. That would have been sufficient to dispose of the case, but Pearson J. thought it right to advert to an argument which had been addressed to him, and he proceeded as follows [19]: "It is right, however, to say something about a contention of "Mr. Caplan, to which much argument was directed on both "sides, because if Mr. Caplan's contention is correct the case "should be decided in his favour on a different ground. He "contended that the law by which a debt or chose in action can

[16] [1954] 1 W.L.R. 139, 150.
[17] [1954] 1 W.L.R. 139, 152.
[18] [1929] 1 K.B. 718; 45 T.L.R. 365.
[19] [1954] 1 W.L.R. 139, 152.

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"properly be affected (whether by discharge or modification or "transfer of the right) is the proper law of the contract, rather "than the lex situs. Mr. Megaw contended, inter alia, that the "only law by which a debt or chose in action can properly be so "affected is the lex situs. The problem arises because a debt "or chose in action can be regarded in two ways: (1) it can be "regarded as properly movable property, and when so regarded "it naturally falls under the lex situs; (2) it can be regarded as "a still unperformed obligation under a contract, and therefore "it might be still subject to the proper law of the contract and "liable to be discharged or altered by that law. A legislative "provision that a debt or a chose in action owing to A shall "be discharged by payment to B could be regarded either as "involving a transfer of the ownership of the property from A "to B, or as an alteration of the contractual obligation by "substituting B for A as the obligee." He then expresses the view that Mr. Caplan's contention could be shortly disposed of. He says [20]: "I am inclined to think that there is a short answer "to Mr. Caplan's contention in this case. The Israeli law of "1950 is, on the face of it, a law dealing with property and not "with contract, and therefore it should be construed as applying "only within those territorial limits which are appropriate to "property legislation. Accordingly, an initial vesting under that "law could only be of a property situated in Israel, and if Mr. "Caplan had to show that this chose in action was caught de "novo by the law of 1950, he would fail to do so for want of "proof that the chose in action was situated in Israel at or after "the time when the law came into force."

He then deals in some detail with the authorities cited in support of the respective arguments, and makes this comment [21] on *Perry* v. *Equitable Life Assurance Society of the United States of America* [22]: "That is a clear decision that a contract can be "annulled, the contractual nexus between the parties can be "dissolved, by legislation of the country whose law is the proper "law of the contract. It is to be observed, however, that as no "payment would have become due under the policy before the "year 1923, and the contract was annulled in 1919, if not earlier, "no chose in action had arisen, so there was nothing to which "any lex situs could apply."

The last two passages from the judgment of Pearson J. to which I desire to refer are these [23]: "On the other side there are "a number of authorities which tend to show that only the lex "situs can alter the title to debts and choses in action. "Evidently, there is a considerable weight of authority in "favour of the view that only the lex situs can alter the title "to debts and choses in action, and the authorities cited to prove "the contrary proposition do not seem to have that effect. On "principle, there is the consideration that, if the action to

[20] [1954] 1 W.L.R. 139, 152.
[21] Ibid. 154.
[22] (1929) 45 T.L.R. 468.
[23] [1954] 1 W.L.R. 139, 156.

" recover a debt or chose in action is brought in the country where " it is properly recoverable and therefore situated, and if there " is a conflict between the lex situs and the proper law (the one " having legislation which vests the debt or chose in action in A " and the other having legislation which vests the debt or chose " in action in B), the court trying the action will be bound to " apply its own law which is the lex situs." These expressions of opinion certainly do not go the length of saying that on a question whether a contract has been discharged, the lex situs ousts the proper law of the contract. The only opinion expressed is that it is probably the lex situs which must be applied when the question to be resolved is whether or not the title to debts or choses in action has been altered. I, therefore, take the view that this case still leaves open the question which I have to decide.

Those are the authorities on which Mr. Megaw relied for his main proposition. I turn now to the authorities which Mr. Wilberforce cited on this point. The first was *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux*,[24] which case, it is to be observed, was not cited to Pearson J. or mentioned in his judgment. The headnote reads as follows: " A party to a contract made and to be performed in England is " not discharged from liability under such contract by a discharge " in bankruptcy or liquidation under the law of a foreign country " in which he is domiciled." The relevant facts appear from the opening sentences of the judgment of Lord Esher M.R.[25]: " In this case the defendants, a French company, entered into " negotiations for the purchase of copper through a London " metal broker, who effected contracts between them and the " plaintiffs in England in the ordinary way. He drew up and " bought and sold notes, by which the contract was expressed " to be according to the rules of the London Metal Exchange. " One of these notes he sent to the plaintiffs, and the other he " sent to the defendants; and both parties retained the notes so " sent to them. The contracts were for the purchase of copper " to be delivered in England. It appears to me impossible to " deny that these were English contracts. The contracts being " so made, the defendants became bound to accept the copper " contracted to be sold. The plaintiffs were always ready and " willing to deliver the copper; but the defendants were not ready " to accept, and absolved the plaintiffs from tendering it. Con- " sequently, according to English law, the plaintiffs are entitled " to sue the defendants for non-acceptance of the copper, the " measure of damages being the difference between the contract " and market price at the time of the breaches of contract. But " the defendants are a French company domiciled in and " governed by the law of France. They have been, by a judg- " ment of the Tribunal of Commerce of the Seine, pronounced

[24] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

[25] 25 Q.B.D. 399, 403.

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" to be in judicial liquidation. It was asserted by the defendants " by way of defence to the action that the pronouncing of that " judgment by the French tribunal by the law of France operated " as a discharge of the defendants from liability to an action on " the contracts; and it was asserted that it so discharged them " in more than one way. It was said that such a judgment " dissolved the French company, so that it no longer existed, and " so dissolved their liability to be sued on the contracts. It was " further said, that the fact of the plaintiffs having by their " agents offered proof of their claims before the French tribunal " operated as a discharge of the defendants' liability to this " action."

Later he said [26]: " The question really is, whether anything " has been proved which is an answer to the plaintiffs' action in " this country according to the law of England. It is clear that " these were English contracts according to two rules of law; " first, because they were made in England; secondly, because " they were to be performed in England. The general rule as to " the law which governs a contract is that the law of the country, " either where the contract is made, or where it is to be so " performed that it must be considered to be a contract of that " country, is the law which governs such contract; not merely " with regard to its construction, but also with regard to all the " conditions applicable to it as a contract. I say ' applicable to " ' it as a contract ' to exclude mere matters of procedure, which " do not affect the contract as such, but relate merely to the " procedure of the court in which litigation may take place " upon the contract. The parties are taken to have agreed that " the law of such country shall be the law which is applicable " to the contract. Therefore, if there be a bankruptcy law, or " any other law of such country, by which a person who would " otherwise be liable under the contract would be discharged, and " the facts be such as to bring that law into operation, such law " would be a law affecting the contract, and would be applicable " to it in the country where the action is brought.

" That, at any rate, is the law of England on the subject. " So, where a contract is made or is to be performed in a foreign " country, so as to be a contract of that country, and there is a " bankruptcy law, or the equivalent of a bankruptcy law, of that " country, by which, under the circumstances that have occurred, " a party to the contract is discharged from liability, he will be " discharged from liability in this country. But it is only in " virtue of the principle which I have mentioned that such a " discharge from a contract takes place. It is now, however, " suggested that, where by the law of the country in which the " defendants are domiciled the defendants would, under the " circumstances which have arisen, be discharged from liability " under a contract, although the contract was not made nor to be

[26] 25 Q.B.D. 399, 405, 406.

" performed in such country, it ought to be held that they are " discharged in this country. It seems to me obvious that such a " proposition is not in accordance with the principle which I " have stated. The law invoked is not a law of the country to " which the contract belongs, or one by which the contracting " parties can be taken to have agreed to be bound; it is the law " of another country by which they have not agreed to be bound. " As Lord Kenyon said, in *Smith* v. *Buchanan*,[27] it is sought to " bind the plaintiffs by a law with which they have nothing to do, " and to which they have not given any assent either express " or implied. The proposition contended for seems to me to " contravene the general principle to which I have alluded as " governing these matters, and to suggest a principle for which " there is no foundation in law or reason. Why should the " plaintiffs be bound by the law of a country to which they do not " belong, and by which they have not contracted to be bound? " Therefore, if it were true that in any of the modes suggested the " defendants were by the law of France discharged from liability, " I should say that such law did not bind the plaintiffs, and that " they were nevertheless entitled, according to English law, to " maintain their action upon an English contract."

That case is a strong case and it has, so far as I know, never been questioned. It is quite true that at the time when that case was decided in 1890, the phrase " proper law of the contract " had not emerged, but there can be no doubt that Lord Esher M.R. was stating as well established that the discharge of a contract is to be governed by its proper law. The case is cited, and, in my view, justifiably cited, by Dr. Cheshire for this proposition: " There is no doubt, either on principle or authority, that dis- " charge affects the substance of the obligation and that it is " governed by the proper law of the contract ": see Cheshire, Private International Law, 5th ed., p. 246. It is cited by Dicey, Conflict of Laws, 6th ed., p. 651, in support of rule 143: " The " validity of the discharge of a contract (otherwise than by bank- " ruptcy) depends upon the proper law of the contract."

The other case on which Mr. Wilberforce relied was *Metliss* v. *National Bank of Greece*.[28] The essential facts emerge from a single sentence at the beginning of the judgment of Romer L.J.: " In this case the plaintiff is suing the defendant company " on a guarantee to which the company was not a party. The " guarantors were the National Bank of Greece, but the plaintiff's " case is that by reason of a decree passed in Greece (which was " the country of the National Bank's domicile) the bank ceased " to exist in 1953 and the whole of its assets and liabilities, " including the liability to the plaintiff under the guarantee, " became vested in the defendant company." Denning L.J.

[27] (1800) 1 East 6.

[28] [1957] 2 Q.B. 33, 47; [1957] 2 W.L.R. 570; [1957] 2 All E.R. 1.

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said at the opening of his judgment, as reported [29]: "Notwithstanding that moratorium, if an English bondholder had brought an action in the English courts for the interest due to him, either against the principal debtor, the National Mortgage Bank of Greece, or against the guarantors, the National Bank of Greece, or against both, the English courts would without doubt have given judgment for the interest due. The English courts would not have recognized the moratorium. The proper law of the contract was English law and no enactment of the Government of Greece could affect the matter"—for which proposition he cites authority. At the end of his judgment he says this [30]: "This brings me to the second point. The defendant company says that if the English courts recognize Greek law so as to make it liable as universal successor, so also they should recognize the Greek law of moratorium. The English courts cannot, it is said, when dealing with the liability of the defendant company, take the Greek law in part and reject it in part. They must recognize it in whole or ignore it altogether. This is a forceful argument, but I do not think we can give effect to it. The rules of private international law do not permit it. The debtor is a Greek debtor but the debt is an English debt. When we are considering the personality of the debtor or succession to his personal effects, we must apply Greek law because he is a Greek; but when we are considering the amount of the debt and the obligation to pay it, we must apply English law because it is an English debt. If the old National Bank of Greece had continued in existence, the English courts would give judgment against that company for immediate payment without regard to the moratorium. Greek law has destroyed the old National Bank of Greece and has set up the new company in its place. We recognize that Greek law has power of life and death over the company which it created, and we must accept the substitute which it has provided. But when the substitute stands in our courts to answer for an English debt, it must answer according to English law, which says that the debt must be paid according to its terms." It is clear from those two passages that he is treating the debt as English because the proper law of the contract was English. This was also the view of Romer L.J., who said [31]: "The plaintiff does not, and could not, rely on novation, but he rests his claim solely on the decree coupled with the fact (now admitted by the defendant company) that the proper law of the contract of guarantee was English. The defendant company's answer, in short, is that our courts will not recognize or enforce against it a liability which it did not contractually accept but which was imposed upon it by foreign law, videlicet, by the law of Greece." And finally Parker L.J., in his judgment, said [32]:

[29] [1957] 2 Q.B. 33, 40.
[30] Ibid. 46.
[31] Ibid. 47.
[32] Ibid. 54.

"The application of the foreign law to status does not involve "applying the foreign law as to obligations. What was trans- "ferred was the liability under the guarantee, whatever it might "from time to time be. If the old National Bank of Greece was "liable to be sued in England, as it was, so could the new bank." It appears to me, therefore, that this case supports the view that it is to the proper law to which one must turn to find out whether a contract has been discharged or not.

In this state of the authorities, I come to the conclusion that the proposition contended for by Mr. Megaw is not established as a rule of English private international law. To my mind it would offend against both principle and considerations of convenience. It must be remembered that, as Dr. Cheshire says (Private International Law, 57th ed., p. 246): "discharge affects "the substance of the obligation," whereas questions of title to and assignment of the benefit or burden of the obligation do not. Every contract has a proper law: it is the law which the parties either expressly or impliedly have chosen to govern their contractual relations. One of the most important aspects of any contract is the manner in which it is to be discharged, and one would suppose that the parties would intend the law which they have chosen as the proper law to govern that important matter—discharge. But according to the proposition advanced, the maturing of the obligation of the debtor under the contract into a debt of itself takes that debt out of the contract, and therefore extinguishes the pre-existing obligation, and forces the creditor, whether he wishes to do so or not, to have recourse to the law of the debtor's residence in order to enforce the debt.

I cannot regard this as sound in principle. It is not supported by the authorities. Indeed to my view it is contrary to the reasoning of Lord Esher M.R. in *Gibbs* v. *Société Industrielle et Commerciale des Métaux*.[33] I, therefore, hold that it is the proper law of this contract which must be applied in the present case to determine whether the lease has been discharged or not.

The next question, therefore, is what is the proper law of the lease. The lease is expressly recited in the agreement, and in the lease there is a recital of the intention immediately to assign the benefit of the lease to the trustee. The two documents are essential parts of the same transaction, namely, the Philadelphia Plan. In those circumstances one would expect that they each would have the same proper law, and I hold that they have.

Now, but for clauses eleventh and twelfth in each document I should not hesitate to hold that the proper law in each document is the law of the Commonwealth of Pennsylvania. The object of the transaction was to raise money in the United States of America by an essentially American method connected particularly with Pennsylvania. Pursuant to the Philadelphia Plan,

[33] 25 Q.B.D. 399.

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the trustee was a Philadelphian corporation having its place of business in Philadelphia. The money to be raised was to be in American dollars primarily from the American public. Payment of capital under the certificates and of rentals under the lease were to be made in gold coin of the United States of America in Philadelphia. The lease was brought into being in order to give the trustee on behalf of the holders of certificates something in the nature of a security, and the fact that the rolling stock was to be used in Cuba would not alter my view that the proper law of the contract was the law of Pennsylvania. There is a further point: it is very difficult to imagine why the parties to the agreement should choose the law of Cuba as the proper law of the agreement. Clause seventh of the agreement appears to me strongly to militate against the conclusion that they have done so. It presupposes that a choice is open to the trustee as to whether it will sue in Cuba or not, but if clauses eleventh and twelfth have the effect that the parties have submitted to the jurisdiction of the Cuban courts and the law of Cuba for all purposes, then the trustee has no such choice. Clause eleventh of the lease expresses the intention of the parties to enter into and execute the lease in accordance with the laws of Cuba, " to the end that " the lease may be registered in Cuba. Mr. Megaw submitted that the words " to the end that " merely introduced a consequence, but did not cut down the generality of the preceding words. I do not share that view. In my opinion, those words state the purpose for which the lease is to be executed in accordance with the laws of Cuba, and they are exhaustive of the purpose. That purpose is the same as the purpose of the latter part of the clause, namely, to protect the trustee's title. In my judgment, on its true construction clause eleventh is narrow in its scope and does not have the effect of making the law of Cuba the proper law of the lease or the agreement. The effect of clause twelfth depends primarily on its construction, and reference to authorities is not helpful unless upon examination the meaning and scope of the clause appears doubtful. It is to be observed that the submission is not general: it is not for all purposes, but for purposes which are expressed in the clause, namely, " for all notifications, sum- " monses and other judicial or extra-judicial formalities to which " this lease shall give rise." The presence of the word " other " has the effect that the word " formalities " qualifies everything from " notifications " onwards. The clause, therefore, is dealing with matters of form and is complementary to clause eleventh. The last phrase " with express renunciation of their own juris- " diction " is, as must follow from the use of the word " with," a renunciation for the purposes only of the limited submission. I would apply the same reasoning and the same construction to clauses eleventh and twelfth of the agreement.

In the result I conclude that the proper law of both the lease and the agreement is the law of the Commonwealth of Pennsylvania. It follows, therefore, that the lease has not been

discharged and that the trustee is entitled to prove in the liquidation of the company for whatever be the proper sum in sterling, a matter with which I shall have to deal later in this judgment.

The amount for which the trustee is entitled to prove should be ascertained as follows: There must first be ascertained what is due to the trustee under the lease. Expressed in dollars this consists of (1) the first, third and fourth items set out at the end of paragraph 2 (a) of the proof, and (2) what upon inquiry shall be found to be the correct sum in dollars under paragraph 2 (b) and (c). As regards the premium of 2½ per cent. on the face value of the certificates, this arises under the agreement and not under the lease, and should not be taken into account at this stage of the calculation. Then the dollars must be converted into sterling. As regards principal, this represents eleven instalments of rental, and so each instalment should be converted at the rate of exchange obtaining when it fell due. As regards the first claim for interest, this represents interest payable under the lease and therefore payable half-yearly on February 14 and August 14 of each year. Therefore, the total sum claimed under this head should be broken down into half-yearly amounts and converted at the rate of exchange obtaining on the respective dates when each half-yearly payment should have been made. The second claim for interest is really a claim for rent on the basis of holding over. I think, therefore, that, for purposes of conversion into sterling, the same method should be adopted as for the first claim for interest. The sums making up what is found to be the correct figure under paragraph 2 (b) must be converted into sterling at the rate obtaining on the respective dates of payment, while the sum found due under paragraph (c) must be converted into sterling at the rate obtaining at the commencement of the winding up, namely, March 4, 1954. If, of course, any of the items comprised in sub-paragraph (b) were incurred in sterling, there will be no need to convert into dollars and then back to sterling.

The sum resulting from the above calculation will represent the sum for which the trustee is entitled to prove in the liquidation. But, of course, as the trustee is a trustee, it can only receive in respect of its proof a sum sufficient to satisfy the proper claims of the certificate holders. In this regard I think that Mr. Wilberforce is right in his submission that the principle underlying the decision in *In re Chesterman's Trusts* [34] applies. I do not see how otherwise to deal with the matter. The proper course, therefore, is to ascertain the sum in dollars to which the certificate holders are entitled for principal, outstanding interest and the premium of 2½ per cent. To that total must be added the sums found due under subparagraphs (b) and (c) of paragraph 2 of the proof. Then there must be ascertained the amount of sterling which would have been required at the date of the

[34] [1923] 2 Ch. 466.

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liquidation to purchase the aggregate amount of dollars so ascertained. This total will represent the maximum amount which the trustee on behalf of the certificate holders can receive in respect of the sum proved for. How much the trustee will in fact receive will depend on the dividend payable in respect of the sum proved for.

What I have said in this judgment up to this point would be sufficient to dispose of the whole matter, but, in case the matter should be taken to the Court of Appeal, there was canvassed before me the incidence of the law of Cuba, upon the alternative bases either (1) that the main point fell to be determined by reference to the law of Cuba and that the situs was Cuba, or (b) that the main point fell to be determined by the proper law of the contract and the proper law was Cuban law.

In those circumstances it is only right that I should express my view on, at any rate, the main points of Cuban law which have been debated before me. [His Lordship then dealt with the main points of Cuban law and concluded:] Finally, I would say that, taking the view that clauses eleventh and twelfth of the lease and the agreement have the limited effect which I have placed upon them, and accepting the view of Dr. Gorrin (an expert on Cuban law) that under Cuban law the law of Pennsylvania would be held to be the proper law of the contract, then, on the assumption that Cuban law applied in this case, my conclusion as to the right of the trustee to prove in the liquidation of the company would be the same as that to which I have arrived earlier in this judgment, before I proceeded to consider the law of Cuba at all.

There remain to be considered the two further claims which Mr. Wilberforce put forward as alternative to his main claim in contract. The first is a claim for damages for conversion. His contention is that the trustee was, on December 1, 1953, the owner of the rolling stock, and that therefore the act of the company in selling it without the consent of the trustee amounted to conversion. I have held earlier in this judgment that the transfer of the rolling stock by the car company to the trustee was valid under Cuban law, the company at the end of the original transaction being in the position of a bailee of the rolling stock. It is not disputed, as I understand the evidence, that on December 1, 1953, the trustee had the right to possession of the rolling stock (assuming my views of the relevant Cuban law are correct) notwithstanding the appointment of the intervenor.

In those circumstances I accept the view of Dr. Gorrin that the sale and transfer of the rolling stock to the Cuban State was unjustifiable under Cuban law. The sale was a tort under English law: it was a conversion by a wrongful sale. Mr. Megaw relied on *Tancred* v. *Allgood*.[35] Upon examination, however, I agree with Mr. Wilberforce that this was not a case of conversion at

[35] (1859) 4 H. & N. 438.

all. It was an action against the sheriff and not against the bailee. In Halsbury's Laws of England, 2nd ed., vol. 33, p. 63, note (1), it is treated as a case of trespass, and I think rightly.

What, then, is the measure of damages? Mr. Megaw relied on *Belsize Motor Company* v. *Cox*[36] for the proposition that where the bailee has an interest in the property, the measure of damages is not the full value of the thing converted, but only the value of the owner's interest therein. Mr. Wilberforce accepted this proposition, and that the company had an interest in the rolling stock: but, invoking *Belsize Motor Company* v. *Cox*,[37] he contended that the interest of the trustee in the rolling stock at the date of conversion was the amount of the outstanding instalments, and, I suppose, interest thereon as provided in the lease, these being the payments which would have had to have been made by the company in order to make itself full owner of the rolling stock. In my view this is the correct formula for calculating damages on this claim in conversion. If the trustee were to prove under this head of claim, then in my judgment it would be entitled to prove for such a sum in sterling as when converted into dollars at the rate obtaining on December 1, 1953, would produce the amount of dollars resulting from the application of the formula to which I have just referred.

I come now to the last point, the claim for damages for breach of the covenant in clause fifth of the lease against assignment of the rolling stock without the consent of the trustee. I approach this claim on the basis that the property in the rolling stock effectively passed to the trustee in 1921 and that the covenants in the lease did not cease to be binding by virtue of the so-called resale agreement in 1922. I therefore come to the conclusion that by the sale of December 1, 1953, which admittedly was made without the consent of the trustee, the company committed a breach of the covenant in question. As regards the question of damages, Mr. Megaw submitted that the phrase "its right or "interest" in clause fifth refers only to its reversionary interest in the lease, and that therefore the act of the company can have resulted in no damage to the trustee. This appears to me to be putting much too narrow a construction on the clause. The document is a commercial document and must be construed so as to give business efficacy to it. I am unable to credit that the parties could have intended to confine the operation of the covenant to the company's reversionary interest. The clause is clearly introduced for the protection of the trustee, who, unless its permission is first obtained, is entitled to insist that the company shall remain the lessee under the lease and shall not be entitled to substitute any other person. In other words, the clause is dealing with the whole of the company's interest as lessee and not merely with its so-called reversionary interest. I do not, therefore, regard this as a claim for which only nominal

[36] [1914] 1 K.B. 244. [37] Ibid.

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damages should be awarded. To ascertain the quantum of damage one should ascertain the position which would have resulted if the clause had been complied with, and the consent of the trustee had been given. In such circumstances, the trustee should have been joined in the sale, in which case it would have received that portion of the purchase price properly attributable to the rolling stock. As I have mentioned earlier, the company valued the rolling stock for insurance purposes in July, 1953, at $200,000. I see no reason to treat it as being of any less value in December, 1953. I have no evidence as to the rate of depreciation; while on the other hand the evidence shows that the company in July, 1953, was cutting down its insurance commitments so far as it possibly could. It must, I think, be a reasonable inference that the sum of $200,000 was the lowest which could properly be placed on the rolling stock in July, 1953. If the trustee were to prove under this head of claim, then in my judgment it would be entitled to prove for such a sum in sterling as when converted into dollars at the rate of exchange obtaining on December 1, 1953, would produce $200,000.

Finally, I should observe that if the trustees were to prove under either of the last two heads, the maximum sum which he could retain would be the sum required to satisfy the claims of the certificate holders calculated as set out earlier in this judgment. In the result, the trustee has the choice of proving under one of three heads.

Order accordingly.

Solicitors: *Herbert Smith & Co.; Norton, Rose & Co.*

P. P.

[QUEEN'S BENCH DIVISION.]

1957
Dec. 10, 19.

Pilcher J.

ISLAND TUG AND BARGE LTD. *v.* S.S. MAKEDONIA (OWNERS).

THE MAKEDONIA.

Shipping — Salvage — Assessment of awards — Elements material — Tax element—Incidence of taxation on award not material.
Damages—Tax element.
Judicial Precedent — Decision at first instance — Whether binding on other judge—Salvage.

A company of professional salvors, incorporated in Canada, rendered salvage services to the steamship *Makedonia* on the terms of Lloyd's Standard Form of Salvage Agreement (No Cure—No Pay). Under the terms of this agreement the arbitrator made an award and the salvors then appealed to the appeal arbitrator. The appeal arbitrator increased the award to £60,000 and found that on the

profit made, by reason of this award, the salvors under Canadian law would be liable to pay tax amounting to about £18,000. The appeal arbitrator awarded the salvors £75,000 (this sum comprising the award of £60,000 plus an additional £15,000 by way of contribution towards the tax payable on the award) subject to the following question of law, which he stated for the opinion of the court: whether in assessing an award for salvage services rendered by the owners of a salvage vessel the incidence of taxation on any award made should be taken into consideration:—

Held, that, if it was proper to consider the element of taxation in assessing a salvage award in respect of personal services, the same consideration applied in respect of services rendered by the owner of a merchant or salvage vessel; but that the considerations of taxation applicable to diminish an award of damages in cases of wrongful dismissal or a tortious act did not justify in the assessment of a salvage award the consideration of the incidence of taxation on such award; accordingly the element of taxation was not one to be taken into consideration in assessing a salvage award.

The Telemachus [1957] P. 47; [1957] 2 W.L.R. 200; [1957] 1 All E.R. 72; [1956] 2 Lloyd's Rep. 490 not followed.

British Transport Commission v. *Gourley* [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796 distinguished.

SPECIAL CASE stated by the appeal arbitrator, Sir Alfred Bucknill, under Lloyd's Standard Form of Salvage Agreement.

The original arbitrator, under the terms of the salvage agreement, awarded the salvors £45,000 and made his award before the decision of Willmer J. in *The Telemachus* [1] had been published. On appeal, the salvors contended that the original award was inadequate for the services rendered, and that the incidence of taxation on the award was an element to be considered in assessing the award. The salvors obtained leave to adduce evidence as to the extent of their liability to pay tax on any award made. The appeal arbitrator stated the following question of law for the decision of the court:

" Whether in assessing the award for salvage services rendered " by the owners of a salvage vessel under Lloyd's Form of Salvage " Agreement (No Cure—No Pay) the arbitrator should take into " account the fact (if it be a fact) that the owners will have to " pay tax on the award."

The appeal arbitrator held that the decision in *The Telemachus* [1] governed the point raised in the special case and continued:

" *The Telemachus* [1] did not decide that all the tax payable by " the contractors should be included in the award, and in my " opinion to do so might impose an unjust hardship on the " respondents. ' Salvage is not governed by the ordinary rules " ' which prevail in mercantile transactions on shore. Salvage " ' is governed by a due regard to benefit received, combined with " ' a just regard for the general interest of ships and marine " ' commerce ' (Kennedy on Civil Salvage, 2nd ed., p. 8, and " cases therein cited). Salvage includes all expenses properly

[1] [1957] P. 47; [1957] 2 W.L.R. 200; [1957] 1 All E.R. 72.

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"incurred by the salvor in the performance of the salvage service: Merchant Shipping Act, 1894, s. 510. But it does not always follow that the court will make an award high enough to cover all such expenses (Kennedy, p. 156).

"The liability of the contractors to pay tax on the award is not, in my opinion, an expense properly incurred in the performance of the service. Assuming that the tax is an incident which the arbitrator ought to take into account when fixing the award, it does not stand in a better position than an expense properly incurred in the performance of the service."

The appeal arbitrator then considered the circumstances of the service and raised the award to £60,000.

With regard to the question of taxation, the appeal arbitrator assumed that under Canadian law the amount of tax would be assessed on the rate ruling when the service terminated, and that the tax payable on the award would be based on the profit made by the salvors out of it and not on the gross award. He then found the following material facts. The total expenses incurred by the salvors, including the maintenance of the salvage vessel, amounted to about £21,000, leaving a profit on the award of about £39,000. The salvors would have to pay tax at the rate of 47 per cent. on the profit under the award, amounting to about £18,000.

Subject to the decision of the court on the question of law the appeal arbitrator awarded the salvors £75,000.

Sir David Cairns Q.C., *S. Knox Cunningham* and *Barry Sheen* for the owners of the salved property.

K. S. Carpmael Q.C. and *Michael Kerr* for the salvors.

The following cases were cited in argument: *The Telemachus* [2]; *Forster* v. *Baker* [3]; *Green* v. *Berliner* [4]; *Receiver for the Metropolitan Police District* v. *Croydon Corporation* [5]; *The Queen Elizabeth* [6]; *British Transport Commission* v. *Gourley* [7]; *The Glengyle* [8]; *Moorhouse* (*Inspector of Taxes*) v. *Dooland* [9]; *Calvert* (*Inspector of Taxes*) v. *Wainwright* [10]; *The Industry.* [11]

Cur. adv. vult.

PILCHER J. stated the facts and continued: It seems reasonably clear that the appeal arbitrator dealt with the case in this way: He first considered whether, apart from the incidence of tax, the original arbitrator's award was sufficient, taking into

[2] [1957] P. 47.
[3] [1910] 2 K.B. 636; 26 T.L.R. 421.
[4] [1936] 2 K.B. 477; 52 T.L.R. 221; [1936] 1 All E.R. 199.
[5] [1956] 1 W.L.R. 1113; [1956] 2 All E.R. 785.
[6] (1949) 82 Ll.L.R. 803.
[7] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.
[8] [1898] A.C. 519; [1898] P. 97; 14 T.L.R. 522.
[9] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93.
[10] [1947] K.B. 526; [1947] 1 All E.R. 282.
[11] (1835) 3 Hag.Adm. 203.

account all the circumstances of the case and all the special considerations, which apply when the service is rendered by a salvage vessel maintained on station for the express purpose of rendering salvage services to vessels in distress. Taking these matters into consideration, he determined that the award was, as he states, "much too little." He accordingly increased it by 25 per cent. to £60,000. It is not now disputed that if questions of tax are to be disregarded, £60,000 is a proper award. It is also common ground that if the argument put forward by the claimants in regard to the tax position is sound, the appeal arbitrator's award of £75,000 is a proper one.

The point which is submitted for the opinion of the court is simply this. Is it proper in law for the court or an arbitrator, when assessing the amount of salvage to be awarded to the owners of a salvage vessel, having taken into account all the elements which have been laid down in countless cases as being matters for consideration, and arrived upon this basis at an appropriate sum, to add to such sum a further sum representing or "on account of" the tax which the salvors, in this case the owners of the salvage vessel, will have to pay under the fiscal laws to which their company is subject, upon the profit shown on the particular service? Put in another way, is there any principle peculiar to the law of salvage which requires or enables the court, upon grounds of public policy, after assessing the award due to a salvor upon generous and well-established principles, to break new ground and further increase his award in such a fashion as to relieve him wholly or substantially from the tax burden upon the profits which he derives from a salvage service?

It will be observed that the question propounded by the appeal arbitrator is confined to the case where the salvors are "the "owners of a salvage vessel." I draw attention to this fact because, on December 7, 1956, Willmer J. gave judgment in *The Telemachus*.[1] The original arbitrator had, as I understand it, on December 7, 1956, heard the arbitration in the present case, but had not yet published his award. In *The Telemachus*[2] salvage services were rendered to the *Telemachus* by a sister ship, the *Tantalus*. There was, of course, no claim for salvage by the owners of the *Tantalus*, who were also the owners of the *Telemachus*. But the master and crew of the *Tantalus* put forward a salvage claim. During the course of the argument Willmer J. himself raised the question of tax,[3] asking whether any members of the crew of the *Tantalus* would have to pay tax on any award made. It was not in dispute before him that mariners were liable under the fiscal laws of this country to include in their income for tax purposes any sums received by them in the form of salvage awards. In so far as the matter was material for my purposes, counsel before me were agreed

[1] [1957] P. 47; [1957] 2 W.L.R. 200; [1957] 1 All E.R. 72.

[2] [1957] P. 47, 48.

[3] Ibid.

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that this was so, apparently on the ground that salvage is a payment for services rendered, and must under the law of this country be regarded as subject to tax, if it derives, as it does when the services are rendered by seamen, from the seamen's service or employment.

To return to *The Telemachus*.[3] During the course of the argument Willmer J. suggested that the principle applied in *British Transport Commission* v. *Gourley*[4] might properly be applied in a case involving personal services for salvage. It is apparent from Willmer J.'s judgment[5] that the judge took the point himself, feeling that there was some principle in the decision in *Gourley's* case[6] which might make it proper for him to take tax into account in arriving at his award in the case before him. In the course of his judgment, having stated the facts, Willmer J. said[7]: "There is, however, I think, one other "matter to be taken into consideration, more especially when "one is dealing with personal awards of this character, and that "is this. Certainly the master of the *Tantalus*, and, I apprehend, "in all probability, all the officers of the *Tantalus*, and, I dare "say, all the European members of her crew, will become liable "to taxation, as part of their earnings, upon such share of my "award as they receive. I raised the question in argument "whether that is an element which ought to be taken into "consideration, and I raised that point more particularly having "regard to the recent decision of the House of Lords in *British* "*Transport Commission* v. *Gourley*.[8] It appears to me that in "principle the same considerations as apply to an award of "damages in favour of an injured plaintiff should properly also "apply to an award of salvage in the case of a plaintiff who has "performed personal services. More particularly I think is that "so when one pays regard to the principles of public policy under-"lying the law relating to salvage awards. In modern conditions "it seems to me that it would be quite unreal, when one is "dealing with personal services, to ignore the possible effect of "taxation upon the amount of the salvage award. If one were "to ignore it, it seems to me that one would be cutting at one "of the root principles on which salvage is awarded, namely, "that of encouragement to mariners to perform services of a "salvage nature. If allowance is not made for the fact of "taxation, it simply means that the reality of the award made "in cases of this sort is so much the less. In those circum-"stances I have thought it right to take that matter into con-"sideration. I have not sought to do so by way of any exact "calculation. I think it must necessarily be dealt with in a "rough and ready way, simply as an element to be considered. "It appears to me that one is in very much the same position

[3] [1957] P. 47, 48.
[4] [1956] A.C. 185; [1956] 2 W.L.R. 96; [1955] 3 All E.R. 796.
[5] [1957] P. 47, 48, 49.
[6] [1956] A.C. 185.
[7] [1957] P. 47, 49.
[8] [1956] A.C. 185.

" with regard to that as one is in relation to expenses necessarily " incurred in the performance of a salvage service. For many " years that has been regarded as an element which the court " should take into consideration in awarding salvage, and for this " reason, that if one ignores the expense which has to be incurred " in rendering the service one may be left in the position that " the salvage award is no reward at all and no encouragement " to mariners to perform salvage services. It appears to me that " in the case of personal services one ought to pay just the same " regard to the incidence of taxation as, in the case of other " services, one pays to the incidence of expenses necessarily " incurred. In the award which I propose to make, therefore, " I think it is right to say that in the case of the master and in " the case of such proportion of the crew as are of European " extraction, I have thought the liability to taxation is an element " to be taken into consideration. Moreover, I will go further and " say that the awards I am about to pronounce are larger than " they would have been if I had come to the conclusion that the " tax element was to be wholly disregarded."

I have thought it right to read virtually the whole of Willmer J.'s judgment on this point because counsel for the respondents, in opening the case, made two submissions to me. He submitted, in the first place, that Willmer J.'s decision in *The Telemachus* [9] was wrong; and, secondly, that, in any event, the principle of that decision should be confined to claims for personal services by members of the crew of a salving ship, and should not extend to the case where the services were rendered by professional salvors.

Counsel for the respondents submitted—and submitted rightly, in my view—that if I took the view that Willmer J.'s decision was wrong, and was not distinguishable from the present case, I was not bound to follow it. The cases on this point are conveniently collected and reviewed by Slade J. in *Metropolitan Police District Receiver* v. *Croydon Corporation.*[10] Slade J. refers to a passage from the judgment of Lord Goddard in *Huddersfield Police Authority* v. *Watson* [11]: " We are con- " sidering a decision of this court. So far as the dictum of " Grove J.[12] is concerned, I can only say for myself that I think " that the modern practice, and the modern view of the subject, " is that a judge of first instance, though he would always follow " the decision of another judge of first instance, unless he is " convinced that the judgment is wrong, would follow it as a " matter of judicial comity. He certainly is not bound to follow " the decisions of a judge of equal jurisdiction. He is only " bound to follow the decisions which are binding on him, which, " in the case of a judge of first instance, are the decisions of the

[9] [1957] P. 47.

[10] [1956] 1 W.L.R. 1113, 1116; [1956] 2 All E.R. 785.

[11] [1947] K.B. 842, 848; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[12] (1884) 53 L.J.Q.B. 335.

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"Court of Appeal, the House of Lords, and the Divisional "Court."

I accordingly approach the matter upon the basis that, unless in my view the case before me can be distinguished on the facts or in principle from *The Telemachus*,[13] I am not bound to follow the principle applied by Willmer J. in *The Telemachus*[14] in answering the question of law propounded to me by the appeal arbitrator.

In *The Telemachus*[15] Willmer J. decided that he ought to take questions of tax into consideration, but was careful to confine his observation to the case before him, where the claims were, as he expressed it, for "personal services" by the master and crew of the *Tantalus*.

The first matter, therefore, which I have to consider is whether the fact that the services in the present case, which were rendered by a salvage vessel maintained on station for the express purposes of rendering salvage services and owned by a company whose principal business was that of professional salvors, suffices factually or in principle to distinguish *The Telemachus*[16] from the case before me.

In the days of sail, salvage services were generally of a personal character, and only those who actually rendered the services were entitled to claim. I may perhaps refer to a well-known passage in the judgment of Lord Stowell in *The Vine*[17]: "It is, I apprehend, a general rule that a party, not actually "occupied in effecting a salvage service, is not entitled to share "in a salvage remuneration. The exception to this rule that "not unfrequently occurs is in favour of owners of vessels, which, "in rendering assistance, have either been diverted from their "proper employment, or have experienced a special mischief, "occasioning to the owners some inconvenience and loss, for "which an equitable compensation may reasonably be claimed." Now that passage is set out on page 74 of the late Lord Justice Kennedy's book on the Law of Civil Salvage in the second edition, and the quotation is followed by these words, which I read from the book: "The right of the owner of the salving "vessel to be rewarded as a salvor has received, especially in "recent times, liberal recognition from the Court of Admiralty. "Where the salving vessel is a steamship and is herself the chief "instrument in the service, as now is commonly the case, it is "the owner who gets the principal share in the reward. Even "where the salvage has been performed entirely by the personal "exertions of the crew of his vessel, he is usually held to be "entitled to some, but, of course, to a smaller share."

With the advent of steam, when the steam vessel was herself the chief instrument in the service, it became recognized that the owner of the salving vessel, although not present at the time,

[13] [1957] P. 47.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] (1825) 2 Hag.Adm. 1 at p. 2.

was entitled to the principal share in the reward—as appears from the passage which I have read—inasmuch as his property had been put at risk, and had moreover been primarily instrumental in effecting the service.

It is, I think, common knowledge that for some 60 years or more companies incorporated in various countries, and whose names are household words in the shipping community, have carried on the business of professional salvors, maintaining salvage vessels and salvage equipment at strategic points. Such companies employ highly skilled personnel, and it has been recognized by the courts of this country, at least since the year 1898, when *The Glengyle* [18] was decided, that services rendered by salvage vessels of this character are deserving of and should receive a particularly generous award. Great stress was laid upon this point by counsel for the claimants, and accordingly I propose to read two or three short passages from the judgments in *The Glengyle*.[19] The passage which I want to read is the judgment of Gorell Barnes J. in the Admiralty Court [20]: "Lord "Stowell said, in *The William Beckford* [21]: 'The principles upon "'which the Court of Admiralty proceeds, lead to a liberal "'remuneration in salvage cases; for they look not merely to "'the exact quantum of service performed in the case itself, but "'to the general interests of the navigation and commerce of "'the country, which are greatly protected by exertions of this "'nature.' These principles have been emphasised in many "cases by different judges of the Admiralty Court. The remarks "of Sir Charles Butt in *The Envoy*,[22] in a case of salvage services "rendered by steam-tugs, are very appropriate to the present "case. He said: 'To my mind, one of the most important "'functions of this court is to encourage the maintenance of "'powerful and efficient steam-tugs around our coasts, to be in "'constant readiness to assist vessels in distress. Not only in "'the course of the year is a large amount of property saved by "'these means, but a considerable sacrifice of life is prevented. "'Therefore, the principle we go upon is not that of a quantum "'meruit, but of giving such an award as will encourage people "'to keep vessels of adequate size and dimensions ready to go "'out.'" Then he turns to the facts of *The Glengyle* [23] and says: "The maintenance and establishment of salvage steamers "such as the *Hermes* and the *Newa* are for the general benefit "of owners and underwriters and others interested in seagoing "vessels and their cargoes, and the crews and passengers of "such vessels, and, guided by the principles above stated, the "Admiralty Court will be liberal in its awards in respect of "services rendered by salvage steamers, even though the awards "may fall somewhat heavily on individual owners. The owners

[18] [1898] P. 97.
[19] Ibid.
[20] [1898] P. 97 at p. 102.
[21] (1801) 3 C.Rob. 355.
[22] Unreported. See Kennedy, The Law of Civil Salvage, 3rd ed., pp. 149 and 150.
[23] [1898] P. 97.

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"of salvage steamers invest a large amount of capital in them. "and maintain them and their crews, divers, and appliances at "great expense, and have no remuneration to look forward to "except that which may be earned by occasional salvage "services."

Then the case is reported in the Court of Appeal and A. L. Smith L.J. says [24]: "What is the amount the plaintiffs are "entitled to recover? If this had been an ordinary salvage case, "either by tugs or by a passing ship, for myself I think that the "run of the authorities show that this sum of £19,000 would be "excessive. Counsel for the appellants have referred to a large "body of cases, in only one of which—*The Thetis* [25]—so large an "amount has been given. But there is this material difference "in this case, namely, that these two large salving vessels are "kept at a very high expense for the purpose of salving ships; "and one cannot shut one's eyes to this fact, that unless those "ships had been kept where they were ready to proceed at once "to sea, the owners of the *Glengyle* and of her cargo would have "lost £76,596. Taking that into consideration as one factor in "the case, as also the risks which the salving vessels and their "crews ran, I cannot say that the sum of £19,000 which has been "awarded by my brother Gorell Barnes is so excessive that this "court ought to set it aside." I have only read those passages from the judgments in *The Glengyle* case [26] because they were stressed, and properly stressed, by Mr. Carpmael on behalf of the claimants. They state a principle which is well known in the Admiralty Court, and well known to arbitrators who have to deal with salvage by arbitration, and it is always applied.

Proceeding, therefore, on the basis, and recognizing, that the claimants in the present case, who were professional salvors, had to have a particularly generous award, I bear in mind that they employ experienced service personnel, and it is well known, although it is not stated by the learned appeal arbitrator in this case, that professional salvors who keep salvage tugs on station have special arrangements which they make for the remuneration of the master and crew of those salvage vessels. But it is unusual, where a professional salvor is a plaintiff in an action or a claimant in an arbitration, for the master and crew of the salvage vessel involved to figure personally as plaintiffs or claimants. The award made, however, in every salvage case is in a sense a reward for personal services. The element of risk to the salving crew is the same whether they are on board a merchant ship or a salvage vessel. The responsibilities undertaken by the master of the salving craft is the same whatever its nature. The danger to the salved vessel does not differ whether the salvor is a merchant ship or a salvage vessel. All these are matters which are crucial when the amount of the salvage award has to be considered.

[24] [1898] P. 97 at p. 110.
[25] (1834) 2 Knapp 390.
[26] [1898] P. 97.

Having given the matter the most careful consideration, I find it quite impossible to distinguish *The Telemachus* [27] from the case now before me, either on its facts or in principle. But for the fact that, in *The Telemachus*,[28] the salving and the salved vessel were in the same ownership, the owners of the *Tantalus* would have figured with her master and crew as plaintiffs. If the incidence of personal taxation is to be taken into account when the claimants are individuals who have actually taken part in this service, it is difficult to see why the same concession should not be made to the owner of a ship, where he is an individual, whose property has been put at risk if his ship has been instrumental in performing the service. If the principle applies to a ship owned by an individual, then why should the same concession be refused to a ship owned by a corporation? If it applies to a merchant ship owned by a corporation, then why should it not apply to a salvage ship similarly owned?

Finding it impossible to distinguished between *The Telemachus* [29] and the case before me, either on the facts or in principle, I have to consider the submission made to me on behalf of the respondents that Willmer J. was wrong in law in taking into account, when he arrived at his award, the fact that the master and certain members of the crew of the *Tantalus* would have to pay tax on the sums awarded to them.

It is quite clear that Willmer J. decided that, when personal salvage services are in question, the incidence of taxation should be taken into account because of the recent decision of the House of Lords in *British Transport Commission* v. *Gourley*.[30] The appeal arbitrator, who clearly took the same view as I do myself, namely, that it was impossible to distinguish *The Telemachus* [31] from the present case, held himself bound by Willmer J.'s decision in *The Telemachus*.[32]

It is probably safe to say that, in spite of the very high rate at which individuals and companies have now been taxed for many years, it would never have occurred to anyone that salvors, personal, mercantile or professional, should, under any principle attaching to the law of salvage, be entitled to off-load all or some of their liability to tax on to the shoulders of the owners of the salved property. Does any principle laid down in *Gourley's* case [33] require that this should be so? I recognize to the full that one of the reasons for awarding salvage services on a liberal scale is so as to encourage mariners to assist vessels in distress, and that this principle applies with particular force when professional salvors are concerned. It is, moreover, inevitable that the salvor may feel correspondingly discouraged when he finds that he has to pay tax at the appropriate rate on the profit element in the

[27] [1957] P. 47.
[28] Ibid.
[29] Ibid.
[30] [1956] A.C. 185.
[31] [1957] P. 47.
[32] Ibid.
[33] [1956] A.C. 185.

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sum awarded to him. This, however, so far as I am aware, has always been the position.

Does any principle laid down in *Gourley's* case [34] support the view expressed by Willmer J. in *The Telemachus*? [35] If I may express my own humble opinion, *Gourley's* case [36] decides no more than this, namely, that in awarding damages for incapacity due to injury caused by the tortious act of another, such damages not being subject to tax, the court should have regard, not to the gross sum which the injured person has been prevented from earning during the period of his incapacity, but to the net amount which would have remained in his hands after he had paid tax at the appropriate rate during such period. The same principle has been applied since *Gourley's* case [37] in a case of wrongful dismissal, when the plaintiff's case was founded on breach of contract.

So far as I am aware, all cases, whether founded on tort or in contract, in which the incidence of taxation has been taken into account, have been cases in which the sum awarded by the court would not have been subject to tax. In all such cases consideration of the tax aspect has led the court to reduce the sum payable by way of damages or compensation by the amount which the plaintiff would have had to pay away in tax if he had not been the victim of the tort or breach of contract in respect of which his action is brought. *Gourley's* case [38] was founded on tort. Lord Reid says [39]: "The general principle on which "damages are assessed is not in doubt. A successful plaintiff "is entitled to have awarded to him such a sum as will, so far "as possible, make good to him the financial loss which he has "suffered and will probably suffer as a result of the wrong done "to him for which the defendant is responsible. It is sometimes "said that he is entitled to restitutio in integrum, but I do not "think that that is a very accurate or helpful way of stating his "right. He cannot in any real sense be restored, even financially, "to his position before the accident. If he had not been injured "he would have had the prospect of earning a continuing income, "it may be, for many years, but there can be no certainty as to "what would have happened." Then he concludes at the end of the paragraph as follows: "Yet damages must be assessed as a "lump sum once and for all, not only in respect of loss accrued "before the trial, but also in respect of prospective loss. Such "damages can only be an estimate, often a very rough estimate, "of the present value of his prospective loss." Lord Reid is there stating the well-known principle upon which damages in tort are assessed in cases of personal injury. The respondent in *Gourley's* case [40] was awarded an approximation of the net sum

[34] [1956] A.C. 185.
[35] [1957] P. 47.
[36] [1956] A.C. 185.
[37] Ibid.
[38] Ibid.
[39] Ibid at p. 212.
[40] Ibid. at p. 185.

which he would have retained, after paying tax at a high rate, had he not been incapacitated.

The following distinctions between *Gourley's* case [41] and the one with which I am concerned spring at once to the eye. Damages in tort and for breach of contract are not subject to tax, whereas salvage awards, or at least such profit element as they may contain, attract tax. In *Gourley's* case [42] the sum awarded was reduced by the introduction of tax considerations. In the present case it is sought to increase the award by bringing tax into consideration.

The claimants in the case before me are a company incorporated under the law of Canada. Their main revenue, as I understand it, is derived from salvage awards earned by the skilful use of the salvage vessels and gear which they own. They are a business concern like any other business concern, whose object is to make profits. Whilst the work they perform is no doubt admirable and to be encouraged, they are not a charity. The company is subject to the fiscal laws of its country of incorporation or its residence, and for my part I can see no principle laid down in the speeches of the majority of the noble Lords in *Gourley's* case [43] which justifies the introduction into the ancient law of salvage of so startling and important an element as is contended for by the claimants in the present case, and was held by Willmer J. to be present in *The Telemachus*.[44]

It is not, I gather, in dispute that in increasing the award of the original arbitrator from £45,000 to £60,000, the appeal arbitrator took into account all the elements which it was proper to consider upon the decided cases, including the fact that the claimants, as professional salvors, were entitled to particularly generous treatment. Having done this, and feeling himself bound by the decision of Willmer J. in *The Telemachus*,[45] he added £15,000 to his award to recompense the claimants for the £18,000 which they would have to pay away in tax. He thus "took the "tax aspect into account" in much the same way as the court and arbitrator "take into account" in arriving at salvage awards the proved expenses of salvors incurred in rendering the salvage services. This is what Willmer J. said he was doing in *The Telemachus*,[46] although he did not indicate to what extent the awards he made had been increased by consideration of the tax position of the salvors.

I need not say that it is only after the most anxious thought and careful consideration that I have felt compelled to disagree with the views on this topic expressed by Willmer J. in *The Telemachus*.[47] I do not feel, as he did, that any principle laid down in *Gourley's* case [48] compels, or even inclines, me to take the view that a salvor who is already generously rewarded on

[41] [1956] A.C. 185.
[42] Ibid.
[43] Ibid.
[44] [1957] P. 47.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] [1956] A.C. 185.

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well-known principles should have his award further increased so as to indemnify him wholly or in part for the fact that the fiscal law to which he is subject requires him to pay tax on the profit element in his salvage award. If it is right that awards made to salvors, which are already assessed on generous lines, should be exempted in whole or in part from liability to tax, this seems to me to be a matter for consideration by the legislature. In my humble opinion, it is not the business of the court to defeat or mitigate the effect of the fiscal laws of this or any other country, more especially where this can only be done at the expense of the owners of the salved property.

For these reasons, I regretfully find myself unable to agree with the judgment of Willmer J. in *The Telemachus*.[49] Unlike the appeal arbitrator, I am not bound by his judgment. I accordingly direct that the order made by the appeal arbitrator in paragraph 14 (2) * of his award shall take effect, and that the claimants will pay to the respondents the costs of the argument of the special case before me.

Appeal allowed.

Solicitors: *Constant & Constant; Ince, Roscoe, Wilson & Griggs.*

A. S-R.

[49] [1957] P. 47.

* Under paragraph 14 (2) of the award, in the event of the court holding that the incidence of taxation was not a material element, the appeal arbitrator awarded the salvors £60,000 with interest and directed that the owners of the salved property pay the costs of the hearing before him.

[COURT OF APPEAL.]

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Dec. 10, 11, 19.

Lord Evershed M.R., Romer and Ormerod L.JJ.

MACFARLANE *v.* GWALTER.

Public Health—Nuisance—Cellar—Grating in pavement—Liability of occupier of adjoining premises to repair where grating dedicated as part of highway—Liability for accident arising through non-repair—Public Health Acts Amendment Act, 1890 (53 & 54 *Vict. c.* 59), *s.* 35 (1).

Nuisance—Highway—Obstruction.

A grating in the pavement of a public highway was in bad condition and was found to constitute a dangerous trap. The purpose of the grating, which had probably formed part of the highway when it was dedicated, was to admit light to the cellar window of an adjoining building and the defendant, who was the occupier of that building, knew of the condition of the grating and had failed to repair it. The plaintiff was walking along the pavement when

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

her leg went through the grating and she was injured. She claimed damages for nuisance caused by breach of the defendant's duty imposed by section 35 (1) of the Public Health Acts Amendment Act, 1890 [1]:—

Held, that, as the defendant was the occupier of the building adjoining the grating, he was under a duty to repair it by section 35 (1) of the Act of 1890 even though it was part of the highway; and that, whether or not a breach of duty imposed by the section would by itself give rise to a remedy, since, the defendant having failed in his duty, the structure fell out of repair and became thereby a nuisance on the highway, the defendant was liable to the plaintiff for her injuries caused by that nuisance.

Russell v. *Men of Devon* (1788) 2 Term Rep. 667 applied.

Penney v. *Berry* [1955] 1 W.L.R. 1021; [1955] 3 All E.R. 182 distinguished.

Appeal from Judge Glazebrook sitting at Gravesend County Court.

On October 27, 1956, the plaintiff, Margaret MacFarlane (an infant, suing by her next friend), was walking along the pavement in Clarence Street, Gravesend, when her left leg went through an iron grating and she was injured. The grating was old, and in bad condition, one of the bars having broken and fallen into the area below. In an action for damages the county court judge found that the grating was a dangerous trap to passers-by and that the defendant, who was the occupier of the adjacent building, by his servant, knew of its condition before the accident and could have taken steps to repair it. There was no conclusive evidence that the grating had been there when the street was dedicated. The county court judge held the action should be dismissed since the grating was part of the surface of the highway and the local authority was responsible for its repair, and that section 35 (1) of the Public Health Acts Amendment Act, 1890, gave no cause of action. He assessed damages at £25.

The appeal by the plaintiff was argued on the basis that the grating did form part of the dedicated highway.

Hugh Griffiths for the plaintiff.
Raymond Kidwell for the defendant.

In addition to the cases referred to in the judgment, the following cases were cited in argument: *Robbins* v. *Jones* [2]; *Fisher* v. *Prowse* [3]; *Hamilton* v. *St. George's, Hanover Square* [4]; *Solomons* v. *R. Gertzenstein Ltd.* [5]; *Swain* v. *Southern Railway* [6];

[1] Public Health Acts Amendment Act, 1890, s. 35 (1): "All vaults, "arches and cellars under any street, "and all openings into such vaults, "arches, or cellars in the surface of "any street, and all cellar-heads, "gratings, lights, and coal-holes in "the surface of any street, and all "landings, flags, or stones of the "path or street supporting the same "respectively, shall be kept in good "condition and repair by the owners "or occupiers of the same, or of the "houses or buildings to which the "same respectively belong."

[2] (1863) 15 C.B.N.S. 221.

[3] (1862) 2 B. & S. 770.

[4] (1873) L.R. 9 Q.B. 42.

[5] [1954] 2 Q.B. 243; [1954] 3 W.L.R. 317; [1954] 2 All E.R. 625.

[6] [1939] 2 K.B. 560; 55 T.L.R. 805; [1939] 2 All E.R. 794.

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M'Kinnon v. *Penson* [7]; *Rundle* v. *Hearle* [8]; *Lyme Regis Corporation* v. *Henley*.[9]. Reference was also made to Pratt and Mackenzie on Highways, 19th ed., and to the Law Quarterly Review (1939) vol. 55, pp. 343 et seq.

Cur. adv. vult.

December 19. LORD EVERSHED M.R. I will ask Ormerod L.J. to read the first judgment.

ORMEROD L.J. This is an appeal from an order of His Honour Judge Glazebrook given on July 10, 1957, at Gravesend County Court dismissing an action by the plaintiff against the defendant for damages for personal injuries arising from the breach of duty of the defendant. The plaintiff is an infant aged 12. On October 27, 1956, she was walking along the pavement in Clarence Street, Gravesend, when her left leg went through an iron grating which was old and in bad condition. It appeared that one of the bars had broken and fallen into the area below the grating. The judge found that the grating was a dangerous trap to passers-by and that the defendant, who was the owner and occupier of the adjacent building, by his servant Mrs. Jones, knew of its condition before the accident and could have taken steps to repair it. The grating was fixed into the pavement and was 2 ft. 6 ins. by 18 ins. It covered a small open area and its purpose was to provide light for the cellar window of the defendant's premises. There was no conclusive evidence available whether the grating was there when the street was dedicated, but the surveyor who was called said that the local authority would not now accept dedication of a street containing such a grating. The judge said: "It seems clear that if the grid, or some "predecessor, was put there by the owner of the adjacent pro-"perty, it must have been done before dedication because there "was no person to do it afterwards"; and this appeal has been argued on the basis that the grid was there at the time of dedication. The county court judge held that the defendant was under no liability to the plaintiff either under statute or at common law.

The questions for this court are whether the defendant was under any duty to repair the grating and, if so, whether by reason of his failure to perform this duty a nuisance had been created upon the highway causing injury to the plaintiff for which the defendant could be made liable in damages.

Mr. Griffiths, on behalf of the plaintiff, argued that the defendant was under a duty to repair the grating by virtue of section 35 (1) of the Public Health Acts Amendment Act, 1890. He submitted that the defendant, in breach of the duty, had allowed the grating to fall into so dangerous a condition as to

[7] (1853) 8 Ex.Rep. 319.
[8] [1898] 2 Q.B. 83; 14 T.L.R. 110.
[9] (1834) 2 Cl. & Fin. 331.

cause it to become a nuisance upon the highway, and that, the plaintiff having suffered injuries by reason of the nuisance, the defendant was liable to compensate her in damages.

[His Lordship read section 35 (1) and continued:] It should be noted that section 35 (2) provides that where default is made in complying with the provisions of the section, the urban authority may, after notice, do the necessary work and recover the cost from the owner or occupier. It was argued that the grating in question came within the meaning of section 35 (1) and that the defendant was the occupier of the house or building to which the grating belonged, there being no reason for the existence of the grating other than to cover the small area which admitted light to the cellar of the defendant's premises. We were referred to a number of authorities in support of this submission. I propose to mention three of them. *Penney* v. *Berry* [1] was a case where the defendant was the owner of premises adjoining the highway, and in the surface of the pavement was an opening into his cellar covered by a metal slab set in a large flagstone. In about 1950 the local authority raised the level of the pavement and so reconstructed it that the metal cover had a concrete surround and rested in a rebate in the concrete. Unfortunately, it was so constructed that one side of the cover was three-quarters of an inch higher than the pavement, with the result that in January, 1953, the plaintiff tripped on the cover and was injured. It was held that she was not entitled to recover from the defendant. Parker L.J. said [2]: "... the general "principle, as I understand it, is that there can be no duty on "the owner of land adjoining the highway where the nuisance is, "to abate the nuisance because the liability is, primarily at any "rate, on the local authority, and unless he has some statutory "power to do so the owner has no right to go onto the pavement "to abate the nuisance. As Shearman J. put it in *Horridge* v. "*Makinson* [3]: 'In my opinion the cases shew that a liability is "'cast upon the owner of the house, in respect of a nuisance, "'only when such owner has a duty to abate the nuisance, and "'he fails to do so.' I think I might add that it is only when "such owner has a duty and a power to abate the nuisance." Parker L.J. then referred to the section and said [4]: "It is quite "clear, therefore, there was an obligation on the defendant to "keep this slab ... in good condition and repair." He went on to say [5]: "To my mind the only question in this case is what "those words 'in good condition and repair' are apt to include." He then discussed why, in his view, there was no breach of duty on the part of the defendant. This case was relied on by the plaintiff as establishing that there was a duty on the defendant to keep the slab in repair and, at least by inference, that if as a

[1] [1955] 1 W.L.R. 1021; [1955] 3 All E.R. 182.
[2] [1955] 1 W.L.R. 1023.
[3] (1915) 84 L.J.K.B. 1294, 1296; 31 T.L.R. 389.
[4] [1955] 1 W.L.R. 1021, 1024.
[5] Ibid.

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result of the defendant's breach the slab fell into disrepair, the defendant would be responsible for any injury thereby caused.

Russell v. *Men of Devon* [6] was a case where the inhabitants of a county were sought to be made liable for injury caused to an individual in consequence of a county bridge being out of repair. Lord Kenyon C.J. held that such an action could not be maintained, but said [7]: "'Many of the principles laid down by the "plaintiff's counsel cannot be controverted, as that an action "would lie by an individual for an injury which he has sustained "against any other individual who is bound to repair."

The principle that an individual cannot recover damages in respect of an injury arising from the default of the public in its duty to repair a highway remains today in the doctrine that a local authority cannot be made liable for injury to an individual arising from nonfeasance in the repair of the highway. This would appear to be because the various statutes passed in the nineteenth century putting the liability to repair on surveyors and local authorities were regarded merely as a means of getting the repairs done and not as intending to create any new right of action: see Lord Halsbury L.C. in *Cowley* v. *Newmarket Local Board.* [8]

In *Pretty* v. *Bickmore* [9] an aperture covered by an iron plate was out of repair so that a passer-by was injured. The question at issue was whether the landlord or the tenant was liable to the plaintiff in view of the terms of the demise, but in the course of his judgment Bovill C.J. said [10]: "The person who is in posses-"sion of the premises and who allows the coal plate to be in a "dangerous condition is the person responsible to the public for "any injury from its being out of repair."

On behalf of the defendant, Mr. Kidwell agreed that if the grating in question did not form part of the dedicated highway the defendant would be liable. But his submission was that as the grating was in position at the time the highway was dedicated and was fixed to the highway it was part of the highway and became vested in the local authority by reason of the Public Health Act, 1875, s. 149, which provides that all streets being, or which at any time become, highways repairable by the inhabitants at large shall vest in and be under the control of the urban authority. He argued, in the first place, that the gratings and other matters referred to in section 35 of the Act of 1890 comprised only cases where the gratings, etc., were not a dedicated part of the highway and therefore not vested in the local authority. For my part, I cannot accept this submission. The section refers in the first place to "all vaults, arches, and cellars "under any street"—matters which would be unlikely to be the subject of dedication—"and all openings into such vaults," etc.,

[6] (1788) 2 Term Rep. 667.
[7] Ibid. 671.
[8] [1892] A.C. 345, 350; 8 T.L.R. 788.
[9] (1873) L.R. 8 C.P. 401.
[10] Ibid.

and then goes on to refer to "all cellar heads, gratings," etc. There is no restriction to cellar heads, etc., which do not form part of a dedicated highway. Mr. Kidwell sought to draw support for his argument from the words "shall be kept in good condition "by the owners or occupiers of the same or of the house and "building to which the same respectively belong." He submitted that the word "belong" was ambiguous in its meaning, but that it must carry an element of proprietary interest. I think the meaning of the words is plain. The section refers to certain structures which are either under the street or in the surface of the street, and in my view its intention is to throw on to the owners or occupiers of these structures, or on the owners or occupiers of the adjoining buildings, the duty of keeping them in repair whether they have been the subject of dedication or not. A grating such as the one in question belongs to the adjoining house or building in the sense that it came into existence and has continued to exist for the sole purpose of providing access of light to the cellar of that house or building, and therefore the duty to repair it falls on the defendant. It was argued that as the grating was part of the highway it was vested in the local authority and, therefore, the effect of section 35 was to throw on to the authority the duty of repairing it, and that this pointed strongly to the construction that the subsection was referring only to structures which had not been the subject of dedication. But for my part, on reading the section as a whole, I have no doubt that the view I have already expressed is the right one.

It was further submitted on behalf of the defendant that, assuming the section applies to a dedicated object, the plaintiff is still not entitled to succeed. Mr. Kidwell argued that the plaintiff must sue on the statute and that, as the section in question was not one the breach of which would give rise to a remedy, the plaintiff was bound to introduce what he called a "middle term," the concept of control, between the statute and liability. He argued that this was not a logical thing to do. The question whether a breach of the duty imposed by the section would give rise to a remedy was not argued before us, although Mr. Griffiths wished to keep the point open. I fail to see what is illogical in introducing what Mr. Kidwell called a middle term. The position is that there was a structure on the highway, and it was the duty of the defendant to keep it in repair. Whether that duty arose by statute or from any other circumstance does not appear to be relevant. The defendant having failed in his duty, the structure fell out of repair and became dangerous to passers-by and thereby became a nuisance on the highway. As a result of that nuisance the plaintiff was injured. I see no reason why, in these circumstances, she cannot recover damages from the defendant. It is true that if the duty to repair was on the local authority she would not have been able to recover unless she could show that the nuisance was due to misfeasance. But it is not suggested here that the defendant is in any sense the

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successor of the inhabitants at large so as to be able to claim the protection of the rule as to nonfeasance. Lord Kenyon C.J. in *Russell* v. *Men of Devon*[11] regarded as incontrovertible the principle that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair, and, in my judgment, there are no circumstances in this case to give rise to a different conclusion.

For these reasons, I would allow the appeal and enter judgment for the plaintiff in the sum of damages assessed by the county court judge.

ROMER L.J. I have had the advantage of reading in advance the judgment which Ormerod L.J. has given, and I so fully concur in that judgment, both in the reasoning and its conclusions, that there is nothing I desire to add.

LORD EVERSHED M.R. I likewise have had the advantage of seeing the judgment of Ormerod L.J. in advance, and, like Romer L.J., I feel that any addition I might make to the reasoning of it would be mere surplusage on my part. In confining myself, therefore, to that expression of agreement, I shall not, I hope, be thought to be disrespectful of the county court judge with whom we are disagreeing, or to the cogent and attractive argument of Mr. Kidwell.

Appeal allowed.

Solicitors: *Church, Bruce & Hawkes, Gravesend; Tolhursts, Gravesend.*

[11] 2 Term Rep. 667.

[QUEEN'S BENCH DIVISION.]

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Jan. 20, 22.
Diplock J.

UNION-CASTLE MAIL STEAMSHIP CO. LTD. *v.* UNITED KINGDOM MUTUAL WAR RISKS ASSOCIATION LTD.

[1957 U. No. 804.]

Insurance—Marine—War risks—"Prolongation of voyage"—Admiralty advice to shipping to avoid Suez Canal area—"Direction"—"Approval"—Calls made at unscheduled ports—Liability of insurers under policy.

Ships' names—Dunnottar Castle—Rhodesia Castle.

The plaintiff shipowners insured two of their vessels, the *Dunnottar Castle* and the *Rhodesia Castle*, cargo and passenger liners under the 1956–57 Standard Form of War Risks Time Policy on Hull and Machinery issued by the defendants. By clause 1 of the policies: "1. This insurance is only to cover the following . . . "(F) Expenses incurred by the assured by reason of: (1) the deten- "tion of the insured ship in pursuance of the orders or directions

"or with the approval of the committee or of any British Govern- "ment department or official or British military authority given "in order to avoid loss of or damage to the insured ship by any "peril hereby insured; (2) prolongation of the voyage arising out "of compliance with such orders or directions, or with such "approval as aforesaid"; and there was a franchise whereby "Nothing shall be payable in respect of the first seven days of each "such period of detention or prolongation. . . ."

The *Dunnottar Castle* sailed from London on October 17, 1956, on a scheduled round-Africa voyage in a clockwise direction and was due to return to London on December 21. The *Rhodesia Castle* sailed from London on September 26 on a scheduled round-Africa voyage in an anti-clockwise direction and was due to arrive back on December 1.

On October 30, 1956, the Admiralty issued the following statement: "In view of the situation between Israel and Egypt, "merchant shipping is advised for the time being and until further "notice, to keep clear of the Suez Canal and Egyptian and Israeli "waters." The plaintiffs ordered the *Dunnottar Castle*, then at Port Said, to turn round and sail back by the Cape, and the *Rhodesia Castle*, which was at Beira on October 30 and due to proceed to Mombasa and Port Sudan (which was outside the area covered by the Admiralty order), to turn round at Mombasa and go back via the Cape and Mediterranean ports. The plaintiffs notified the defendants of the diversions and the defendants acknowledged the information, but made no comment. The plaintiffs did not seek any approval of their instructions to the masters of the vessels, but had they asked the committee the committee would in fact have approved them. The *Dunnottar Castle* reached London on January 10, 1957, and the *Rhodesia Castle* on December 11, 1956. In the event calls were made by both vessels at unscheduled ports, some of the scheduled ports were not called at, and additional passengers were taken on and carried in a reverse direction to the scheduled voyages of the vessels.

On a claim by the plaintiffs under the policies:—

Held, (1) that in the context of clause 1 (1) (F) the word "directions" did not include advice, warnings, recommendations or authoritative guidance the ignoring of which gave rise to no sanctions, and that, accordingly, the Admiralty warning of September 30, 1956, was not an order or direction of any British Government department within the meaning of the clause.

(2) That the plaintiffs were entitled to rely upon the Admiralty warning as constituting "approval" by a British Government department of such of the steps taken by them as were taken to heed the advice contained in the warning.

(3) That there had been no "approval," express or implied, by the defendants' committee within the meaning of the policy; the fact that the committee would have approved if asked could not amount to implied approval when none in fact was sought; nor could the committee's failure to raise objections give rise to any estoppel, for there was no duty upon them to speak.

(4) That, while in turning the *Dunnottar Castle* back out of the area covered by the warning the plaintiffs were acting with the approval of the Admiralty (and it mattered not if their motives in so doing were mixed), the turning round of the *Rhodesia Castle* at Mombasa and the failure to allow her to proceed to Port Sudan as scheduled were not steps taken in compliance with the Admiralty warning.

(5) That if the result of keeping away from the defined area necessarily caused a deviation which prolonged the length of the

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voyage, expenses incurred as a result of that prolongation would be recoverable under the policy, but that the peril insured against was a prolongation of "the voyage"—namely, the voyage on which the vessel was engaged at the moment when the steps were taken with the approval of the Admiralty—and the movements of each of the two vessels after turning back could not be considered as a continuation of their original voyages; that although a minor variation in the order of calling at scheduled ports would not necessarily amount to a change of voyage, the calls at a number of unscheduled ports, the carrying of passengers in the reverse direction from that of the scheduled voyage, and the omission to call at scheduled ports, however sensible commercially, amounted to a new or changed voyage and not to a prolongation of the voyage within the meaning of the policy; accordingly, the plaintiffs were not entitled to recover under the policies.

Per curiam. "Prolongation" in the policy is used in a temporal sense and does not start until the date on which the voyage would normally have ended, and there may be deviation without prolongation. It is the actual expenses incurred during prolongation of the voyage after the expiry of the first seven days which are recoverable; additional expenses incurred during the first seven days are irrelevant and neither savings in those days nor benefits accruing as a result of the prolongation should be taken into account in assessing a claim under the policy.

ACTION.

The plaintiffs, the Union-Castle Mail Steamship Co. Ltd., the owners of the *S.S. Dunnottar Castle* and the *S.S. Rhodesia Castle*, were members of the defendant association, the United Kingdom Mutual War Risks Association Ltd. By two policies dated November 3, 1956, in the form of the "1956–57 Standard "Form of War Risks Time Policy on Hull and Machinery" the defendants agreed to insure the plaintiffs and the *Dunnottar Castle* and the *Rhodesia Castle* against the risks set out in the policies from February 20, 1956, until February 20, 1957.

Clause 1 of the policies provided as follows: "1. This "insurance is only to cover the following, namely: . . . (F) "Expenses incurred by the assured by reason of: (1) the deten- "tion of the insured ship in pursuance of the orders or direc- "tions or with the approval of the committee or of any British "Government department or official or British military authority "given in order to avoid loss of or damage to the insured ship "by any peril hereby insured; (2) prolongation of the voyage "arising out of compliance with such orders or directions, or "with such approval as aforesaid; . . . Nothing shall be pay- "able in respect of the first seven days of each such period of "detention or prolongation and the amount recoverable shall be "assessed by the committee whose decision shall in all respects "be final."

Clause 2 of the policies incorporated the rules of the association and clause 5 contained, inter alia, a warranty to comply with "orders" given by or on behalf of the Government, "directions" given by the association, and certain "orders, "directions and recommendations" of the committee. Rule 10

of the association's rules required each member to comply with "all orders, directions and recommendations" of the committee.

During September, 1956, tension arose in the area of the Middle East and the Suez Canal and on September 13, 1956, the defendants' directors ("the committee") passed a resolution authorizing "the managers, in the event that any department "of H.M. Government recommends that ships shall not pass "through the Suez Canal, to direct all members accordingly and "to notify them that failure to comply with such direction will "be considered as a breach of warranty under clause 5 of the "association's policy."

On September 26 the *Rhodesia Castle* sailed from London on a scheduled round-Africa voyage in a clockwise direction, being due to return to London on December 6. On October 17 the *Dunnottar Castle* sailed from London on a similar voyage in an anti-clockwise direction and was due to return to London on December 21. On October 29 hostilities between Israel and Egypt broke out, and on October 30 the British and French Governments gave an ultimatum to the Israeli and Egyptian Governments. At 4.30 p.m. on October 30, 1956, the Board of Admiralty issued the following statement: "In view of the "situation between Israel and Egypt, merchant shipping is "advised, for the time being and until further notice, to keep "clear of the Suez Canal and Egyptian and Israeli waters."

At the time when that statement was issued the *Dunnottar Castle* was at Port Said, whence she was due to leave for Suez, while the *Rhodesia Castle* was at Beira, being scheduled to call at Mombasa on November 4 and to proceed from there to Port Sudan. The plaintiffs immediately cabled to the captain of the *Dunnottar Castle* not to proceed further but to await further instructions. On the following day, November 1, it was announced that the Suez Canal had been blocked, and it remained blocked for many months thereafter. On November 2 the plaintiffs instructed the *Dunnottar Castle* to sail forthwith and proceed via the Cape; on the same day they ordered the *Rhodesia Castle* to turn at Mombasa and to take passengers booked for the *Dunnottar Castle* to Beira-Capetown and to return via Cape and Mediterranean ports. In the result both vessels made calls at unscheduled ports, omitted to call at some scheduled ports, took on additional freight, and some additional passengers were embarked and carried in a reverse direction to the scheduled voyages. The *Rhodesia Castle* reached London on December 11, 1956, ten days later than her scheduled date, and the *Dunnottar Castle* on January 10, 1957, 20 days later than scheduled. The plaintiffs informed the defendants of the diversions and in each case the defendants acknowledged the information without comment. The plaintiffs did not seek approval of their instructions to the masters of the vessels, but had they asked the committee the committee would in fact have approved them.

The plaintiffs contended that in the circumstances of the then

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existing political and military situation the Admiralty warning of October 30, 1956, was an order or direction given by a British Government department and that any alterations in the proposed itineries of merchant vesseds made in order to leave or avoid the areas referred to and resulting in prolongation of the voyages of the vessels were or resulted in prolongations of the voyages of such vessels arising out of compliance with an order or direction or with the approval of the Admiralty within the terms of clause 1 (1) (F) of the policies, and that, accordingly, the voyage of the *Dunnottar Castle* was prolonged for 20 days (13 days after allowing for the franchise) and that of the *Rhodesia Castle* for ten days (three days after allowing for the franchise) within the clause; alternatively, that the voyages were prolonged in that the vessels were diverted from their intended voyages on or about November 2, 1956. They also contended that such prolongations of the voyages were made with the approval of the defendants' committee within the terms of clause 1 (1) (F) of the policies. The plaintiffs claimed, inter alia, declarations that the defendants were liable to pay to them under the policies all expenses incurred by them in connexion with the voyage of the *Dunnottar Castle* from December 29, 1956, to January 10, 1957, inclusive, and a similar declaration in respect of the expenses incurred in connexion with the voyage of the *Rhodesia Castle* from December 9 to 11 inclusive; or alternatively, all the expenses incurred by them by reason of the diversion of the vessels from their intended voyage, other than the expenses incurred during the first seven days of the diversions. They sought further declarations that they were not obliged to give credit to the defendants in respect of any savings effected or benefits incurred by them in connexion with the voyages actually performed as contrasted with the intended voyages of the vessels; alternatively, that they were only obliged to give credit to the extent of any such savings or benefits as might have been effected or obtained from December 29, 1956, to January 10, 1957, in respect of the *Dunnottar Castle*, and from December 9 to 11, 1956, in respect of the *Rhodesia Castle*.

The defendants denied that the plaintiffs were entitled to the relief claimed. They contended, inter alia, that the Admiralty statement was not an order or direction within the terms of clause 1 (1) (F) of the policy and that no alteration made in the proposed itineraries of the vessels resulting in prolongations of the voyages arose out of compliance with such order or direction or with "approval" within the policies; also that, as the Suez Canal was blocked, the vessels could not have performed their scheduled voyages; alternatively, that the scheduled voyages became impossible of performance and/or were abandoned by the plaintiffs. They further contended that if the plaintiffs were entitled to recover any sums under the policies such sums did not exceed the actual expenses, less savings, or alternatively the actual expenses incurred by the vessels in getting away from or keeping clear of the Suez Canal and Egyptian and Israeli waters.

and did not include expenses incurred during the first seven days in which the vessels were so engaged; and that if the plaintiffs were entitled to be paid the expenses incurred by them beyond the first seven days in respect of the difference in time between the scheduled and the actual voyages of the vessels they were entitled to no more than the difference between the estimated expenses of the scheduled voyages and the actual expenses of the actual voyages, less the actual expenses incurred by them during the first seven days after the vessels departed from their scheduled itineries and less any additional savings incurred in proceeding to and from and in calling at ports not included in the scheduled voyages.

The facts are more fully stated in the judgment.

A. A. Mocatta Q.C. and *Michael Kerr* for the plaintiffs.
Eustace Roskill Q.C. and *Stephen Terrell* for the defendants.

No cases were cited in argument.

Cur. adv. vult.

January 22. DIPLOCK J. read the following judgment: In respect of the year February 20, 1956, to February 20, 1957, the defendants, a mutual insurance association, issued to their members of whom the plaintiff company is one, a standard form of War Risks Time Policy upon hull and machinery. During the currency of the policy there occurred the Suez crisis, as a result of which vessels which had commenced voyages which would normally take them into or through what I may conveniently call the Suez Canal area, were diverted from that area. Among the vessels so diverted were two vessels belonging to the plaintiffs, the *S.S. Dunnottar Castle* and the *S.S. Rhodesia Castle*, in respect of each of which there was current a policy in the above-mentioned form.

The plaintiffs claim that they are entitled to recover under the policy in respect of each vessel certain expenses which they allege to have been incurred by them by reason of the "prolongation of the voyage" of that vessel arising out of the diversion. The defendants deny that there is any such liability under the policies and, if they be wrong as to that, they further deny that the plaintiffs have correctly quantified their claims.

I am informed that the action is a friendly action, and that it is brought with the object of obtaining the guidance of this court, and maybe of superior courts, as to the true construction of the relevant clauses of the policy, and their application in the circumstances which arose in the Suez crisis; the parties have accordingly waived the arbitration clause in the policies. Furthermore, while not strictly a test action, the cases of the *Dunnottar Castle* and the *Rhodesia Castle* have been selected as raising a variety of questions, one or more of which are likely to arise in respect of

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other vessels insured by the defendants or by other mutual insurance associations who, I am informed, have issued policies in similar terms.

I have accordingly been invited to deal with the various contentions of the parties as to the true construction of the relevant clauses in the policy both as to liability and as to quantum, notwithstanding the fact that some of the views which I express may, as a result of the decision at which I have arrived, be obiter dicta, and notwithstanding, as regards quantum, the provision in the policy that "the amount recoverable shall be "assessed by the committee (of the defendants), whose decision "shall in all respects be final."

Before turning to the words of the policies which I have to construe, it is convenient that I should set out the relevant facts to which those words have to be applied.

As is well known by the end of October, 1956, a state of acute international tension had arisen in the area of the Middle East which included the Suez Canal; the immediate cause of the crisis was the prospect of hostilities between Israel and Egypt, which in fact broke out on October 29. But the possibility of a crisis which would make it undesirable or dangerous for British ships to use the Suez Canal had been foreseen much earlier, and in particular had been foreseen by the defendants, whose directors, who are called the committee, on September 13 had passed a resolution in the following terms: "By virtue of the powers "afforded under rule 10 of the association's rules, the committee hereby authorize the managers, in the event that any "department of H.M. Government recommends that ships shall "not pass through the Suez Canal, to direct all members accordingly and to notify them that failure to comply with such "direction will be considered as a breach of warranty under "clause 5 of the association's policy." Clause 5 of the policy, at which it will be necessary to glance later, contains a warranty to comply with certain directions of the committee.

Hostilities between Israel and Egypt having broken out on October 29, the United Kingdom and French Governments, on October 30, gave to the Israeli and Egyptian Governments what was in effect an ultimatum to stop all warlike action and to withdraw their military forces to a distance of 10 miles from the Suez Canal. A 12-hour time limit was given, and failing voluntary compliance within that period, it was made clear that British and French forces would intervene to secure compliance.

At 4.30 p.m. on the same day, October 30, the Admiralty issued the following warning to merchant shipping: "In view of "the situation between Israel and Egypt, merchant shipping is "advised, for the time being and until further notice, to keep "clear of the Suez Canal and Egyptian and Israeli waters." The area to which this warning applied was defined on November 2 so as to include Port Said and Suez, but to exclude Port Sudan and Aden.

The Franco-British ultimatum was rejected by Egypt and hostilities continued with Israel. On November 1 it was announced by the Egyptian Government that the canal had been blocked as a result of Anglo-French bombing. At 9.45 a.m. on November 2 the Admiralty confirmed that the canal was blocked, but stated that this was by the action of the Egyptian authorities. It is common knowledge that it remained blocked for many months thereafter.

Now I come to the position of the *Dunnottar Castle*. This vessel had left London on October 17 on the round-Africa service, that is to say, on a round voyage from London back to the United Kingdom, going round Africa clockwise and scheduled to call at Gibraltar, Marseilles, Genoa, Port Said, Suez, Aden, Mombasa, Tanga, Zanzibar, Beira, Lourenço Marques, Durban, East London, Port Elizabeth, Capetown, St. Helena, Ascension, Las Palmas and the United Kingdom. The expected arrival and departure dates at these ports were scheduled and it is sufficient to note that her scheduled date of arrival at Port Said was October 29, and Suez October 30, and her scheduled date of arrival in the United Kingdom was December 31.

Immediately on learning of the Admiralty warning of October 30, the general manager of the plaintiffs sent a cable to the captain of the *Dunnottar Castle* in the following terms: "In "view of Admiralty warning advising merchant shipping keep "clear of Suez and Egyptian waters request you do not proceed "further meantime. Await further instructions." The *Dunnottar Castle* was in fact behind schedule, but had arrived at Port Said at 6.30 p.m. local time, or 4 p.m. Greenwich mean time, on October 30, that is to say, some three hours before the cable was sent. Her position was cabled to the general manager, who promptly sent two further cables, one to Port Said and one to the captain of the *Dunnottar Castle;* the one to the port reads as follows: "Please instruct *Dunnottar Castle* and *Tintagel Castle* "sail forthwith and proceed via Cape." That to the captain read: "Referring earlier message you should sail forthwith and "proceed via Cape. Instructions will follow regarding bunkers "and ports of call."

The vessel left Port Said in consequence of those instructions at 4.30 a.m. Greenwich mean time on October 31. The Mombasa office of the plaintiffs was informed on the same day, October 31, in the following terms: "*Dunnottar Castle Tintagel Castle* "turned Port Said and proceeding via Atlantic will advise "amended schedules soonest possible." To that the Mombasa office replied on the same date as follows: "Addressed London "repeated Cape Town *Dunnottar Castle* referring to your tele-"gram 31st instant following passengers booked from all B E A "ports Beira 32 Durban 48 Cape Town 34 London 45. If "*Rhodesia Castle* routed via Cape could accommodate all above "passengers if still desire travel. Telegraph instructions "soonest." As a result of a further cable sent on November 2,

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these passengers, or some of them, were in fact transferred to the *Rhodesia Castle*.

On November 2 further instructions were sent to the *Dunnottar Castle*; they were as follows: "Reference to our telegram "31st ultimo until further notice you should continue to proceed "via Cape calling at Gibraltar for water or bunkers if necessary "and Las Palmas for bunkers where 1,900 tons have been "stemmed. It is intended you should call at Capetown, Durban "and Beira for passenger purposes only thereafter continuing to "Mombasa. Passengers already on board who are proceeding "to Capetown, Durban and Beira will be refunded difference "between fare paid and those applying to ports concerned via "West Coast. Passengers to Port Elizabeth and East London "may land at Capetown or Durban at their option for carriage to "port of destination by mail vessel but we cannot accept expenses "while awaiting transport telegraph us when you would expect "reach Las Palmas Capetown."

The defendants were in fact informed of this diversion on November 2 and acknowledged this information on November 6. The voyage which was in fact undertaken by the *Dunnottar Castle* was not quite as was set out in the instructions which I have read; it was as follows: Gibraltar, Marseilles, Genoa and Port Said (before diversion), Las Palmas, Capetown, Port Elizabeth, East London, Durban, Beira, Mombasa, Tanga, Zanzibar, Dar-es-Salaam, Beira (again), Lourenço Marques, Durban, East London, Port Elizabeth, Capetown (again), and Las Palmas (again), and she arrived in London on January 10, 1957, that is to say, 20 days later than scheduled.

As compared with the scheduled voyage on which she had embarked, of the 14 intermediate ports at which she was still due to call at the time of the diversion, she omitted to call at four ports, namely Suez, Aden, St. Helena and Ascension, and she called twice, once in each direction, at six ports, Las Palmas (for bunkers and water only), Capetown, Port Elizabeth, East London, Durban and Beira. She embarked a number of additional passengers on the first call at the last five ports, and loaded some additional freight. These passengers were carried in the reverse direction to that of the scheduled voyage. As against this, other passengers who were booked by the *Dunnottar Castle* were carried by the *Rhodesia Castle*, and some passage money was returned to passengers to Capetown and elsewhere who were carried by what was in effect a shorter route.

The facts relating to the *Rhodesia Castle* are as follows: This vessel was also engaged on the round-Africa service, but sailing from London round Africa widdershins or anti-clockwise, and scheduled to call at Rotterdam, Las Palmas, Ascension, St. Helena, Capetown, Port Elizabeth, East London, Durban, Lourenço Marques, Beira, Dar-es-Salaam, Zanzibar, Tanga, Mombasa, Aden, Port Sudan, Suez, Port Said, Genoa, Marseilles and Gibraltar. The expected dates of arrival at these ports were

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scheduled. She was due at Dar-es-Salaam on November 1 and 2, at Mombasa on November 4, and she was not due to enter the area to which the Admiralty warning of October 30 related until November 15, when she was scheduled to depart from Port Sudan. Her scheduled date of arrival in London was December 1.

Her plight was thus less urgent than that of the *Dunnottar Castle*, and the first move came from the Mombasa office on October 31, 1956, when a cable was sent by that office; it is the cable I have already read in connection with the *Dunnottar Castle*, and it says that if the *Rhodesia Castle* is routed via the Cape she could accommodate all the passengers booked on the *Dunnottar Castle*.

The reply to that cable as regards the *Rhodesia Castle*, sent on the same date by the head office to the plaintiffs, was as follows: " . . . *Rhodesia Castle* position as yet too confused to " give definite instructions Cape Town informed." On November 2, the *Rhodesia Castle* was ordered to turn at Mombasa, to take passengers booked for the *Dunnottar Castle* from B.E.A. ports to Beira-Capetown and to return via Cape and Mediterranean ports.

The voyage which was in fact undertaken by the *Rhodesia Castle* was: Rotterdam, Las Palmas, Ascension, St. Helena, Capetown, Port Elizabeth, East London, Durban, Lourenço Marques, Beira and Dar-es-Salaam (before orders for diversion were given), Zanzibar, Tanga and Mombasa (before orders for diversion took effect), and then Dar-es-Salaam, Durban, Capetown, Las Palmas (for bunkers only), Genoa, Marseilles and London, where she arrived on December 11, that is to say, 10 days late.

As compared with the scheduled voyage on which she embarked, of the seven intermediate ports at which she was still due to call at the time of the diversion, she omitted to call at five ports, namely Aden, Port Sudan, Suez, Port Said and Gibraltar, and she called a second time at four ports already visited, namely Dar-es-Salaam, Durban, Capetown and Las Palmas, the call at Las Palmas being for bunkers only. She called to embark or disembark passengers at Dar-es-Salaam, Durban and Capetown, and loaded freight. Passengers disembarked at these ports were carried in the reverse direction to that of the scheduled voyage of the *Rhodesia Castle*. The defendants were notified of the diversion on November 5, and they acknowledged the diversion on November 6.

On those facts the plaintiffs claim that there was a loss under clause 1 (1) (F) (2) of the policy in respect of each vessel.

In construing the policy there are three general matters to be borne in mind: First, that it is primarily a war risks policy and that it contemplates the possibility of a war in which the British Government may be engaged; secondly, that it also covers allied risks from hostilities (civil war, rebellion, etc.) in which Her

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Majesty's Government may not be engaged; thirdly, it is a policy on hull and machinery, not on freights or profits.

Clause 1 (1) (F), on which the plaintiffs rely, is in the following terms: "This insurance is only to cover the following, namely: "... (F) Expenses incurred by the assured by reason of: (1) the "detention of the insured ship in pursuance of the orders or "directions or with the approval of the committee or of any "British Government department or official or British military "authority given in order to avoid loss of or damage to the "insured ship by any peril hereby insured; (2) prolongation of "the voyage arising out of compliance with such orders or "directions, or with such approval as aforesaid; (3) detention of "the insured ship by persons engaged in war, civil war, rebellion "or revolution or by military or usurped power; (4) detention by "an official acting or purporting to act on behalf of any foreign "Government or authority not engaged in war, civil war, rebel-"lion or revolution when such detention is considered by the "committee in its absolute discretion to have been in furtherance "of the political aims of such Government or authority." Then a franchise qualifying the whole: "Nothing shall be payable in "respect of the first seven days of each such period of detention "or prolongation and the amount recoverable shall be assessed "by the committee, whose decision shall in all respects be final."

The plaintiffs' contention is that the voyage of each vessel was prolonged in excess of seven days, that they have thereby incurred expenses, and that such expenses were incurred "by "reason of prolongation of the voyage arising out of compliance "with directions of a British Government department given in "order to avoid loss of or damage to the insured ship by a peril "insured by the policy." They rely upon the Admiralty warning of October 30, 1956, as being such directions of a British Government department; alternatively, they say that the expenses were incurred by reason of the prolongation of the voyage with the approval of the Admiralty given with such object, and also, or in the final alternative, with the approval of the committee. They rely upon the Admiralty warning as constituting the approval of the Admiralty, and upon various matters to which I shall advert later, as constituting the approval of the committee.

Was the Admiralty warning a "direction" of a British Government department? In terms it purports to be no more than "advice"; and, indeed, neither the Admiralty or any other British Government department had power to do any more than to advise as to action to be taken to avoid loss of or damage to a British merchant vessel. Such advice has no legal sanction behind it.

But the words "orders or directions" of any British Government department or official or British military authority have a familiar and indeed an ominous ring. During the last war very wide powers to make orders, by statutory instrument, and to give directions by less formal documents enforceable by sanctions were

granted to Government departments and officials, and bearing in mind that this is a war risks policy, which contemplates the possibility of a state of war, I should have little hesitation in holding that the words "orders or directions of any British "Government department or official or British military autho-"rity" applied only to instructions, the ignoring of which gives rise to legal sanctions and did not include advice, warnings or exhortations which the shipowner was at liberty to accept or disregard as he pleased.

But in clause 1 (F) the expression "orders or directions" does not apply merely to those given by Governmental authorities, but also to "orders or directions" given by the committee. Should this fact widen the meaning of the word "directions" to include advice the ignoring of which gives rise to no legal sanction? I think not. "Orders and directions" and, indeed, "recommendations" of the committee, do give rise to sanctions. Clause 2 of the policy incorporates the rules of the association, rule 10 of which requires each member to comply with "all "orders, directions and recommendations" of the committee.

I pause to glance briefly to see whether any light can be thrown on the meaning of the words "orders or directions" by their use in other clauses of the policy, for it is a sound rule of construction that prima facie the same expressions are used in the same sense wherever they appear in the same policy. But little assistance is available from this source. Clause 1 (E) refers to "orders, directions or recommendations" of the committee, but it does not appear from the rules that there is any real distinction between these; all must equally be complied with by members. Clause 5 (A) (a) contains a warranty to comply with "orders" given by or on behalf of the Government and "directions" given by the association; clause 5 (B) (c) to "orders" given by or on behalf of the Government, and "orders, "directions and recommendations" of the committee. It is thus difficult, if not impossible, to find any systematic distinction drawn between the words "orders" and "directions," but it affords perhaps some little support to the view which I have expressed as to the meaning of the word "directions" in clause 1 (F) (1) that the word "recommendations" is used in relation to instructions of the committee, which have a sanction, in clause 1 (E), but is omitted in the immediately succeeding clause which deals with instructions by Government authorities as well as by the committee, which Governmental instructions, if merely in the form of "recommendations" would give rise to no sanctions if ignored.

I hold, therefore, that in the context of clause 1 (1) (F) the word "directions" does not include advice, warnings, recommendations or "authoritative guidance" (a dictionary definition relied upon by Mr. Mocatta—whatever the adjective in this context may mean) the ignoring of which gives rise to no sanctions. The Admiralty warning of October 30, 1956, was not, therefore,

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an order or direction of any British Government department within the meaning of clause 1 (1) (F) of the policy.

But there is the other limb of the clause to be considered. As I have indicated, I think that the reference to "orders or "directions" in relation to Governmental authorities contemplates a state of war in which the Government will assume emergency powers to give orders and directions for the safety of British shipping. But the risks covered by the policy include risks which may arise—as they in fact arose—without any such emergency powers being assumed. In such circumstances the Government can only express views, whether classed as advice, warnings or exhortations, as to the steps to be taken by shipowners for the safety of their ships; and it seems to me that this is the state of affairs contemplated by the latter part of the clause which is cast in wide terms and covers steps in fact taken with the approval of a Government department, in so far as their object is, in the view of the Government department, directed to avoid loss of or damage to the ship by one of the perils insured.

Whether a particular step is taken with the approval of the Government authority is a question of fact. The approval need not be given in any particular form; it may be given in advance; it may—although it does not arise in this case—be given, I think, retrospectively; it may be given generally to all ships or specifically to individual ships. If advice is given by the Admiralty to ships generally, steps taken in accordance with that advice are, in my view, taken with the approval of the Admiralty within the meaning of the clause.

The plaintiffs are therefore entitled to rely upon the Admiralty warning as constituting approval by a British Government department of such of the steps taken by them as were taken to heed the advice contained in the warning. Whether those steps constituted, or caused, a prolongation of the voyage within the meaning of the policy is another question, which will involve consideration of the terms of the Admiralty warning; but before I turn to that I must deal with the third contention of the plaintiffs, namely, that the prolongation of the voyages was with the approval of the committee.

No express approval is relied upon; none was sought. After the decision to send the *Dunnottar Castle* round Africa anticlockwise, the plaintiffs informed the defendants of it on November 2 in a letter in the following terms: "For your "information and records we have to give you formal notification "that, following the Admiralty advice with regard to shipping "likely to be affected by operations in the Egyptian crisis, the "*Dunnottar Castle*, which arrived at Port Said on 30th ultimo "*en route* for East and South Africa via Suez Canal, was turned "round and is now proceeding back through the Mediterranean "and will make her passage via the Cape"; and similarly, as respects the *Rhodesia Castle*, on November 5 they wrote a letter

in the following terms: "We understand that the War Risks "Associations have agreed to meet, to some extent, the additional "expenses incurred by owners through diversions owing to the "Egyptian hostilities. We have already notified you of the "*Dunnottar Castle* turn round at Port Said, and we now give "you formal advice that the *Rhodesia Castle* and *Braemar Castle* "which were already on Round-Africa voyages, out via the Cape "and home via the Suez Canal, will be turned round at Mombasa "and Beira respectively," and then follows a query as to the meaning of the clause and the intentions of the clubs.

The notification as regards the *Dunnottar Castle* was acknowledged on November 6 in a letter in the following terms: "Dear "Sirs, m.v. *Dunnottar Castle*. We are obliged for your letter of "the 2nd instant advising that following the recent Admiralty "advices concerning the Egyptian crisis, this vessel which "arrived at Port Said on the 30th ultimo *en route* for East "and South African ports through the Suez Canal has been "turned round and re-routed via the Cape. We are noting our "records accordingly." The acknowledgment of the notification as regards the *Rhodesia Castle* appears in another letter of the same date, which reads as follows: "Dear Sirs, Suez Canal— "Diversions. Since acknowledging yours of the 2nd instant "regarding your *Dunnottar Castle*, we received your letter of "yesterday advising that your *Rhodesia Castle* and *Braemar* "*Castle* are also involved in these diversions. We observe that "both will be turned round at Mombasa and Beira respectively "for return home via the Cape instead of through the canal," and then there is a paragraph which deals with the intentions of the association as regards claims under these policies.

The information as to the change of plans for the *Dunnottar Castle* and the *Rhodesia Castle* was, as I have pointed out, noted by the managers—not by the committee—on November 6. The association were not informed of the plaintiffs' intentions that both the *Dunnottar Castle* and the *Rhodesia Castle* should make calls additional to the scheduled calls for passengers or freight at various African ports, calls which would affect the delay in the vessel's return to her final port in the United Kingdom. There is nothing here approaching approval—as contrasted with mere knowledge—and the resolution of September 13, 1956, on which the plaintiffs also rely, seems to me to give rise to no inference either favourable to the plaintiffs or against them, since it was directed, not to clause 1 (F) (2), but to the warranty in clause 5.

I hold that there was in fact no approval, express or implied, by the committee within the meaning of the policy to any of the steps taken by the plaintiffs, nor can the committee's failure to raise objections to those steps give rise to any estoppel, since I can see no duty upon them to speak.

The only matter which has given me some trouble is the admission in the defence that if the plaintiffs had asked for the committee's approval, they would in fact have approved the

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instructions given to the masters of the vessels, which I understand to mean the full re-routing instructions, including the additional calls at the various African ports and the omission of calls at other scheduled ports. I do not, however, read this admission as including an admission that the approval of the detailed re-routing instructions would have been given " in order " to avoid loss of or damage to the insured ship by any peril " insured "; but in any event the fact that the committee would have approved, if asked, appears to me to be irrelevant. It cannot amount to an implied approval when none was in fact sought or given, any more than a contract for the sale of goods could be implied from an admission that a potential buyer would have accepted an offer if it had been made when in fact it was not.

I come next to the questions: (1) Which, if any, of the steps in fact taken by the plaintiffs in relation to each vessel were taken in compliance with the Admiralty warning? and (2) Did those steps constitute or cause a prolongation of the voyage within the meaning of clause 1 (1) (F) (2)?

As regards the first question, the Admiralty warning merely advised ships to keep clear of a defined area in the Mediterranean and the northern part of the Red Sea. It was plainly given to avoid loss of or damage to merchant ships by perils which were in fact covered by the policies which I am construing.

In turning the *Dunnottar Castle* back from Port Said out of the area covered by the warning, and in preventing her proceeding further into the area to Suez and through the canal, the plaintiffs were acting with the approval of the Admiralty; and, indeed, the orders to this ship to turn about were given in consequence of the warning and for no other reason. So, too, in preventing the *Rhodesia Castle* from proceeding into the area covered by the warning, the plaintiffs were acting with the approval of the Admiralty, and I think that it matters not if their motive in so acting was a mixed one, and influenced by the probability that the canal was already blocked when the decision so to act was taken, and the even greater probability that it would be blocked by the time the *Rhodesia Castle* was scheduled to arrive at the canal.

But in turning round at Mombasa instead of at Port Sudan, and failing to proceed to Aden and Port Sudan, which were scheduled calls upon the voyage of the *Rhodesia Castle*, the plaintiffs were not complying with the Admiralty warning or acting with the Admiralty approval. To turn round at Mombasa, however, did not increase, but decreased, the delay in the vessel's return to her final port in the United Kingdom.

As regards the second question, the defendants say: Even assuming those particular steps were taken as respects one or other vessel with Admiralty approval, it does not follow that the delay in the return of that vessel to London, which in fact occurred, was a prolongation of the voyage with Admiralty

approval, a fortiori, with Admiralty approval given in order to avoid loss of or damage to the vessel by an insured peril. All that concerned the Admiralty was that the vessel should not be in the danger area. The Admiralty's approval was in fact limited, and its relevant approval under the policy must, in law, be limited to that.

The actual amount of delay in the return of the *Dunnottar Castle* to its final port in the United Kingdom was due to a number of factors with many of which the Admiralty were not concerned—the owners' decision to go round the Cape to Mombasa, to call at intermediate ports on the way to disembark passengers and to embark them for onward carriage to Aden, St. Helena and Ascension, and similarly with the case of the *Rhodesia Castle*.

The defendants put their contention in a variety of ways. They say that the Admiralty approval was merely to keeping away from a particular area; it did not operate on anything done outside that area. They say that there was no sufficiently proximate connexion between the Admiralty approval of keeping out of the area and the voyage actually undertaken round the Cape. They say that the original voyage was not prolonged, but abandoned, and a new voyage undertaken; the voyage was changed.

I think the first view, namely, that the Admiralty approval did not operate upon anything done outside the area of the warning, puts the matter too high. If the result of keeping away from the defined area is necessarily to cause a deviation which prolongs the length of the voyage upon which an insured vessel is engaged, the expenses incurred as a result of that prolongation would, in my view, be recoverable, subject to the franchise, under the policy. I gave in the course of the argument the example of a vessel on a voyage to Bombay which, as a result of the Admiralty warning, went round the Cape instead of through the canal. The expenses incurred by the prolongation of the voyage to Bombay would, in my view, be recoverable, subject to the franchise.

The second and third contentions are, I think, two different ways of expressing the same thing. The peril insured against is a prolongation of "the voyage"; that is, the voyage upon which the vessel is engaged at the moment at which the steps are taken with the Admiralty approval in order to avoid loss of or damage to the insured ship by a peril insured. At that stage it is open to the owner to continue the voyage with a deviation, in which case he may have a claim under the policy, or to abandon the voyage, or to change the voyage, in which case he has no claim under the policy. Which of these courses he has in fact adopted is in each case a question of fact, and, indeed, may be one of degree.

In each of the present cases I hold that the voyage on which the vessel was engaged at the moment at which steps were taken

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to avoid the area referred to in the Admiralty warning was changed.

In the case of the *Dunnottar Castle* it does not seem to me that the movements she in fact undertook after turning back from the Suez area can be considered as a continuation of the same voyage on which she was engaged when she turned back. A call at Las Palmas for bunkers would no doubt not affect the identity of the voyage; nor would an omission to call at ports within the area to which the Admiralty warning applied; nor should I be understood as saying that some minor variation in the order of calling at scheduled ports must necessarily amount to a change of voyage. But calls at four South African ports and one Portuguese East African port to carry new passengers in the reverse direction from the original voyage, the omission to call at Aden and two other ports (I exclude Suez, which was in the warning area), however sensible it may be as a matter of commercial common sense, seems to me to amount to a new or changed voyage, and not to a prolongation of the voyage within the meaning of the policy.

I am fortified in this view by the impossibility of saying to what extent the actual delay in the arrival of the vessel at her final port in the United Kingdom was due to these different calls and omissions to call, which the owners undertook for their own commercial convenience and which bore, so far as I can see, no causal relation to the Admiralty warning, save that that warning was no doubt a causa sine qua non. Similar considerations appear to me to apply to the *Rhodesia Castle*, and I do not think it is necessary to deal with the detailed calls and omissions to which I have already referred.

I therefore find that the plaintiffs are not entitled to recover under either of the policies.

I have, however, been asked to deal—as it turns out in this case, obiter—with certain questions of principle as to the method of assessing the expenses recoverable in cases where there is a valid claim under a policy in these terms.

The matter has been pleaded in a number of different ways, but the real issues are whether, in quantifying the claim, the assured must give credit for any savings of expenses as a consequence of the deviation which results in prolongation of the voyage (such as savings of Suez Canal dues or port charges at ports omitted), and for any financial benefits which accrue as a consequence of such deviation (such as additional freight or fares earned).

What he is entitled to recover is: "Expenses incurred by "reason of the prolongation of the voyage." If those words stood by themselves, "prolongation" might conceivably be construed in a geographical sense, although this is not the primary sense in which I would read it. Alternatively, it might be construed as meaning that the assured could recover the difference between the expenses actually incurred by him during

the whole of the prolonged voyage and those which would have been incurred if the voyage had been carried out as originally contemplated.

But these words do not stand alone. That "prolongation" is used in a purely temporal sense appears from the reference to "period of prolongation" in the last part of the clause; there may be deviation without "prolongation." The provision that nothing shall be payable in respect of the first seven days of such period of "prolongation" seems to me to make two things plain: First, that "prolongation" does not start until the date on which the voyage normally would have ended; and secondly, that it is the actual expenses incurred during the voyage after the expiry of such seven days which are recoverable, although no doubt this is a figure which may in practice have to be estimated.

It does not seem to me that any savings made in consequence of the deviation which resulted in the prolongation of the voyage have any relevance to this calculation, any more than any additional expenses which may have been incurred before the expiry of the seven days after the date upon which the voyage would normally have ended.

The policy is not one against loss of profits or on freight; nor is the clause analogous to a sue and labour clause, and the highly theoretical possibility that the assured might, as a result of savings, be in a better position than if there had been no deviation, does not persuade me to place any other construction than I have upon the words.

The same considerations apply to benefits. The clause relates to expenses only; but the kind of benefit which has been discussed in the present cases seems to me to be unlikely to accrue except in cases where there has been a change of voyage, in which case, as I have held, there is no claim under the policy.

It is, I suppose, possible that by reason of late arrival at intermediate ports consequent upon deviation, a shipowner might obtain additional passengers or freight for onward carriage, but it does not seem to me that the policy or the clause is concerned with such matters, any more than it is concerned with loss of booked passengers or freight for onward carriage which results from such delay.

I hold, therefore, that neither savings made before prolongation, nor benefits which accrued as a result of the prolongation, should be taken into consideration in assessing the claim under the policy.

As this is a friendly action, and as I have been told that the defendants are paying the costs in any event, I think there is nothing that really remains for me to deal with.

Judgment for the defendants.

Solicitors: *Holman, Fenwick & Willan; Richards, Butler & Co.*

J. F. L.

[HOUSE OF LORDS.]

H. L. (E.)* 1957 Nov. 12, 13, 14, 19, 20. 1958 Jan. 23.

INCOME TAX SPECIAL COMMISSIONERS APPELLANTS;

AND

LINSLEYS (ESTABLISHED 1894) LTD. . RESPONDENTS.

Revenue — Profits tax — Investment company — Direction by special commissioners—Computation of company's actual income—Deduction of amount payable by company for profits tax—Whether profits tax "payable" before election—Meaning of "payable"—When tax "falls to be computed"—Finance Act, 1947 (10 & 11 *Geo.* 6, *c.* 35), *s.* 31 (3)—*Whether direction required if nil actual income—"Payable"—Finance Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 33), *s.* 68—*Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 262.

Revenue—Surtax—Company.

Section 68 (1) of the Finance Act, 1952, provides: "Where "... the actual income from all sources of a body corporate ... "falls to be computed under paragraph 6 of the First Schedule to "the [Finance Act, 1922] or subsection (3) of section two hundred "and fifty-five of the [Income Tax Act, 1952], then, if any amount "is payable by the body corporate by way of the profits tax or the "excess profits levy, respectively, for any chargeable accounting "period falling wholly or partly within that year or period, a "deduction shall be allowed, in computing the said actual income, "of such an amount as would, after deduction of income tax at the "standard rate in force for the year of assessment during which the "said year or period ends, be equal to so much of the amount so "payable by the body corporate as is apportionable to the said year "or period: ..."

An investment company, to which section 245 of the Income Tax Act, 1952, applied, required the Special Commissioners to make a direction pursuant to section 262 of that Act in respect of the company's income for the period April 6 to May 7, 1953. The Special Commissioners refused to make a direction on the ground that when the actual income of the company was computed, including a deduction in respect of the company's liability to profits tax, to which it had been assessed, a nil sum resulted and that there was no obligation upon them to make a direction in respect of a nil actual income. The company claimed to be entitled to require an order of mandamus to issue to the Special Commissioners requiring them to make a direction. In that event it would escape payment of £16,421 profits tax by electing to pay surtax on a sum not exceeding £8,920:—

Held, that profits tax, having been assessed, was "payable" within the meaning of section 68 (1) of the Act of 1952 notwithstanding that no profits tax would ultimately be payable if, after a direction under section 262, and a consequent apportionment, an election was made under section 31 (3) of the Finance Act, 1947. A pending appeal to the House of Lords against that assessment to profits tax could be disregarded in this respect, since it only raised again the same question now before the House, and must fail if the present appeal was allowed. Accordingly, the Special Commissioners were not obliged to make the direction, since a necessary

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD SOMERVELL OF HARROW and LORD DENNING.

preliminary to a direction and apportionment was the computation of the company's actual income from all sources and, in computing it, a deduction must be made in respect of any profits tax payable by the company during the relevant period. There was no obligation to make a direction in respect of non-existent income and no possibility of "apportioning" nothing. Therefore there was no right to an order of mandamus.

Per Lord Denning. The making of an election was not a condition precedent to the profits tax being payable, but a condition defeasant.

Dicta of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [1926] A.C. 37, 52; 42 T.L.R. 58; and Lord Porter and Lord Morton of Henryton in *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.* [1950] A.C. 149, 163, 169–170; [1950] 1 All E.R. 1 applied.

Decision of the Court of Appeal sub nom. *Reg.* v. *Income Tax Special Commissioners, ex parte Linsley's (Established* 1894) *Ltd.* [1957] 2 Q.B. 78; [1957] 2 W.L.R. 654; [1957] 2 All E.R. 167 reversed.

APPEAL from the Court of Appeal (Jenkins, Hodson and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal made on March 6, 1957, dismissing the appeal of the appellants, the Commissioners for the Special Purposes of the Income Tax Acts, from an order of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Hallett and Donovan JJ.) made on October 19, 1956, whereby it was ordered that the commissioners should forthwith, and they were commanded to, give a direction under sections 245 and 262 of the Income Tax Act, 1952, in respect of the period from April 6, 1953, to May 7, 1953 (both inclusive), in relation to the respondent company, Linsleys (Established 1894) Ltd. (the applicants), and that the respondents' costs of the motion be paid by the appellants to the respondents, such costs to be taxed; and it was further ordered that the proceedings therein be stayed for 14 days from the date of the order and that if within that time the appellants gave notice of appeal and entered the same, then the proceedings be further stayed until the determination of the appeal.

The facts are fully stated in the opinion of Lord Reid.

Sir Reginald Manningham-Buller Q.C., *A.-G.* and *E. B. Stamp* for the appellants.

Cyril King Q.C. and *Hubert Monroe* for the respondent company.

The following authorities were referred to in argument: *Whitney* v. *Inland Revenue Commissioners* [1]; *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*[2]; and *Inland Revenue Commissioners* v. *Kered Ltd.*[3]

[1] [1926] A.C. 37; 42 T.L.R. 58.
[2] [1950] A.C. 149; [1950] 1 All E.R. 1.
[3] [1939] 1 K.B. 402; [1939] 1 All E.R. 45.

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Income Tax Special Commissioners v. Linsleys (Established 1894) Ltd.

Their Lordships took time for consideration.

January 23, 1958. Viscount Simonds. My Lords, I have had the advantage of reading the opinion which my noble and learned friend, Lord Reid, is about to deliver, and I agree so fully in his reasoning and conclusions that I do not think it necessary to add anything. In accordance with it, I move that the appeal be allowed and the appropriate declaration made; the respondents must pay the appellants' costs in the Divisional Court; each party will bear their own costs in the Court of Appeal and this House.

Lord Morton of Henryton. My Lords, I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend, Lord Reid. That opinion sets out fully the facts leading up to this appeal, and the relevant statutory provisions, and I agree with it; but as your Lordships are differing from the unanimous conclusion of the Court of Appeal and of the Divisional Court, I shall state shortly, in my own words, my reasons for thinking that the appeal should be allowed.

For the purpose of stating the respective contentions of the parties, I borrow, with only trifling alterations, the language of Donovan J. in delivering the judgment of the Divisional Court.[1]

Counsel for the Crown contend that the Special Commissioners are not obliged to give a direction under section 262 (1) of the Income Tax Act, 1952, followed by an apportionment, because (1) a necessary preliminary to a direction and apportionment is the computation of the respondent company's actual income from all sources in accordance with the terms of section 255 (3) of the same Act; (2) in computing that income, any profits tax payable by the company for the relevant period (April 6 to May 7, 1953) "grossed-up" in accordance with section 68 of the Finance Act, 1952, must be deducted under the mandatory provisions of the same section; (3) the amount of the profits tax so payable is £16,421, and the gross sum to be deducted is £29,856; (4) when this sum is deducted, the result is that the actual income from all sources of the company for the relevant period is reduced to nil; (5) there is no obligation under section 262 to make a direction in regard to non-existent income and no possibility of "apportioning" nothing; (6) therefore section 262 (1) imposes no duty upon the Special Commissioners for the relevant period.

Counsel for the company attack the third stage in this reasoning. They submit that the sum there mentioned is not "payable" within the meaning of section 68 of the Finance Act, 1952, because profits tax is not "payable" within the meaning

[1] [1957] 2 Q.B. 78, 85; affirming [1956] 3 W.L.R. 854; [1956] 3 All E.R. 577.

of that section unless the amount thereof has been finally determined and must ultimately be payable, having regard to all relevant sections of the taxing statutes, including section 31 of the Finance Act, 1947; and no profits tax will ever be payable by the company if, after a direction under section 262 of the Income Tax Act, 1952, and a consequent apportionment, the company and the corporate member thereof exercise their right to " elect " under section 31 (3) of the Finance Act, 1947.

To this argument counsel for the Crown reply that profits tax is now " payable " within the meaning of section 68 of the Finance Act, 1952, because the distributions made by the company in liquidation attracted profits tax under the charge imposed by section 30 (3) of the Finance Act, 1947; and the amount of tax payable has been particularized by an assessment made upon the company. Thus the decision of this appeal turns upon the question whether this sum of tax is or is not " payable," within the meaning of section 68 of the Finance Act, 1952, in the circumstances of the present case.

My Lords, I express no opinion upon the question whether a particular sum of profits tax can be said to be " payable " within the meaning of section 68 before there has been an assessment, but in the present case I am of opinion that the contentions of counsel for the Crown are well founded. In the case of an investment company, to which section 262 of the Income Tax Act, 1952, applies, it may not be necessary for the Special Commissioners to make any computation of the actual income from all sources of the company before giving a direction, because the direction is to be given under section 262 (1) " without con- " sidering whether or not the company has distributed a reason- " able part of its said income." To this extent the position under section 262 differs from the position under section 245; but it seems to me impossible for the commissioners to apportion the actual income from all sources of the company among the members of the company without first computing what that actual income is. This computation must be carried out in accordance with the provisions of section 255 (3) of the Income Tax Act, 1952, and section 68 of the Finance Act, 1952, and no election under section 31 (3) of the Act of 1947 can take place until there has been an apportionment of the income. Thus the order of events is first, computation, secondly, apportionment, and thirdly, election, and, in my view, the provisions of section 68 compel the commissioners to deduct, at the first stage, the sum of £29,856 already mentioned. The reasons which lead me to this result are as follows:

(a) This sum has already been assessed upon the company and is, I think, " payable " in any ordinary sense of the word. This view is supported by the observations of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [2] and by members

[2] [1926] A.C. 37, 52; 42 T.L.R. 58.

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of your Lordships' House in *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*[3]

(b) The words "the amount payable" appear in subsection (4) (*a*) of the same section 68 and in that subsection the word "payable" cannot mean "finally determined," because it is contemplated that the amount "payable" may be reduced by reason of a deficiency of profits for a subsequent period. It seems to me that the same meaning should be given to the word "payable" in subsections (1) and (4). If so, the possibility of a subsequent election under section 31 (3) of the Act of 1947 would not relieve the commissioners from the duty to deduct the sum now in question in accordance with section 68 (1) of the Act of 1952.

(c) The contention of counsel for the company would result in section 68 (1) having a very limited application, whereas it appears to me to be intended to be a general relieving section for the benefit of the taxpayer.

(d) It might well happen in many cases that the company would have paid the sum assessed by way of profits tax before the commissioners came to make their computation under section 68, and it would seem strange if a sum which had actually been paid, and properly paid, should be held not to be "payable" within the meaning of the section.

(e) Although both sides could point to certain anomalous results if their contention were rejected, the most striking anomaly arises from the argument on behalf of the respondent company. For if that argument were correct, an investment company having an investment income of (e.g.) £10, and being liable for profits tax amounting to a very large sum, could get rid of the liability for profits tax by insisting upon a direction being given by the commissioners under section 262 (1), followed by an apportionment of the £10, thus bringing into effect the provisions of section 31 (2) or 31 (3) of the Finance Act, 1947.

I have not overlooked the fact that an appeal against the relevant assessment to profits tax is still pending, but that appeal only raises again the question which is now before this House. I agree with my noble and learned friend, Lord Reid, in thinking that in these circumstances the fact that this appeal is still pending can be disregarded, and I join with him in refraining from expressing any opinion on a case in which the assessment is attacked on some other ground.

I agree with the motion proposed by my noble and learned friend on the Woolsack.

Lord Reid. My Lords, the facts of this case are simple. The respondent, whom I will call "the company," was at all material times under the control of not more than five persons of whom some, but not all, were individuals. Until 1952 the company

[3] [1950] A.C. 149, 163, 169–170; [1950] 1 All E.R. 1.

carried on trade as beer, wine and spirit merchants, but on April 1 of that year it sold its business. Thereafter it was an investment company. On May 7, 1953, it went into voluntary liquidation. In respect of its last chargeable accounting period from April 1 to May 7, 1953, the company was assessed to profits tax in the sum of £18,927, mainly on account of distribution charges in respect of assets distributed in the liquidation. If no account be taken of this assessment its actual income for the period April 5 to May 7, 1953, was not more than £8,920. If this assessed amount of profits tax is treated as an expense, its actual income for that period is nil, being arithmetically a minus quantity. In this action the company seeks an order of mandamus against the appellants, the Special Commissioners; and by a judgment of the Divisional Court, affirmed by the Court of Appeal, the Special Commissioners have been ordered to give a direction under sections 245 and 262 of the Income Tax Act, 1952, in respect of the period April 6 to May 7, 1953. The present appeal is brought against that order. The result of that order would be that the company would not be bound to pay that part of the profits tax attributable to that period, i.e., £16,421, but that the actual income of the company, i.e., £8,920, or such less sum as might ultimately be determined, would be deemed to be the income of its members, so that surtax would be payable in respect of what would be apportioned to individual members and other additional tax would be payable in respect of the part apportioned to corporate members of the company.

The difficulty in this case arises from the interrelation of provisions by which the income of certain companies can be deemed to be the income of their members, beginning with section 21 of the Finance Act, 1922, and provisions dealing with profits tax which began as the national defence contribution in the Finance Act, 1937. Under the Act of 1922, if it appeared to the Special Commissioners that a company to which these provisions applied had not distributed a reasonable part of its actual income (i.e., its income for the year in question estimated on income tax principles), they could direct that the company's actual income should be deemed to be the income of its members and apportion that income among the members. As a result surtax (then super-tax) had to be paid by the company on the whole of the company's actual income at rates at which its members would pay the surtax, although the income had not been distributed to the members. Then the Finance Act, 1939, made even more stringent provisions regarding certain investment companies: section 14 (1) required the Special Commissioners to give such a direction whereby the whole actual income of such companies (subject to special provisions for any part of it which might be estate or trading income) was deemed to be the income of the members whether or not a reasonable part had been distributed.

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The Finance Act, 1937, s. 19, charged national defence contribution on profits in each chargeable accounting period from trade or business and included investment companies within the scope of the charge. But by section 25 it allowed national defence contribution to be deducted as an expense in computing profits for income tax purposes. By the Finance Act, 1947, extensive alterations were made. This tax had been renamed profits tax; the rate was increased to 25 per cent.; and provision was made for non-distribution relief and for a distribution charge when profits which had enjoyed that relief were ultimately distributed. Moreover, individuals and partnerships were relieved from this tax which thereafter only applied to companies and corporate bodies. The provision which allowed national defence contribution to be deducted as an expense for income tax purposes remained in force for profits tax. The previous enactments dealing with income tax were consolidated in the Income Tax Act, 1952. Thereafter further amendments were made by the Finance Act, 1952, whereby, in the general case, profits tax was no longer allowed to be deducted as an expense in computing income for income tax purposes; but special provision was made to permit deduction of profits tax in cases where directions were to be given by the Special Commissioners.

The difficulty which arises in the present case can only arise if profits tax payable by an investment company in respect of a particular period exceeds the profits of the company for that period. That can happen, and has happened in this case, because in the past the company has enjoyed non-distribution relief in respect of profits not then distributed to its members; and then when those profits come to be distributed, as happened here in the liquidation, the company has to pay distribution charges, corresponding to the earlier non-distribution relief, in addition to profits tax payable in respect of the actual profits for the period in question. The drafting of the various statutory provisions suggests that this possibility was overlooked, but that is hardly surprising. We are therefore confronted with the not unusual problem of applying statutory provisions to circumstances which they were not designed to meet. In such a case it appears to me to be necessary to make a rather wide survey, because one can easily reach a wrong conclusion if attention is concentrated only on those provisions which are immediately applicable to the particular case.

Two general points call for notice. In the first place, in cases where the Special Commissioners direct that the whole actual income of a company is to be deemed to be the income of its members, such income would be subject to triple taxation unless special provision were made—it would be subject to income tax, profits tax and surtax, notwithstanding the fact that surtax is a tax on individuals and that individuals are not subject to profits tax. And, secondly, the matter is complicated by the fact that the provisions regarding profits tax and surtax might seem to be

at cross-purposes. Non-distribution relief in respect of profits tax is calculated to discourage companies from making a full distribution of profits to their members; whereas the provisions with regard to directions by the Special Commissioners are calculated to encourage such distribution by imposing heavy, and indeed penal, liabilities on companies which fail to make sufficiently large distributions.

It seems appropriate first to consider sections 245 and 262 of the Income Tax Act, 1952 (which replaced section 21 of the Finance Act, 1922, and section 14 (1) of the Finance Act, 1939). The relevant parts of those sections are as follows:—

" Section 245.—*Power to direct that income of bodies corporate is to be deemed to be income of their members.*

" With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

" Section 262.—*Investment companies; directions to be given automatically for all years in certain cases.*

" (1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which section two hundred and forty-five of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said section two hundred and forty-five in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income. (2) The provisions of this Chapter shall apply, with the necessary modifications, in cases in which directions are given by virtue of subsection (1) of this section as they apply in cases in which directions are given by virtue of the last preceding section with respect to a year of assessment: Provided that—(*a*) no deduction shall be allowed in computing the

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"actual income from all sources of the company which would "not be allowable in computing the total income of an individual "for the purposes of this Act, other than deductions for any "profits tax payable by the company or for any such sums "disbursed by the company as expenses of management as the "Special Commissioners consider reasonable, having regard to "the requirements of the company's business and, in the case of "directors' fees or other payments for services, to the actual "services rendered to the company; . . ."

"Actual income" is defined as follows, by section 255 (3): "In computing, for the purposes of this Chapter, the actual "income from all sources of a company for any year or period, "the income from any source shall be estimated in accordance "with the provisions of this Act relating to the computation of "income from that source, except that the income shall be com- "puted by reference to the income for such year or period as "aforesaid and not by reference to any other year or period."

The procedure for apportionment of income is set out in section 248 as follows: "(1) Where a direction has been given "under section two hundred and forty-five of this Act with "respect to a company, the apportionment of the actual income "from all sources of the company shall be made by the Special "Commissioners in accordance with the respective interests of "the members. (2) Notice of any such apportionment shall be "given by serving on the company a statement showing the "amount of the actual income from all sources adopted by the "Special Commissioners for the purposes of the said section 245 "and either the amount apportioned to each member or the "amount apportioned to each class of shares, as the Commis- "sioners think fit."

It will be seen that section 245 is the leading section. Under it the giving of a direction is within the discretion of the Special Commissioners and before giving a direction they must determine whether or not a reasonable part of the company's actual income has been distributed. It would seem to be clear that they cannot determine whether a reasonable part of the actual income has been distributed unless they know what the actual income was. There appears to be no means whereby a direction once given can later be cancelled or withdrawn and therefore it would not be right for the commissioners to make their determination until they had before them all the facts from which the actual income could be computed and had made the necessary computation. When this section was enacted profits tax was still a permissible deduction for income tax purposes, and it would require an exceedingly cogent argument to persuade me that the commissioners were not required to deduct profits tax in computing the actual income which they must have in mind when determining whether a reasonable part of it has been distributed.

Section 262 applies to a particular class of the companies to which section 245 applies. When it applies the commissioners

have no discretion. They are required to give a direction, which is a direction under section 245, whether or not a reasonable part of the actual income has been distributed. Again it would require an exceedingly cogent argument to persuade me that "actual income" in this section has a different meaning from "actual income" in section 245.

In the present case the taxpayer, the company, seeks to compel the commissioners to issue a direction under this section. It must be very unusual for a taxpayer to take this course, but I think that it is open to the company provided it can show that the section does apply. But in my judgment the section cannot apply unless there is some "actual income" for the period in question. Subject to an exception which does not arise in this case, the section provides that the whole actual income for every year of assessment shall be deemed to be the income of the members of the company, and the giving of a direction is merely for the purpose of achieving this object. It would be quite unreasonable to read this section as requiring the commissioners to give a direction as regards a year when the company had no actual income and there was nothing which could be deemed to be the income of its members. Moreover, a direction must be followed by an apportionment. Directions given by virtue of section 262 are directions under section 245 and section 248 requires that every such direction must be followed by a statement showing the amount of the actual income adopted by the commissioners for the purposes of section 245 and the amount apportioned to each member or each class of shares. It would be even more unreasonable to read this as requiring the commissioners to apportion a non-existent income by attributing nil to each member or class of shares.

I have said that this company was an investment company. A point was taken that, by reason of the definition, a company can only be an investment company so long as it has an actual income, and that if this company had no actual income during the period in question it ceased to be an investment company during that period. I find it unnecessary to deal with the point and only mention it to avoid any misunderstanding.

The question, therefore, is whether for the period in question the company had any actual income. If the profits tax of £16,421 was not a proper deduction, then the company had an actual income, and the commissioners were bound to give a direction and to apportion that income. But if the profits tax was deductible in ascertaining the actual income, then the company had no actual income, the commissioners were not bound to give a direction, and this appeal must succeed.

It is, I think, clear that any profits tax which was "payable" by the company at the time when the computation of actual income was made must be deducted in making that computation. That is, in effect, enacted by the proviso to section 262 (2) which I have already quoted. The Finance Act, 1952, by section 33,

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provided that in general profits tax should not be a deduction but special provision was made by section 68 to cover cases involving directions. The relevant parts of that section are: "(1) Where for the purposes of section twenty-one of the Finance "Act, 1922, or Chapter III of Part IX of the Income Tax Act, "1952 (which provide for the payment of surtax, in certain cases, "on undistributed income of companies), the actual income from "all sources of a body corporate for a year or period ending after "the end of the year nineteen hundred and fifty-one falls to be "computed under paragraph 6 of the First Schedule to the said "Act of 1922 or subsection (3) of section two hundred and fifty-"five of the said Act of 1952, then, if any amount is payable by "the body corporate by way of the profits tax or the excess "profits levy, respectively, for any chargeable accounting period "falling wholly or partly within that year or period, a deduction "shall be allowed, in computing the said actual income, of such "an amount as would, after deduction of income tax at the "standard rate in force for the year of assessment during which "the said year or period ends, be equal to so much of the "amount so payable by the body corporate as is apportionable "to the said year or period: . . . (2) Paragraph (*a*) of the proviso "to subsection (2) of section two hundred and sixty-two of the "Income Tax Act, 1952 (which relates to the deductions allow-"able in computing the actual income from all sources of an "investment company in relation to which a direction is in force "under subsection (1) of that section), shall have effect as if "instead of authorising a deduction for profits tax payable by the "company it authorised a deduction, in relation to any amount "payable by the company by way of profits tax or the excess "profits levy, of such an amount as would, after deduction of "income tax at the standard rate in force for the year of assess-"ment in respect of which the direction is given, be equal to the "first-mentioned amount. . . . (4) If—(*a*) the amount payable "by a body corporate in respect of the excess profits levy for "any chargeable accounting period is reduced by reason of a "deficiency of profits for a subsequent period; and (*b*) the amount "deducted under the preceding provisions of this section in "computing the actual income from all sources of the body "corporate was arrived at without regard to the reduction and "is excessive in view thereof, such apportionments, assessments "or additional assessments to surtax shall be made as are neces-"sary to counteract the excessive deduction and may be so "made notwithstanding that the time limited by law for making "assessments or additional assessments has expired."

Again, a deduction is to be made if any amount is "payable" by way of profits tax. The amount of the deduction is not the sum payable as profits tax but that sum "grossed up." But no point arises on that in this case.

I hope that I state the company's contention accurately when I say that it is that the profits tax which has been assessed on

the company was not and is not now "payable" within the meaning of these provisions, because if a certain event should happen the company would be under no obligation to pay the tax. To understand this contention it is necessary first to consider the provisions of section 31 of the Finance Act, 1947. Subsection (1) provides (subject to modifications which do not affect the present question) that section 19 of the Finance Act, 1937 (the section which charges profits tax) shall not apply to any trade or business unless it is carried on by a body corporate, unincorporated society or other body. Having so provided, it then was logical and reasonable to make special provisions for the case where a business is carried on by a body corporate, but, by reason of a direction by the Special Commissioners, the actual income of the body corporate must be deemed to be the income of its members so as to attract surtax. Profits tax was now only a tax on bodies corporate; surtax was and is only a tax on individuals. So it would not have been appropriate to charge both profits tax and surtax in respect of the same income. The remaining provisions of section 31 appear to be intended to avoid this double taxation, so far as possible. Those provisions, so far as relevant to this matter, are as follows: "(2) The said section "nineteen shall not apply to any trade or business carried on by "a body corporate during any chargeable accounting period if, "for a year or period which includes, or for years or periods "which together include, the whole of the chargeable accounting "period, the actual income of the body corporate from all sources "is apportioned under or for the purposes of section twenty-one "of the Finance Act, 1922, and all the persons to whom it is "apportioned are individuals. (3) If, for a year or period which "includes, or for years or periods which together include, the "whole of a chargeable accounting period of a trade or business "carried on by a body corporate, the actual income of the body "corporate from all sources is apportioned under or for the "purposes of the said section twenty-one, and some (but not "all) of the persons to whom the income is apportioned are "individuals, then if by notice in writing given to the Commis-"sioners within six months from the end of that chargeable "accounting period, or such longer time as the Commissioners "may in any case allow, the body corporate and the persons "other than individuals to whom the income is apportioned "jointly so elect as respects that chargeable accounting period "and each subsequent chargeable accounting period the whole "of which is included in a year or period or years or periods for "which the said actual income is so apportioned to those persons "and persons who are individuals, the provisions of this Part of "this Act shall apply as if—(*a*) the trade or business had been "carried on, during that and each such subsequent chargeable "accounting period, in partnership by the persons to whom the "income is apportioned, and the share of any one of them of "the profits and losses of the trade or business therefor had been

" equal to the proportion of the income apportioned for the year " or period or years or periods in question which is apportioned " therefor to that one of them; . . . and the body itself shall " not be chargeable to profits tax for that or any such subsequent " chargeable accounting period."

Subsection (2) deals with the case where all the members of the company are individuals, and, before coming to the more complicated provisions of subsection (3), I think it desirable to deal with subsection (2). Its provisions are somewhat complicated because the periods in respect of which profits tax and surtax are calculated are not the same. But I do not think that any light is thrown on the present question by considering this complication. Omitting it, the subsection provides that the section charging profits tax " shall not apply . . . if . . . the actual " income of the body corporate . . . is apportioned under or for " the purposes of section 21 of the Finance Act, 1922 " (now section 245 of the Income Tax Act, 1952). That appears to me to mean that the section charging profits tax does apply unless and until the actual income has been apportioned, but that it ceases to apply if and when the apportionment is made. That can be illustrated in this way. The Special Commissioners who deal with directions do not deal with profits tax, and in the general case of a trading company a considerable time may elapse before they are in a position to decide whether to give a direction. In the meantime profits tax may well have been assessed and on a demand being made for payment of the assessed profits tax it would, in my opinion, be no answer for the company to say that the profits tax is not payable because the Special Commissioners may later give a direction, which would be followed by an apportionment and consequent relief from the tax. The profits tax must be paid, but, if later a direction is given by the Special Commissioners and is followed by an apportionment, then the section charging profits tax does not apply and the tax which has been paid must be repaid. Any other view would mean that the recovery of profits tax from " section 21 " trading companies would be held up for years until it was clear that the Special Commissioners could not give directions to them under section 245.

If I am right so far, then it appears to me necessarily to follow that, at least as regards trading companies where the commissioners have a discretion whether or not to give a direction, profits tax which has been assessed is " payable " in every ordinary sense of that word and therefore must be allowed as a deduction by the commissioners in computing the actual income which they adopt when considering whether the sums which have been distributed to the members amount to a reasonable part of the company's actual income. Otherwise there might be grave injustice. The commissioners' decision whether a reasonable part of the actual income has been distributed must depend in large measure on the figure which they adopt as the amount of the actual income. If this figure is inflated by neglecting the liability

for profits tax because it is not yet "payable," the commissioners might see fit to give a direction which they would not have given if the amount of actual income which they had in mind had been the lower figure resulting from deduction of the amount of profits tax. It appears to me to be an inadequate answer to say that, although the commissioners are not entitled to deduct profits tax in computing actual income because it is not yet "payable," yet they make allowance for profits tax as a potential liability in considering whether the amount of the actual income which has been distributed is reasonable.

The terms of section 68 of the Finance Act, 1952, appear to me to give strong support to the view which I have expressed. But the Court of Appeal took a different view of this section and it is therefore necessary to examine it with some care. It directs that where for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, the actual income of a company "falls "to be computed" under section 255 (3), then, if any profits tax or excess profits levy is payable, a deduction shall be allowed. The Court of Appeal held that the actual income did not fall to be computed until after a direction had been given. With all respect, I am unable to agree. Chapter III includes all the provisions with regard to the giving of directions to which I have referred. Section 255 (3) is merely the definition of actual income. I have already given my reasons for thinking that the provisions of Chapter III require the commissioners to determine the amount of actual income before they decide whether or not to give a direction in cases where they have a discretion and therefore it appears to me that the actual income does "fall to be computed" within the meaning of section 68 at that stage. And the same must apply to investment companies because, for the reasons I have stated, directions can only be given to those companies if they have an actual income, and before giving a direction there must be a computation to determine whether there is any actual income. Moreover, under section 248 the commissioners must apportion the amount of the actual income adopted by them for the purposes of section 245. There is no provision for a computation of actual income after the direction but before the apportionment and that again appears to me to require a computation before a direction is given.

The Court of Appeal also relied on the terms of section 68 (2). That subsection deals with the amount of a deduction. The difficulty does not arise from the enacting words but from the words in brackets which purport to describe the proviso to section 262 (2) of the Income Tax Act, 1952. Those words could well be held to support the view of the Court of Appeal but they seem to me to be a misdescription of the proviso to section 262 (2). This is one of the places where I think that obscurity has resulted from a failure of the draftsman to anticipate a case like the present—as I have said, a very natural failure. In fact the

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proviso merely deals with the deductions to be allowed in computing actual income. But the words in brackets in section 68 (2) refer to deductions in computing the actual income of a company "in relation to which a direction is in force" under section 262 (1). It would seem that these words have crept in because the draftsman assumed that a direction would always be given automatically to an investment company and did not realize that a computation must first be made to determine whether the company has in fact any actual income. Whether that be the true explanation or not, I cannot regard the presence of these words in brackets, which are mere description, as of much weight in comparison with the other considerations to which I have referred.

It therefore appears to me that section 68 has enacted that when a computation of actual income is being made by the commissioners before they consider whether or not to give a direction, then, if any amount is payable as profits tax, a deduction shall be allowed. But the argument for the company is that at that stage no profits tax can ever be "payable" because the tax cannot be finally payable until the commissioners have decided that no direction is to be given. If the company's argument is right I cannot imagine any possible case where profits tax could be "payable," in the sense of finally payable, at that stage, and no such case was suggested in argument: so this provision of section 68 would be meaningless.

A further argument was submitted for the company. If the amount of profits tax is deducted in computing the income apportioned and thereafter by reason of the apportionment profits tax ceases to be payable, then the sum so deducted will be retained by the company unapportioned and will not be chargeable to surtax. If this were so, it would support the company's contention, but the Attorney-General submitted an argument that this sum would not escape taxation but could be covered by an additional apportionment.

Section 68 also deals with excess profits levy. Some argument was based on the provisions which deal with this tax. For what they are worth in this connexion they appear to me to support the appellants' contention because they make it clear that excess profits levy is "payable" within the meaning of this section although not finally payable because events in subsequent years may cause the amount "payable" to be ultimately reduced.

I can now turn to section 31 (3) of the Finance Act, 1947, under which the present question arises. This subsection applies where, as in the present case, not all the members of the company subject to direction are individuals, some being corporate bodies. Giving a direction imposes a liability on the company to pay surtax, but it does not directly affect individual members unless they choose to relieve the company by paying their shares of the surtax. It does, however, affect the tax position of non-individual members and it was apparently thought that such members

required special protection. Accordingly, a direction given to a company with non-individual members is not followed automatically by relief from profits tax, as it would be if all the members were individuals. Such relief only arises if the company itself and its non-individual members jointly elect to claim it. One might suppose that it would always be in their interest to claim the relief, but we were informed that there are cases where that is not so, in view of the fact that the election to claim relief, once made, applies not only to the period in question but to all subsequent periods.

Basically the schemes under subsections (2) and (3) of section 31 are the same, Under whichever subsection the case falls, no question of relief from profits tax can arise until there has been a direction and consequent apportionment of the actual income of the company. There cannot be a direction unless the company has an actual income, and in determining whether the company has an actual income there must be deducted profits tax which is payable and will remain payable if no direction is given. The only difference is that, whereas under subsection (2) relief from profits tax is automatic once a direction is given, under subsection (3) there is a further stage and there must be an election before relief is granted. If all the members of this company had been individuals there would have been no automatic relief from profits tax for the reasons which I have given, and for the same reasons there is no right to elect that there shall be relief. It would be somewhat strange if it were otherwise. If the company were right they would escape payment of £16,421 by electing to pay surtax on a sum not exceeding £8,920. Such a result might follow from the construction of numerous and complicated enactments but it could hardly have been intended.

It only remains to note a further argument for the company. In this case the profits tax was assessed but the assessment is still under appeal, and it was said that, whatever might be the effect when such an assessment had become final, the tax cannot be "payable" before that. I do not intend to express any opinion about a case where there has been no assessment or where the amount payable is in dispute. But it appears that the only ground for the appeal in the present case is that nothing is "payable"—the same ground as the company maintains before your Lordships. If this appeal is allowed it follows that the appeal against the assessment must fail and therefore I think that it is proper to disregard the fact that that appeal is still pending.

In my judgment this appeal should be allowed. I agree with what my noble and learned friend has just said about costs.

LORD SOMERVELL OF HARROW. My Lords, where the actual income of companies liable to surtax falls to be computed, section 68 of the Finance Act, 1952, allows a deduction, if any amount is payable by the company by way of the profits tax or

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the excess profits levy. Section 31 of the Finance Act, 1947, gives exemption from profits tax to such companies if certain conditions are fulfilled. Under section 31 (2), if the actual income from all sources is apportioned and all the persons to whom it is apportioned are individuals, the section which charges the profits tax is not to apply. Under section 31 (3), if the actual income from all sources is apportioned and some but not all of the persons to whom it is apportioned are individuals, then the company is not chargeable to profits tax if, by notice, the company and the persons aforesaid, other than individuals, so elect. The election binds those concerned for the current and all subsequent chargeable accounting periods. There are other provisions which I need not summarize.

The question turns on the construction of section 68 and in particular on the word "payable." The taxpayer submits that no deduction is to be made unless and until it is clear that the conditions of section 31 providing for exemption cannot be fulfilled. In other words, "payable" means payable in the last resort. As apportionment is a condition precedent to the exemption under section 31, there can, on this view, be no deduction before or for the purpose of apportionment. There is an initial difficulty, to my mind, in that there must be computation before apportionment and, on the face of it, the deduction is to be made when the actual income falls to be computed.

The Crown submits that the profits tax is payable within the section notwithstanding that later events may give exemption. The courts below have accepted the taxpayer's contention. It is, no doubt, a possible meaning of "payable," a meaning which certain contexts might make plainly right.

It is therefore necessary to consider the context. Beginning with trading companies under section 245 of the Income Tax Act, 1952, the first computation of the actual income from all sources would be in order that the commissioners may decide whether the company has or has not distributed a reasonable amount of its income. In considering that question, it would be absurd to disregard the liability to profits tax. If the commissioners decide that there has been no failure to distribute a reasonable amount, no exemption under section 31 will arise. The taxpayer's submission does not make sense at that stage. This stage does not exist in the case of investment companies where the direction is automatic (section 262 of the Income Tax Act, 1952). If the commissioners decide to make a direction and apportionment, and all the members are individuals, the taxpayer's construction works more simply than the Crown's. If the actual income is £2,000 and the profits tax £500, the Crown has to make two bites at the cherry, although under section 31 (2) there can be no ultimate liability to profits tax. When one comes to section 31 (3) the Crown would on the above figures apportion £1,500, and then have to have an additional apportionment of £500 if, but

only if, the election were exercised. On the taxpayer's construction the whole £2,000 would be apportioned, since the election might destroy liability to profits tax. The Attorney-General submitted that there would be no machinery if the election were not exercised for withdrawing the original apportionment and substituting one for £1,500. In his view, surtax would be levied on the whole £2,000 and the taxpayer would in addition have to pay £500 profits tax. If I had thought the taxpayer's construction was right, there would, in my opinion, be no difficulty in implying a power to make the necessary adjustment to carry out the substantive effect of the Act.

If one considers consequences, the results of the taxpayer's construction would be remarkable. In the present case, however small the actual income and however large the distribution charges the apportionment of the former would relieve the taxpayer of all liability for the latter if all members were individuals or if the election were exercised. Benevolent as at times financial provisions may be, it is impossible to believe that such capricious benevolence could have been intended. Unhappily the Crown's submission has its own anomaly, though perhaps a lesser one. On the Crown's contention, if the profits tax is less than the actual income by however small a sum, the whole of the actual income is treated on a surtax basis and no profits tax is exigible. I am assuming that either it is a section 31 (2) case or the election is exercised. If, on the other hand, the profits tax exceeds the actual income by however small a sum one would have expected the actual income to be treated on a surtax basis, the excess of the profits tax over that amount being payable as profits tax. This is not the result on the Crown's contention. The whole has to be handed over as profits tax, the taxpayer not retaining what would be left out of the actual income after surtax.

Context and consequences do not, in my opinion, give any sufficient support to the taxpayer's construction. The ordinary meaning of "payable" is, I think, that for which the Crown contend, that is payable at the time of computation disregarding the fact that subsequent events may destroy the liability.

I would, therefore, allow the appeal.

LORD DENNING. My Lords, this case depends on the meaning of the word "payable" in section 68 of the Finance Act, 1952. The courts below have held that profits tax is not "payable" within that section until it has been ascertained that no election can or will be made under section 31 (3) of the Finance Act, 1947.

It seems to me that this treats the making of an election as a *condition precedent* to the profits tax being payable; whereas, on the true construction of the statute, it is not a condition precedent but a *condition defeasant*. The profits tax is "payable" when everything has happened to make it payable, that is to say, when it is duly assessed on the taxpayer. It may thereafter cease to be payable if an election is made: but, that being a condition

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defeasant, the legal position is that right up till that moment it is payable. The result is that in computing the "actual income" of these surtax companies—so as to see whether a direction or apportionment should be made—the profits tax (grossed up) must be deducted before the direction or apportionment is made. This is a sensible and practical way of working the Act.

I would allow the appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Smith & Hudson for Rollitt, Farrell & Bladon, Hull.*

F. C.

[COURT OF APPEAL.]

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Husband and Wife — Divorce — Appeal — Costs — Decree — Party cited mulcted in costs — Disclosure of successful party's adultery after granting of decree absolute — Appeal against order as to costs — Whether such appeal lies after decree has been made absolute — Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 31 (1) (*e*), 184—*Matrimonial Causes Rules*, 1957 (1957, *No.* 619 (*L.*4)), *r.* 69 (2).
Husband and Wife—Practice (in matrimonial causes)—Costs.
Fraud—Fraud to court.

A husband, whose wife had petitioned for divorce on the ground of his alleged cruelty, cross-petitioned on the ground of the wife's admitted adultery with the party cited. After a six-day hearing, mainly on the issue as to cruelty, the commissioner dismissed the wife's petition, granted the husband a decree nisi, and ordered that the party cited should pay all the husband's costs. Two months after the decree had been made absolute, and both parties had married again, the party cited applied to the commissioner for leave to appeal against the order as to costs, supporting his application by fresh and undisputed evidence that the husband had before the hearing of the petition himself been guilty of adultery which he had concealed from the court. Leave to appeal was granted by the commissioner, and on a motion to the Court of Appeal for leave to appeal out of time and to adduce fresh evidence, and on the appeal by the party cited:—

Held, varying the order of the commissioner, that each party should bear his own costs, since a party who had concealed a material fact of this nature from the court ought not to be permitted to obtain an advantage from his deceit.

An appeal may lie from an order as to costs by leave of the court after the decree nisi has been made absolute, despite the restriction on appeals after decree absolute contained in section 31 (1) (*e*) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] for an appeal against the order as to costs is not an

[1] Supreme Court of Judicature Act, 1925, s. 31: "(1) No appeal "shall lie— . . . (*e*) from an order "absolute for the dissolution or "nullity of marriage in favour of "any party who having had time "and opportunity to appeal from the "decree nisi on which the order was

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appeal against the decree absolute. The form of the decree nisi and rule 69 of the Matrimonial Causes Rules, 1957,[2] recognize that the order as to costs is distinct from the order nisi dissolving the marriage and is not so ancillary to it as to merge with it in the decree absolute.

Semble. The general principles applicable to all motions for leave to adduce fresh evidence are equally applicable to such a motion by a party to divorce proceedings who has not had "time "and opportunity" to appeal until after a decree of divorce has been made absolute, despite the restriction on such appeals in section 31 (1) (*e*) of the Act of 1925.

APPEAL from Mr. Commissioner Blanco-White Q.C.

A wife filed a petition in 1955 for the dissolution of her marriage on the ground of her husband's alleged cruelty. She admitted that she had herself been guilty of adultery with one Gilder during the year preceding the presentation of her petition, and asked for the discretion of the court to be exercised in her favour. The husband by his answer, delivered some time later, denied the cruelty alleged, and cross-petitioned for divorce on the ground of his wife's admitted adultery with Gilder in the matrimonial home from April to November, 1954, and thereafter at another address; and Gilder was joined in the proceedings as the party cited. By his pleading the party cited alleged that the cruelty of the husband had conduced to the wife's adultery.

During the six-day hearing of the petition the main issue contested was that between husband and wife on the charge of cruelty, though the party cited gave such evidence as he could to support that charge. The commissioner at the conclusion of the hearing dismissed the wife's petition and granted the husband a decree nisi on the ground of the wife's adultery. He ordered that the party cited should pay the whole of the husband's costs. The decree nisi, drawn up on March 7, 1957, contained, in addition to the words dissolving the marriage, the provision as to the costs and also a provision as to the custody of the five children of the marriage. The decree nisi was made absolute on April 25, 1957.

The question of the custody of the children was contested and was accordingly adjourned into chambers. For the purpose of

"founded, has not appealed from that "decree; . . ."

S. 184: "(1) As soon as any "decree for divorce is made absolute, "either of the parties to the mar- "riage may, if there is no right of "appeal against the decree absolute, "marry again as if the prior mar- "riage had been dissolved by death "or, if there is such a right of "appeal, may so marry again, if no "appeal is presented against the "decree, as soon as the time for "appealing has expired, or, if an "appeal is so presented, as soon as "the appeal has been dismissed: . . ."

[2] Matrimonial Causes Rules, 1957, r. 69: "(2) An order for payment "of costs contained in a decree nisi, "if drawn up before the decree is "made absolute, shall direct pay- "ment into court, and, unless other- "wise directed, such costs shall not "be paid out of court until the "decree has been made absolute, but "a wife who is unsuccessful in a "cause and who at the trial has "obtained an order for costs may "proceed forthwith to obtain payment "of the amount allowed on taxa- "tion."

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those proceedings the former husband and the woman whom he married after the decree was made absolute swore affidavits to show that they were fit persons to have the custody of the children. The first wife, the mother of the children (who had also since the decree absolute married the party cited), carried out investigations, and discovered, in June, 1957—two months after the decree had been made absolute—that her former husband had committed adultery on three occasions before the hearing of the petition with the woman whom he had married after the decree absolute, and that on May 27, 1957, the woman had given birth to a child of whom he had acknowledged himself the father on the child's birth certificate.

The party cited thereupon applied ex parte to the commissioner on July 23, 1957, for leave to appeal out of time against the order as to costs made against him. His application was supported by an affidavit by the wife setting out the newly discovered facts. The commissioner granted the leave asked for and stated that had he known the facts now brought to his attention he would have made a different order as to costs.

The party cited thereupon applied to the Court of Appeal ex parte on July 29, 1957, for leave to appeal out of time and for leave to adduce fresh evidence, namely, evidence that the husband had concealed from the commissioner the fact that he had himself been guilty of adultery. The court adjourned its decision on the motion to the hearing of the appeal on its merits, and extended the time for appeal. On the resumed hearing the court also had before it an affidavit by the former husband in which he admitted that he had been guilty of adultery and tendered his apology to the court for concealing it from the commissioner, praying in extenuation his anxiety of mind over the impending trial and money matters. The court granted leave to adduce the fresh evidence, and the appeal on the merits was heard at the same time.

Anthony Lincoln (for *F. M. Drake*) for the party cited.
Eric Falk for the husband.

The following cases were cited in the course of the argument: *O'Neill* v. *O'Neill and Pigott* [3]; *Everitt* v. *Everitt* [4]; *Braddock* v. *Tillotson's Newspapers Ltd.* [5]; *Wiseman* v. *Wiseman.* [6]

HODSON L.J. stated the facts and continued: The trial lasted a very long time, but the party cited did not increase the length of the trial except so far as he supported it by his conduct in his pleading, and by such evidence as he was able to give in support of the wife's case. However that may be, in the exercise of his

[3] [1949] W.N. 394; 65 T.L.R. 624; [1949] 2 All E.R. 649.
[4] [1948] W.N. 345; 65 T.L.R. 121; [1948] 2 All E.R. 545.
[5] [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306.
[6] [1953] P. 79; [1953] 2 W.L.R. 499; [1953] 1 All E.R. 601.

discretion the commissioner made that order which involved the party cited in a very substantial liability as to costs.

The decree nisi pronounced on that day was made absolute on April 25, but it was not until July, 1957, that the wife discovered what is now, and has been since its discovery, an undisputed fact, namely, that the husband had committed adultery with another woman and had committed adultery with that other woman before the hearing. In fact he was living with her and on May 27, 1957, she gave birth to a child, which must have been conceived before the hearing, of which the husband has declared himself over his own signature to be the father. The husband had never disclosed this fact to the court. He has never pretended that he did not realize that his own adultery which had been committed was a relevant matter for the court's consideration, and he does not seek to say that he did not grossly deceive the court in regard to the concealment of this matter. It is not that he has committed perjury. He was not asked to swear one way or the other about this matter either in the interlocutory proceedings or when the suit was tried. But he has kept back this fact and misled the commissioner into believing a state of facts existed which did not exist, namely, that the wife had committed adultery, whereas he had not, the fact being that they had both committed adultery. Indeed, he so far misled the commissioner as to lead him to say in his judgment that, so far as he could see, the husband's attachment to the wife remained intact up to that moment, whereas the truth was he had set up another establishment with another woman.

It would be wholly wrong for this court to lend countenance to such deception by giving the husband any relief, in those circumstances, against the party cited. The decree absolute stands, and it cannot be altered or appealed against. Of course, the case might have taken many different courses if this adultery had been disclosed. The petition might have been dismissed. It may be that that was the reason why the husband kept this matter back. A decree nisi might have been made against him. He might have been anxious to avoid that consequence because he thought that he might have a better chance in the proceedings for custody which ensued—there are five children—if he had not himself been found guilty of having committed adultery. A decree might have been made in favour of both parties, and, as happened here, a different approach might have been made on the question of costs. The commissioner made it clear that if he had found that this man had committed adultery, let alone if he had been told at the last minute at the end of his judgment, or immediately before giving his judgment, he would not have condemned the party cited in costs.

I should point out that no blame is to be attached in any way to the commissioner, who acted on the materials that he had before him. He was grossly deceived. The court was deceived, and it has now been enlightened. It has now to do what it can

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to put the matter right by altering the order in the way the appellant asks and make no order as to costs, leaving each party to bear his own costs.

There was an objection made on behalf of the respondent to this appeal that in any event this court could not take any such course, and I must consider that. It depends on a section of the Supreme Court of Judicature (Consolidation) Act, 1925, which is designed to prevent appeals from decrees absolute. Section 31 (1) (*e*) of that Act provides that there shall be no appeal "from "an order absolute for the dissolution or nullity of marriage in "favour of any party who having had time and opportunity to "appeal from the decree nisi on which the order was founded, "has not appealed from that decree." This is not an appeal from a decree absolute. That is the answer to that contention; the contention being that, although this is not a direct appeal from a decree absolute, it is an appeal from a decree nisi, and that this was merged in the decree absolute, and, accordingly, that the order for costs contained in the decree nisi is in effect part of the decree absolute. I find it difficult to follow that argument, and I am quite unable to accept it. If one looks at the form of the decree nisi itself it becomes absolute under the present procedure without any order. It is divided into several parts, only one of which is the order nisi, namely, that part which dissolves the marriage. It contains other provisions, one of which is a provision as to costs, and another of which is a provision as to the custody of children. The decree nisi is not made operative until it is made absolute and that takes place nowadays by a more or less automatic process unless there is any intervention. But I do not accept the argument that the order for costs is in such a way ancillary to the decree nisi as to merge with it in the decree absolute. The taxation takes place on the direction given in the decree nisi itself. So far as I can see, if a decree nisi is awarded without any limitation as to taxation, there would be no objection to taxing costs thrown away if the decree nisi had not been made absolute. But the Matrimonial Causes Rules, 1957 [rule 69] provide for the order for payment of costs contained in the decree nisi, if it is drawn up before the decree nisi is made absolute, to direct payment into court, which indicates, to my mind, that the court in these rules was alive to the difference between the order for costs and the decree which was what actually dissolved the marriage.

I think there is no substance in the point. It is unnecessary to consider further whether the appellant here had "time and "opportunity" to appeal from the decree nisi. If it is necessary so to decide, I am inclined to the view that it would be right to say on the material we have had before us that the appellant had no "time or opportunity" to appeal against this decree. Indeed, I am of opinion that the same principles should be adopted in dealing with applications of this kind as are adopted in all applications to an appellate court when the question whether

or not fresh evidence should be allowed is before the court. Following these principles the fresh evidence should be admitted. I would therefore allow the appeal.

PEARCE L.J. I agree. In my view, the restriction on appeals contained in section 31 (1) (*e*) of the Supreme Court of Judicature (Consolidation) Act, 1925, has no application here. This is not an appeal against an order absolute. It is an appeal against an order for costs made on a decree nisi. The natural meaning of the words in section 31 (1) (*e*) does not restrict such an appeal: nor do I think that *O'Neill* v. *O'Neill and Pigott*,[1] to which we have been referred, compels us to put that gloss on the words "appeal" or order absolute."

I, too, if it were necessary, would be inclined to hold that in this case the appellant had no opportunity for appealing from the decree nisi since the true facts were concealed from him by the deceit of the respondent.

So far as the merits are concerned, the respondent concealed his adultery from the court in order to obtain from it a decree as of right instead of a decree in the discretion of the court. Part of the fruit of that deceit is the order for costs, and now that that deceit has been discovered, it seems to me wrong that the order should stand. For these reasons, I agree that the appeal should be allowed.

HARMAN J. I agree. It must be a universal rule in all divisions of the court that serious notice will be taken of attempts to deceive it. It would be contrary to all principle to allow a litigant who has deceived, and deliberately deceived, the court to obtain from that deceit an advantage which, if the truth had been known, he would never have had. That is the reason why the appeal should be allowed.

As to the point of law, it seems to me that that is answered, as my Lord [Hodson L.J.] has said, by the simple submission that it is not the fact that this is an appeal from an order absolute, and that is the end of it.

Appeal allowed with costs, to be limited to the sum of £24, payable by four monthly instalments of £6 each, the first payment to be one month from today: certificate to the respondent for legal aid.

Solicitors: *Field, Roscoe & Co. for Cave & Co., Luton; Peacock & Goddard for Cooke & Sons, Luton.*

M. M. H.

[1] [1949] W.N. 394; 65 T.L.R. 624; [1949] 2 All E.R. 649.

[PROBATE, ETC., DIVISION.]

NOTE.

1957
Dec. 5.
1958
Jan. 15.

Mr. Commissioner Latey Q.C.

LANCE *v.* LANCE AND GARDINER.

Husband and Wife—Practice—Submission of no case—Divorce—Submission of no case by co-respondent—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 5.

DEFENDED PETITION for divorce.

At the close of the petitioner's case, by which it was alleged that the respondent had committed adultery with the co-respondent, it was submitted by counsel for the co-respondent that there was no case for him to answer, and that he was not obliged, having regard to the wording of section 5 of the Matrimonial Causes Act, 1950, to be put to his election to call no evidence upon such a submission. The commissioner ruled that he would not put counsel to his election, and after argument on the evidence held that there was no evidence on which the co-respondent could be found guilty of adultery, and accordingly dismissed him from the suit, reserving detailed judgment on the question raised by the submission until the whole case had been concluded.

Harold Brown Q.C. and *D. Armstead Fairweather* for the husband.
Bernard Gillis Q.C. and *Kenneth Jones* for the wife.
Colin Duncan for the co-respondent.

MR. COMMISSIONER LATEY Q.C. said during the course of his judgment when dealing with the submission of no case to answer: So far as the co-respondent is concerned, I accepted the submission of his counsel, Mr. Colin Duncan, when the petitioner's case was closed, that there was no case of adultery against him to answer. Before taking that course I had to consider whether or not, following the decision in *Alexander* v. *Rayson*,[1] the court was bound to put counsel for the co-respondent to his election, that is, if he submits no case to answer, that he must stand by his election and call no evidence if his submission were to fail. Mr. Colin Duncan urged that he was not obliged to make such election, on two grounds. The first was that Lord Greene M.R., in *Yuill* v. *Yuill*,[2] having stated that the practice was discussed in *Alexander* v. *Rayson*,[3] said: "I will assume that it is a proper "practice to follow in the Divorce Division. It does not mean that "counsel by submitting no case ipso facto loses his right to call "evidence if his submission fails. He only loses that right if he "definitely elects to call no evidence. He may make this election "expressly or (as in *Laurie* v. *Raglan Building Co.*[4]) impliedly. The "practice which has been laid down amounts to no more than a "direction to the judge to put counsel who desires to make a submission of no case to his election, and to refuse to rule unless counsel "elects to call no evidence . . . but if . . . no election in fact takes "place, counsel is entitled to call his evidence just as if he had never "made the submission."

Mr. Colin Duncan declared at the outset, after the petitioner's case was closed, that he refused to elect, and following the direction just cited in *Yuill* v. *Yuill*[5] this court might refuse to rule. But he then

[1] [1936] 1 K.B. 169; 52 T.L.R. 131.
[2] [1945] P. 15, 18; 61 T.L.R. 176; [1945] 1 All E.R. 183.
[3] [1936] 1 K.B. 169.
[4] [1942] 1 K.B. 152; [1941] 3 All E.R. 332.
[5] [1945] P. 15.

came to his second ground, that he was invoking section 5 of the Matrimonial Causes Act, 1950; and he proposed to call evidence if his submission that there was no evidence on which the case could proceed against the co-respondent were rejected. This section, originally section 11 of the Matrimonial Causes Act, 1858, later reproduced as section 179 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides: "In any case in which, on the petition of a husband "for divorce on the ground of adultery, the alleged adulterer is made "co-respondent or in which, on the petition of a wife for divorce on "the ground of adultery, the person with whom the husband is alleged "to have committed adultery is made a respondent, the court may, "after the close of the evidence on the part of the petitioner, direct "the co-respondent or the respondent, as the case may be, to be "dismissed from the proceedings if the court is of opinion that there "is not sufficient evidence against him or her."

It is to be observed that Lord Greene M.R., in his explanation in *Yuill* v. *Yuill* [6] of the principle laid down in *Alexander* v. *Rayson*,[7] said: "I will assume that it is a proper practice to follow in the "Divorce Court." In fact there was no such practice of election in the Divorce Court before the decision in *Alexander* v. *Rayson*.[7] I am not quoting Lord Greene M.R. in that, but stating it as a fact. Moreover, the attention of the Court of Appeal in *Yuill* v. *Yuill* [8] was not drawn to section 179 of the Judicature Act, 1925, for the all sufficient reason that it does not apply to husband and wife who are opposing parties in a divorce suit. This section is identical with section 5 of the Matrimonial Causes Act, 1950, which has replaced it. It was a procedural section peculiar to the Divorce Court and it has never been repealed; and Mr. Colin Duncan urged that it gave this court a discretion, which must be exercised judicially, to hold that there was no case to answer at the close of the petitioner's evidence, and that this section should be applied, notwithstanding the practice laid down in the civil suit of *Alexander* v. *Rayson*.[9]

Further, he referred to my own observations in *Beal* v. *Beal* (*Reade cited*),[10] in which I allowed counsel for the party cited to submit no case, without putting him to his election, rejected his submission, and allowed him to call evidence on the strength of section 5.

Mr. Harold Brown argued that it was incumbent on me under *Alexander* v. *Rayson* [11] to put Mr. Colin Duncan to his election, and drew my attention to a recent decision of Sachs J. in *Gilbert* v. *Gilbert and Abdon* (*Adams intervening*),[12] in which the same submission of no case to answer was made on behalf of a woman intervener and the judge put her counsel to his election. It is clear that in that suit the judge, having heard all the evidence on behalf of the wife, had some doubts as to there being no case to answer, and that is why he put counsel to his election. Incidentally, the judge pointed out the possible inconvenience of a party being thus dismissed from the suit, and further evidence being adduced by an alleged accomplice in the adultery which would go a long way to proving the guilt of the party discharged, and Mr. Brown emphasized that point in the present case. Of course, it is not an uncommon situation in the Divorce Court, however paradoxical it may appear to the lay mind, that "A" is found guilty of adultery with "B," but "B" is acquitted thereof for lack of proof against "B."

Sachs J. also demurred in *Gilbert* v. *Gilbert* [12] to my suggestion in *Beal* v. *Beal* (*Reade cited*) [13] that section 5 might be obsolete, and

[6] [1945] P. 15, 18.
[7] [1936] 1 K.B. 169.
[8] [1945] P. 15.
[9] [1936] 1 K.B. 169.
[10] [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1228n.
[11] [1936] 1 K.B. 169.
[12] [1958] 2 W.L.R. 8; [1957] 3 All E.R. 604.
[13] [1953] 1 W.L.R. 1365.

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said [14]: "Nothing in the way of a rule of practice could prevail against "the provisions of that section or to take away that discretion from "the courts." I cheerfully accept his Lordship's correction, especially as I have held in this case that section 5 is in full force in the Divorce Court.

This decision on the point of procedure having been made, Mr. Colin Duncan submitted on the pleadings and on the evidence that no case at all of adultery had been made out against the co-respondent. He said that there was not a scintilla of evidence of inclination and next to nothing of association, except that of a riding master and the wife as a voluntary assistant in looking after the horses.

Despite Mr. Brown's argument to the contrary, that was already the conclusion which had been forming in my mind before any submission was made. I therefore exercised my discretion under section 5, which I could have done without any application by counsel, and I dismissed the co-respondent from the suit.

There has been nothing in the subsequent evidence, to which I shall refer later, called on behalf of the respondent, to throw any doubt on that decision, which incidentally saved considerable costs of further representation of the co-respondent during the continuance of the trial, and also saved the co-respondent from anxiety with regard to his own position during the long adjournment that became necessary.

Solicitors: *Smiles & Co.; D. Herbert, Banbury; Stoneham & Sons.*

J. B. G.

[14] [1958] 2 W.L.R. 8, 10.

[PROBATE, ETC., DIVISION.]

MANNING *v.* MANNING.

1957
July 12, 15, 22;
Dec. 19, 20.

Mr. Commissioner Latey Q.C.

Husband and Wife—Divorce—Conflict of jurisdiction—Foreign decree based on last common residence — Decree to wife domiciled in England—Wife petitioner in fact resident for over three years in the foreign jurisdiction—Grounds of divorce alien to English law —Recognition of decree—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 18 (1) (*b*).

Conflict of Laws — Jurisdiction — Divorce — Comity — Recognition of foreign divorces—Wife's decree—Parties domiciled in England.

A wife domiciled in England obtained in Norway a Norwegian decree of divorce based upon a period of separation. The jurisdiction of the Norwegian tribunal was founded upon the fact that the last common residence of the parties had been in Norway, although the wife, a Norwegian by birth, had in fact been ordinarily resident in Norway for considerably more than three years before the decree. Upon a petition presented by the husband (who remained domiciled in England) for a declaration that the Norwegian decree was valid and the marriage thereby dissolved or, in the alternative, for a decree of divorce on the ground of desertion:—

Held, (1) that as the wife had in fact been ordinarily resident in Norway for a period of more than three years before her application for a divorce the marriage should be recognized upon a basis of reciprocity as having been validly dissolved by the Norwegian decree.

Travers v. *Holley* [1953] P. 246; [1953] 2 W.L.R. 507; [1953] 2 All E.R. 794; *Arnold* v. *Arnold* [1957] P. 237; [1957] 2 W.L.R.

366; [1957] 1 All E.R. 570; and *Robinson-Scott* v. *Robinson-Scott* [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473 applied.

Fenton v. *Fenton* [1957] V.L.R. 17 [1] not followed.

(2) And this was so although the grounds for the divorce were not grounds recognized in the English courts, for the ground of a divorce in the lex fori need not be taken into consideration so long as it does not offend against natural justice as conceived in the English courts.

(3) As the Norwegian court had accordingly had jurisdiction there was no jurisdiction in the English court to consider the husband's alternative plea for a divorce in this country, for the marriage had already been dissolved.

Per curiam. I am content in considering an obiter dictum of mine in *Arnold* v. *Arnold* [1957] P. 237, 253, in which I suggested that even less than three years' residence might be held to confer jurisdiction [to dissolve abroad a marriage upon the application of a wife domiciled in England], to follow the principle laid down by Karminski J. in *Robinson-Scott* v. *Robinson-Scott* (supra) that there must be at least three years' residence to found jurisdiction wherever the proceedings are brought.

PETITION by husband for a declaration that his marriage had been validly dissolved by a Norwegian divorce or, in the alternative, for a decree of divorce on the ground of desertion

The parties were married in England in 1948 and made a home in Norway, which was the wife's country. The husband was at all times domiciled in England. In February, 1951, the husband returned to England on the basis that the wife would join him when he had found employment and suitable accommodation; but she refused to do so and in July, 1952, he signed when visiting her in Norway what he thought to be a declaration that they were living apart, although it was in fact an application for a certificate of separation, a usual preliminary to a suit for divorce in Norway. This led to a Norwegian divorce being granted to the wife in February, 1955, in the circumstances

[1] October 4, 1956: [1957] V.L.R. 17. The headnote reads: "F., "whose domicile of origin was Victorian, acquired a domicile of "choice in England and thereafter "in 1932 married E. in England. "Having deserted E. in England, "he abandoned his domicile of "choice and reverted to his Victorian domicile. In 1938 E. presented in England a petition for "divorce on the ground of F.'s desertion. In 1949 a decree nisi was "pronounced in that suit by the "English court [April 13, 1949] and "was made absolute. After the "decree abolute, F. went through a "form of marriage with S. in Sydney, and now he petitioned for a "divorce from S.:—*Held*, the decree "of the English court could not be "recognized as valid, because it was "not the court of the domicile. "Although the English court had "had jurisdiction to pronounce the "decree by virtue of section 13 of "the Matrimonial Causes Act, 1937 "[section 18 (1) (*a*) of the Act of "1950], and although that section is "similar to but not identical with "section 75 of the Victorian Marriage Act 1928, this was not a "reason for recognizing the decree. "*Travers* v. *Holley* [1953] P. 246 "not followed." The matter came before the Full Court (Herring C.J., Gavan Duffy and O'Bryan JJ.) on a case stated by Sholl J. pursuant to section 115 (2) of the Victorian Marriage Act, 1928. The case was not contested by the respondent, but the Attorney-General was represented. (No explanation was forthcoming for the delay in the English proceedings between 1938 and 1949.)

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set forth in the judgment, in which the other relevant facts are more fully considered.

H. S. Law, for the petitioner, submitted that the declaration could be made upon the basis of the principles of comity expressed in *Travers* v. *Holley*,[2] *Arnold* v. *Arnold*[3] and *Carr* v. *Carr*,[4] but further submitted that if the petitioner, whose only wish was to have his status clarified, had made out a case of desertion upon the basis that he had never understood the real meaning of the separation document which he had signed, the English court could grant him as a domiciled Englishman a decree of divorce regardless of the position arising out of the Norwegian decree. It was unnecessary if a petitioner was entitled to a finding of a matrimonial offence which would entitle him to a decree first to have investigated the validity or otherwise in England of a foreign decree which purported to dissolve the marriage in another country. He submitted that a petitioner might elect in such circumstances which remedy he would seek first.

[MR. COMMISSIONER LATEY Q.C. How can you say that if the marriage has been dissolved legally? If the dissolution is recognized by the English court what jurisdiction is there here to dissolve the marriage again? It cannot be done.]

[The case was adjourned for the assistance in argument of the Queen's Proctor, by which time Karminski J. had heard and determined *Robinson-Scott* v. *Robinson-Scott*.[5] The commissioner drew the attention of the Queen's Proctor to *Fenton* v. *Fenton*,[6] a case which had not been cited to Karminski J.]

Colin Duncan, for the Queen's Proctor, submitted that notwithstanding the principles in *Le Mesurier* v. *Le Mesurier*,[7] which had provided for so long the test of jurisdiction in divorce, namely domicile, the courts must now recognize the new principles of reciprocity arising from statutory encroachments in the rule such as those in section 18 of the Matrimonial Causes Act, 1950. The principles in *Arnold* v. *Arnold*[8] and *Robinson-Scott* v. *Robinson-Scott*,[9] although extending the principle in *Travers* v. *Holley*,[10] were accepted; and there was no reason, in view of those authorities, to follow in this country the reasoning in *Fenton* v. *Fenton*.[11] (He referred also to *Lord Advocate* v. *Jaffrey*,[12] *Shaw* v. *Gould*,[13] *Warden* v. *Warden*,[14] *Dunne* v. *Saban*[15] and *Carr* v. *Carr*.[16])

[2] [1953] P. 246; [1953] 2 W.L.R. 507; [1953] 2 All E.R. 794.
[3] [1957] P. 237; [1957] 2 W.L.R. 366; [1957] 1 All E.R. 570.
[4] [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61.
[5] [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.
[6] [1957] V.L.R. 17.
[7] [1895] A.C. 517; 11 T.L.R. 481.
[8] [1957] P. 237.
[9] [1957] 3 W.L.R. 842.
[10] [1953] P. 246.
[11] [1957] V.L.R. 17.
[12] [1921] 1 A.C. 146; 36 T.L.R. 820.
[13] (1868) L.R. 3 H.L. 55.
[14] 1951 S.C. 406.
[15] [1955] P. 178; [1954] 3 W.L.R. 980; [1954] 3 All E.R. 586.
[16] [1955] 1 W.L.R. 422.

Law, in reply, adopted the submissions of the Queen's Proctor.

[Reference was also made upon the issue of desertion at the earlier hearings to *Carlisle and Cumberland Banking Company* v. *Bragg*,[17] *Bagot* v. *Chapman*[18] and *Crabb* v. *Crabb*.[19]]

MR. COMMISSIONER LATEY. This is a petition for a declaration of status presented in pursuance of R.S.C., Ord. 25, r. 5, and of the decision in *Travers* v. *Holley*,[1] which was to the effect that it would be contrary to principle if the English courts refused to recognize a jurisdiction which mutatis mutandis they claimed for themselves.

It is a petition dated April 3, 1957, formulated on alternative grounds (a) for a direct declaration of the validity of a Norwegian decree of divorce, or (b) for an English decree of divorce on the grounds of desertion of upwards of three years by the wife respondent. In his final address Mr. Law, on behalf of the petitioner, abandoned this latter plea.

The petitioner, Derrick Ernest John Manning, aged 31 years, of Fulbourn Road, Cambridge, who has always been domiciled in England, was married on June 22, 1948, at the Cambridge register office, to a Norwegian girl, Elna Nilsen. There has been no issue of the marriage. In September, 1948, the wife went to Norway. The husband followed her in December, 1948, and in May, 1949, he obtained employment in that country at a place some 50 miles from Ervik, where she was living. He saw her at regular intervals, but gave up his job in the summer of 1950 and returned to England in February, 1951, on the basis that she should join him after he had obtained employment and suitable accommodation in England. When he had done so he wrote several times to her asking her to join him but she did not come. In July, 1952, he went over to see her, and met her at Bergen. She said that she did not want to live with him any more and wanted a divorce, and they stayed at separate hotels. He demurred to her proposal and for several days tried to persuade her to change her mind, which she refused to do. The husband has told me that she had told him that she would not live in England. At her request he saw a Norwegian lawyer and signed a document written in Norwegian, dated July 24, 1952, which he understood was a declaration that he and his wife were living apart. He did not understand that it was an agreement to live apart. This document, which has been put in, was in fact an application for a certificate of separation, which is a usual preliminary to a suit for divorce in Norway. The document was signed by both parties, and the last paragraph reads: "We are "applying for a separation certificate in accordance with the Law "of May 31, 1918, No. 2, paragraph 41." The next day the

[17] [1911] 1 K.B. 489.
[18] [1907] 2 Ch. 222; 23 T.L.R. 562.
[19] (1868) L.R. 1 P. & M. 601.
[1] [1953] P. 246; [1953] 2 W.L.R. 507; [1953] 2 All E.R. 794.

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husband returned to England, and since that time he has not seen his wife nor had any letter from her. About three weeks later he received a copy of the certificate of separation dated August 6, 1952. That translated reads as follows: "Separation "certificate. The sheriff of Bergen and Hordaland County makes "known: That Derrick Ernest John Manning, laboratory "assistant, and Elna Manning (housewife), née Nilsen, both of "Aasane, have applied for a separation certificate and that "mediation as required by law has taken place according to the "certificate issued by Johannes Gulbranson (vicar) Bergen "July 24, 1952. In accordance with the law of May 31, 1918, "No. 2, paragraph 41, and the law of June 25, 1937, such a "certificate is hereby granted. This certificate does not give the "right to enter into a new marriage." Then there is the name of the sheriff and the witness.

Apparently the husband did nothing for many months until in 1954 he became anxious about his legal position, and on September 27 of that year he wrote to the Norwegian legal authorities as follows: "On August 6, 1952, you granted a "—then followed the Norwegian word for "separation"—"to my "wife Elna Manning of Ervik i Aasane and to myself. I "would like to know whether this order is still valid and, if so, "can I withdraw my consent." He was, of course, referring to the certificate. On October 1, 1954, a reply was sent to him saying: "The separation certificate dated August 6, 1952, is still "valid provided that both parties have since lived apart. The "certificate only becomes null and void if and when both parties "are in agreement to live together again."

On November 17, 1954, he received a letter from the Norwegian consul-general at London that an application had been made by Mrs. Manning in Norway for a divorce. The date of the wife's application does not appear from the Norwegian court papers, but for reasons explained hereafter it could not have been made before the expiry of two years after the date of the certificate of separation, that is not before August 6, 1954. By that time the wife had been continuously resident in Norway since 1948, about five or six years.

The consul-general invited Mr. Manning to attend at his office. Mr. Manning replied that he was not agreeable to the proposed divorce and did not accept the invitation. The consul-general wrote to him on December 14, 1954, as follows: "When "such a legal separation has been in force for one year without "cohabitation having been resumed, Norwegian law provides that "both parties, if in agreement, can apply for divorce." The consul-general added that Mrs. Manning required Mr. Manning's signature to the petition.

On April 28, 1955, following a further inquiry by the husband, the consul-general sent him a copy of a decree of divorce granted by the county governor of Bergen, dated February 17, 1955. Translated this reads: "In accordance with the Matrimonial

"Law of May 31, 1918, paragraph 43, first section, second "period, a decree of divorce is hereby granted to"—and then the husband and wife are mentioned by name—"The decree of "divorce is final. Signed at Bergen, February 17, 1955." In fact, this judgment, as was indicated in another document attached to the decree, could be made the subject of appeal within three weeks, but that period had expired long before the husband became aware of the decree.

From these facts two issues arose: first, was this document he signed a consensual agreement for separation which would have terminated any desertion on the part of the wife? That would affect the alternative plea of the petitioner in this case if this court were to find that the Norwegian decree was invalid for want of jurisdiction. The second issue was: the husband being always domiciled in England according to English law, was the Norwegian decree of divorce valid? If the answer to this second question were in the affirmative, the first point does not arise.

Mr. A. D. Hald, a Norwegian lawyer, gave expert evidence that in Norwegian law the decree in Norway is valid. The last common residence of the spouses (in this case Norway) was sufficient to found jurisdiction in that country. If spouses were separated and a certificate of separation were issued by the competent legal authority and separation continued for two years thereafter the Norwegian court could grant either party a divorce. He told me that this was laid down by a subsection of the Norwegian Matrimonial Law of May 31, 1918, paragraph 43, which was actually referred to in the decree. That subsection translated reads: "If the separation has existed for at least two "years then either of the parties can demand a divorce." Mr. Hald made it clear that at least two years of continuous separation must follow the date of the certificate of separation to qualify one of the parties only to petition. He told me that in Norwegian law the English conception of domicile to found jurisdiction did not operate—it was the last common residence of the spouses—and, moreover, if a Norwegian woman married an Englishman she would lose her Norwegian citizenship on leaving the country, but if she stayed in Norway she would still be domiciled there. By that I have assumed that Mr. Hald was saying that she would not lose the jurisdiction of the Norwegian tribunal in a divorce suit. He further informed me with regard to a hypothetical converse position, that if a man were domiciled according to the English conception in Norway and his wife came to England, and if she had lived here for three years or more, and she satisfied the English court that her husband had deserted her for upwards of three years, and she was granted a divorce here, that in such case the Norwegian court would recognize the English decree as valid. Mr. Hald also stated that the Law of May 31, 1918, No. 2, paragraph 45, provided another ground of divorce in Norway, malicious desertion for two years or more, but it was rarely employed, as 99 per cent. of the desertion cases were

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based on three years' actual separation. Having examined the documents in connexion with the Norwegian divorce in this case, Mr. Hald also expressed the opinion that in the circumstances surrounding the signature of the husband of the application for the certificate of separation the Norwegian court was undoubtedly justified in regarding it as an assent by him to the agreement to separate, and the only point there is that one has to see if the Norwegian court exercised its jurisdiction in accordance with its own procedure as laid down by law.

On these facts, including the Norwegian law, Mr. Law, for the petitioner, has submitted that this Norwegian decree of divorce should be accepted as valid according to the principle laid down in *Travers* v. *Holley*,[2] which laid down a principle which hitherto was new in English law. It is unnecessary to review in detail the cases implementing or declining to apply that decision, because they have been cited in previous judgments of this court, for example, in *Arnold* v. *Arnold*[3] (wherein a Finnish decree of divorce was recognized in the case of a petitioner domiciled in England), and in the very recent case of *Robinson-Scott* v. *Robinson-Scott*.[4] In that last case Karminski J. recognized the validity of a Swiss decree of divorce at Zurich granted to a Swiss wife married to an Englishman domiciled in England, and the decree was granted on the basis of the wife's having a separate domicile for the purposes of divorce according to the Swiss code, she having been resident for five years within the jurisdiction. The Zurich court in 1953 pronounced a decree of divorce on the ground that the matrimonial relations between the parties were deeply and irreparably disrupted. Thus, neither the basis of jurisdiction nor the ground of divorce had their actual equivalent in English law. Karminski J. held that where in fact there has been three years' residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English courts will accept that as a ground for exercising jurisdiction, because it would itself accept jurisdiction on proof of similar residence in England.[5] "It is not essential for recognition by this court that the foreign court should assume "jurisdiction on the grounds laid down by section 18 of the "Matrimonial Causes Act, 1950. It is sufficient that facts exist "which would enable the English courts to assume jurisdiction. "I find that the Zurich court here had jurisdiction and that "the decree pronounced by that court in favour of the wife on "July 3, 1953, was valid. Accordingly, I declare that the marriage between the husband and the wife was validly dissolved on "July 3, 1953, by the decree and judgment of the District Court "of Zurich."

Karminski J. referred in his judgment to an obiter dictum of

[2] [1953] P. 246.

[3] [1957] P. 237; [1957] 2 W.L.R. 366; [1957] 1 All E.R. 570.

[4] [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.

[5] [1957] 3 W.L.R. 842.

mine in *Arnold* v. *Arnold*,[6] in which I suggested that even less than three years' residence might be held to confer jurisdiction if such a length of time founded jurisdiction in some other country according to the law of that country. Karminski J. said on that point in *Robinson-Scott* v. *Robinson-Scott*[7]: "Whatever "may have been the motive of the legislature in insisting on "three years' residence under section 18 (1) (*b*) of the Matri- "monial Causes Act, 1950, I cannot agree with Mr. Commis- "sioner Latey that the period of residence demanded by the law "of the foreign court to found jurisdiction is immaterial. If "similarity is the basis of recognition, there must be similarity "in fact though not in terminology. There seems to be a "profound difference between the two years' residence in Florida "found in *Dunne* v. *Saban*,[8] and the residence of five years and "upwards in Zurich in the present case."

I am content to follow the principle which Karminski J. had laid down, that is, that there must be at least three years' residence to found jurisdiction wherever the action is brought.

Like his Lordship in that case, I have had the benefit of the argument of Mr. Colin Duncan for the Queen's Proctor, and in substance he has submitted that this case comes within the decision in *Robinson-Scott* v. *Robinson-Scott*[10] and the principle of *Travers* v. *Holley*[11]; and he has made it clear that in supporting that view he has accepted, as of course the court must, the decision of Karminski J. in *Robinson-Scott* v. *Robinson-Scott*.[12]

Mr. Duncan, with his usual thorough method, took me through all the authorities, beginning with *Le Mesurier* v. *Le Mesurier*,[13] and the various cases following *Travers* v. *Holley*.[14] He pointed out the drastic inroad made into the rigid rule of domicile as the sole test of jurisdiction effected by what is now section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, by which three years' ordinary residence by a wife in England enables her to present a petition here although her husband is domiciled abroad.

Mr. Duncan referred me to *Fenton* v. *Fenton*,[15] an Australian case, in which the full Supreme Court of Victoria, a tribunal whose decisions command the greatest respect in this country, has refused to accept the principle in *Travers* v. *Holley*,[16] on the ground that the old decisions in *Le Mesurier* v. *Le Mesurier*[17] and subsequent cases in the House of Lords have established a principle of sole jurisdiction, namely, the domicile of the husband, from which no court can depart unless there be legislation to the contrary. Mr. Duncan pointed out that this court here is no more bound by a decision of the Victorian court than

[6] [1957] P. 237, 253.
[7] [1957] 3 W.L.R. 842, 849.
[8] [1955] P. 178; [1954] 3 W.L.R. 980; [1954] 3 All E.R. 586.
[10] [1957] 3 W.L.R. 842.
[11] [1953] P. 246.
[12] [1957] 3 W.L.R. 842.
[13] [1895] A.C. 517; 11 T.L.R. 481.
[14] [1953] P. 246.
[15] [1957] V.L.R. 17.
[16] [1953] P. 246.
[17] [1895] A.C. 517.

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that court is bound by a decision of the English Court of Appeal.

I would venture to say, however, that the decision in *Le Mesurier* v. *Le Mesurier*,[17] made by the Judicial Committee of the Privy Council so as to set the seal on a doctrine which has never before so clearly laid down, that is to say, that domicile was the sole test of jurisdiction in divorce, was judge-made law. So was the Court of Appeal's decision in *Travers* v. *Holley*,[18] which actually sprang from the statutory jurisdiction laid down in section 18 of the Matrimonial Causes Act, 1950. When I say sprang from that section, I mean that the court took into account the changed circumstances brought about by that section.

One of the matters which gave me serious food for thought in this case was the fact that, although all the early decisions in connexion with *Travers* v. *Holley* [18] deal with a ground of divorce common to all the countries concerned, that is, desertion, in this case the Norwegian court granted a divorce on the ground of mutual separation, a ground unknown to the English law. I ventured to suggest in *Arnold* v. *Arnold* [19] that once jurisdiction was established the particular ground of divorce was beside the point. I am encouraged in that view by the decision of Karminski J. in *Robinson-Scott* v. *Robinson-Scott* [20] that the Swiss decree was valid though the ground of the divorce was unknown to the English law. He also very succinctly put the point in a sentence that I have already quoted [21]: "It is not "essential for recognition by this court that the foreign court "should assume jurisdiction on the grounds laid down by section "18 of the Matrimonial Causes Act, 1950." Section 18 (1) (*b*) provides that "in the case of proceedings for divorce or nullity "of marriage, if the wife is resident in England and has been "ordinarily resident there for a period of three years immediately "preceding the commencement of the proceedings, and the "husband is not domiciled in any other part of the United "Kingdom or in the Channel Islands or the Isle of Man," the wife may petition in this country. Therefore, on this question of grounds for divorce it should be taken as an established principle that the ground of a divorce in the lex fori need not be taken into consideration in cases of this kind, so long as it does not offend against natural justice as conceived in the English court.

In this case, therefore, we find the reciprocity of jurisdiction contemplated by the Court of Appeal in *Travers* v. *Holley*,[22] and that principle should be applied, the wife having continuously resided in Norway for well over five years before the application for divorce.

I accordingly make the declaration sought, that the marriage of the petitioner with the respondent was validly dissolved by

[17] [1895] A.C. 517.
[18] [1953] P. 246.
[19] [1957] P. 237.
[20] [1957] 3 W.L.R. 842.
[21] Ibid.
[22] [1953] P. 246.

the Norwegian decree in 1955. This marriage having been dissolved in 1955 the plea for divorce falls by the way, and it is unnecessary for me to pass to the issue of desertion.

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Declaration accordingly.

Solicitors: *Vizard, Oldham, Crowder & Cash, for Wild & Hewitson, Cambridge; The Queen's Proctor.*

J. B. G.

[CHANCERY DIVISION.]

In re McMORRAN, DECD.
MERCANTILE BANK OF INDIA LTD. *v.* PERKINS AND OTHERS.

1957 *Nov.* 20, 21; *Dec.* 20.

Harman J.

[1957 M. 1435.]

Conflict of Laws—Power of appointment—Special power—Power under English will—Donee domiciled in Scotland—Scottish will—Whether power exercised by will — Whether principles of construction of Scottish or English law applicable.

Conflict of Laws—Scottish and English law—Power of appointment—General disposition by will—Whether exercise of special power—Conflicting rules.

By a will dated 1927 and a codicil dated 1932, both in English form, a father resident and domiciled in England left part of his estate on trust for his son for life with remainder to the son's issue as he should appoint. He was also given power to appoint to his surviving wife a life or less interest in any amount up to half of his share. The father was survived by the son who, being resident and domiciled in Scotland, made in 1943 in Scottish form a will followed by a "trust disposition and settlement." By this latter he devised and bequeathed to his trustees the whole estate, inter alia, over which he "might have the power of disposal" at the time of his death in trust as to the residue thereof in favour of his children, subject to a life interest in favour of his wife.

It was asked by this summons, inter alia, whether the son had by the trust disposition and settlement exercised the power to appoint half the income of his share under the father's will to his wife and the corpus to his issue. The decided cases indicated that an English court applying English principles of construction would hold that the power had not been exercised—*In re Knight* [1957] Ch. 441; [1957] 2 W.L.R. 987; [1957] 2 All E.R. 252—but the evidence was that a Scottish court applying Scottish principles would hold that it had done so:—

Held, (1) that the principle to apply was that in questions of construction an English court must find the true meaning of the appointor from the words he had used in the frame in which he had used them.

(2) That the document purporting to exercise the power being a will in Scottish form and using Scottish terms of art, its language must take effect according to Scottish law, which was familiar with powers and their exercise.

(3) That in accordance with the evidence the son's will constituted a valid exercise of the English power in so far as the

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execution was not excessive; so that the son's will operated as an appointment of one-half of the income to the wife, and of the corpus and the other half of the income to the children.

In re Simpson [1916] 1 Ch. 502 and *In re Waite* [1957] 2 W.L.R. 1024; [1957] 1 All E.R. 629 distinguished.

ADJOURNED SUMMONS.

This summons raised the question whether a purported appointment, contained in a Scottish will, in exercise of a special power of appointment conferred by an English will, was an effective exercise of that power.

The following statement of the facts is taken in substance from the written judgment of Harman J.: Thomas McMorran (hereinafter called "the father") made his will in English form on August 4, 1927. In it he described himself as of Frithwood House, Eastbury, in the County of Hertford, and of 149, Leadenhall Street in the City of London, merchant. He was at all material times resident and domiciled in England. The plaintiff was the present trustee of his will which was proved in England in 1940. By it the father made a general gift to his trustees on the usual administrative trusts. The beneficial trusts, as varied by a codicil dated November 29, 1932, were, as to two-thirds for the wife while his widow, and subject to that for his children equally but settled as to each share on trust for the child for life with remainder to such of the issue of the child as the child should by deed or will appoint, but no appointee was to take before attaining 21: the gift in default of appointment was for grandchildren of the testator at 21 or marriage. Superimposed on this was a further power for each child by deed or will to appoint to a surviving spouse a life or less interest in any part not exceeding one-half of the income of that child's share. The trustees were empowered to pay over a child's share to him or her absolutely on attaining 25.

The father had four daughters and one son, Thomas White McMorran, hereinafter called "the son." The father's widow died in 1948. There remained undistributed two-thirds of the son's share, represented at the date of this summons by investments worth about £30,000. The son became resident and domiciled in Scotland, and made his will in Scottish form by a trust disposition and settlement dated September 8, 1943. The relevant portion of that instrument was as follows: "I assign, "dispose, devise, legate and bequeath to them, as trustees under "these presents (the persons or person acting for the time as "trustees or trustee under these presents being hereinafter "referred to as 'my trustees') the whole means and estate, "heritable and moveable, real and personal, wherever situated, "which shall belong to me, or over which I may have the power "of disposal at the time of my death in trust for the following "purposes, videlicet: (First) For payment of my debts, sickbed, "funeral and executory expenses: (Second) I direct my trustees "to pay to my wife Mrs. Mary Anne Donald or McMorran in

" the event of her surviving me the sum of five hundred pounds " free of duty as soon as possible after my decease to enable her " to meet current expenses: (Third) I direct my trustees in the " event of my wife surviving me to deliver and pay to her free " of all death duties, videlicet: (One) to deliver to her the whole " household furniture and plenishing of every kind whether " useful or ornamental belonging to me at the time of my death, " and (Two) to pay to her during her lifetime after my death " the free annual income of the residue of my estate, but " declaring that she shall be bound as a condition of receiving " the said income to maintain and educate our children in a " manner suitable to their station in life until they are able to " maintain themselves: (Fourth) I direct my trustees to hold " the residue of my said means and estate for behoof of my " children and the issue of such of them as may, before attaining " a vested interest as hereinafter provided, die leaving issue, and " to account for and pay over the same to the said children and " remoter issue equally share and share alike, the issue of any " child who shall have died before attaining a vested interest " taking their parents' share, original and accrescing, equally " among them if more than one: Declaring (one) That the shares " of residue falling to my children or remoter issue shall vest " and be payable on the death of the survivor of my said wife " and me if the children shall then have attained the age of " twenty-five years complete. . . ."

That instrument was on the son's death in 1943 registered according to Scottish law and was later resealed in England. The son had no powers of appointment save those conferred on him by the father's will. This summons, taken out on June 20, 1957, by the bank as sole trustee of the father's will, asked, inter alia, (1) whether the son, by the trust disposition and settlement, exercised over the fund representing the undistributed part of his settled one-fifth share of the father's residuary estate (a) the power to appoint to any wife who might survive the son during the residue of her life or for any less period any part not exceeding one-half of the annual income of that share; (b) the power to appoint the corpus of that share among his issue. The defendants to the summons were, first, the son's widow, who had remarried, and, second, third and fourth, his children, two of whom were infants.

Edmund Wright for the bank as trustee.

The Hon. T. J. Barnes for the widow and the elder son.

E. I. Goulding for the younger son and the daughter, both infants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

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December 20. HARMAN J. read a judgment, in which he stated the facts substantially as set out above, and continued: The plaintiff has taken advice in Scotland on this matter, and has been advised that in a Scottish court the power would be held to be well exercised applying Scottish principles of construction. On the other hand, in an English court applying English principles of construction it seems likely that the powers would be held not to have been exercised: *In re Knight.*[1] This is a most unfortunate divergence. Both systems are familiar with powers both general and special, and both apply the same tests, but the courts of the two countries construe the language differently, the Scots holding that a general reference in a will to powers which the testator has or may have is a sufficient reference to a special power, while the English courts, generally speaking, take the contrary view. See, for instance, the headnote in *In re Knight.*[2] "A testatrix," states the headnote, "gave her residuary estate on trust for sale and directed her "trustees to stand possessed of the residue of the proceeds after "payment of expenses on trust for a daughter and for the "children of a deceased son and a daughter in specified shares. "The residuary estate was expressed as 'including any property "'over which I may have any power of disposition at the date "'of my death.' Under the terms of the will of the testatrix's "father she had a special power of appointment of a share of "the residue of her father's estate amongst a class of objects "which included all the persons who were beneficially entitled to "her own residuary estate. The class of objects did not include "her trustees:—*Held*, that the intention to exercise a special "power must be gathered from the whole will; and that the "words used by the testatrix were not, in the context of her "will, apt to exercise the special power of appointment conferred "on her by her father's will."

The first question, therefore, to be answered is whether the Scots or the English rule should be followed. The cases on the question whether foreign wills execute English powers are numerous, and I have not found them easy to reconcile. Most of them concern general powers where a difficult question emerges, namely, whether section 27 of the Wills Act ought to be imported into a foreign will notwithstanding the rule that a will, generally speaking, should be construed in accordance with the law of the testator's domicile. I begin with *In re Price*,[3] a case of a general power, where the headnote reads as follows: "A will of a domiciled foreigner, which is valid by the law of "the testator's domicile and has been recognized as a valid will "in this country by the Probate Division, is capable of operating "as an execution of a power of appointment by will over "personal estate under an English instrument, although the

[1] [1957] Ch. 441; [1957] 2 W.L.R. 987; [1957] 2 All E.R. 252.

[2] [1957] 2 W.L.R. 987.

[3] [1900] 1 Ch. 442; 16 T.L.R. 189.

" formalities required by sections 9 and 10 of the Wills Act have " not been observed." Then: " Although as a general rule a " will is to be construed according to the law of the testator's " domicile, this rule does not apply where there are indications " on the face of the will that the testator wrote it with reference " to the law of some other country." This case shows that, so far as validity is concerned, a foreign will admitted to probate in this country, notwithstanding that it did not comply with English formalities, is capable of executing an English power. This is now well settled law. There was there an indication that the will was written with an eye on the law of this country, and it is arguable that this was the ground of the decision. Stirling J. said[4]: " In general a will is to be construed according to the law " of the domicile of the testator: ' but this is a mere canon of " ' interpretation, which should not be adhered to when there is " ' any reason, from the nature of the will, or otherwise, to " ' suppose that the testator wrote it with reference to the law " ' of some other country ': Dicey, Conflict of Laws, p. 695. " Considering first the law of France, according to which primâ " facie the will is to be construed, the evidence shews that the " will of Madame Forfillier is a complete disposition of all the " property which she could dispose of; but it also appears that " the mode of disposition by appointment is not practised in " France, and that if a French court had to consider the effect " of the will in this respect it would apply the English law. It " is contended with regard to the law of England that the " provisions of the Wills Act including section 27 are inapplic- " able, and that consequently the law of England applicable is " the law as it existed before that Act, and that, there being no " reference in the will either to the power or to the property, " it is not a good execution of the power. If I am to apply the " law as it existed before the Wills Act, questions of difficulty " might arise; but it appears to me that I can decide this case " upon another ground. The testatrix says, ' I declare that this " ' will annuls all the others . . . and that it shall thus be " ' considered in England the same as in France.' I think that " that amounts to a declaration by the testatrix that she meant " the will to operate as her last will in England as well as in " France. I think it is indicated upon the face of the will that " she wrote it with reference to the law of England as well as the " law of France. Therefore I think that I am entitled to apply " the rules of construction which would by English law be " applied to a will expressed in the same terms and of the same " date as that annexed to the letters of administration, including " the rule of construction introduced by section 27 of the Wills " Act." Stirling J.'s decision, apart from the special point, did turn on the fact that French law has no knowledge of powers and therefore would apply English law including section 27.

[4] [1900] 1 Ch. 442, 452.

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In the same volume is *Poucy* v. *Hordern*,[5] a case of a special power, where the judge decided that the will which purported to exercise the power was capable of doing so, notwithstanding that the testatrix by French law could not, so far as her own property was concerned, have disposed of it except to a limited extent. Farwell J. said[6]: "But the power in this case is a special "power, and the execution of such a power does not bring the "appointed property into the will of the appointor at all, but "operates as a nomination of the persons whose names are to be "inserted in the settlement as entitled in remainder in lieu of "the power of appointment. There is, therefore, no disposition "of property belonging to the testatrix."

This last principle does not apply to a general power as is shown by *In re Pryce*.[7] Here, although it was held that the testatrix domiciled in Holland could, by a will in Dutch form, exercise the power and so make the appointed fund her own for all purposes, she could dispose of it only so far as Dutch law gave her testamentary capacity. A like conclusion was reached in *In re Lewal*,[8] where Peterson J. held that the testatrix, though an infant, could exercise a general power by a will in French form, but only to the extent of her testamentary capacity according to the law of France.

The case of *In re d'Este*[9] reached a different conclusion as regards section 27 and has not been followed. The reasoning, however, of Buckley J. seems to me to be apposite, where he says[10]: "What would be the court of construction to determine "the effect of this French will? This being a foreign instrument, "executed by a foreigner in her domicile, prima facie it would "have to be considered according to the law of the domicile. "That is not, indeed, disputed. But it is said, and said truly, "that where you have a power exercisable by will, the thing "which you look at must no doubt be a will, otherwise it is not "an exercise of the power; but that, when you have got it and "read it, it takes effect not as a will—because ex hypothesi the "property does not belong to the testator—but operates under "the settlement containing the power. That is true. Then it is "said that I must take this French document and read it, not as "a will in the sense in which I have explained, but as if the "directions contained in it were introduced into the instrument "which contained the power. That is quite right; but how must "I read it? I have, referentially, to introduce into the instru-"ment which contains the power a foreign document. I have "to see whether the power was exercised, and therefore to find "out the meaning of what is expressed by the donee of the "power. Now how am I to ascertain the meaning of the donee "of the power? I must ascertain it according to the law of the

[5] [1900] 1 Ch. 492; 16 T.L.R. 191.
[6] [1900] 1 Ch. 492, 494.
[7] [1911] 2 Ch. 286.
[8] [1918] 2 Ch. 391; 34 T.L.R. 538.
[9] [1903] 1 Ch. 898.
[10] Ibid. 903.

" place applicable to the document executed by the donee, and " to the domicile of that person, and that law is to be taken as " the law governing its construction. If I do that, I have to " read the French will and say what its meaning is according to " the principle of French construction, excluding, therefore, " section 27, which is a rule for English construction. The " evidence as to French law is that powers of appointment are " unknown in France. If a court of construction in France were " to read this document for the purpose of determining its effect " as regards this power, it would have to be informed by evidence " what a power of appointment is in our law; and, having learned " what it is, it would have to apply the proper principles of " construction in France to ascertain whether or not this property " passed under the instrument. Section 27, which is a rule of " construction here and not there, as it appears to me, would " have no place in the discussion."

This case was criticized by Neville J. in *In re Simpson*,[11] where he says in effect that Buckley J.'s conclusion did not follow from his premise. In this I respectfully concur, for the French law not knowing powers must necessarily have recourse to the English law when confronted with one. Neville J. says[12]: " The evidence shows that the words used would be sufficient " according to French law to pass all her personal property. A " power of disposition by will over property not belonging to the " testator is, however, unknown to French law, and in ascertain- " ing whether the will disposed of such property a French court " would be compelled to inquire what such a power was and how " it could be executed by an English will. The answer would " be that the bequest if contained in an English will would be " sufficient to pass the property subject to the power. And so " in an English court the construction which would be applied to " an English will must be applied to the construction of a " French will valid in England so far as regards the power. Lord " Wrenbury, then Buckley J., in *In re d'Este*,[13] held that " section 27 of the Wills Act did not apply to a French will, " holding, I think, that if sections 9 and 10 applied the will was " not entitled to probate, while if they did not apply neither " could section 27 apply. I am unable to see why." Then he continues at the bottom of the page: " I think I am right in " saying that Buckley J.'s decision depended mainly on the view " that French rules of construction must be applied in deter- " mining the meaning of a French will, and, if so, section 27 " could not apply because French law knows nothing of " section 27. But neither does it know anything of powers of " appointment by will, so that a resort to English law was " essential, involving, as it appears to me, the consideration of " what was necessary for the execution of the power by will." Neville J. also, in an earlier passage in his judgment, expressed

[11] [1916] 1 Ch. 502.
[12] Ibid. 508.
[13] [1903] 1 Ch. 898.

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this opinion [14]: "It will appear later that in my judgment in "regard to a power, English rules of construction must always "apply, at all events where powers are unknown to the law of "the domicile."

If this means that the language must be construed in all respects as though it appeared in an English will, I think it may be too broadly stated. *In re Walker* [15] seems to show that a Scots will is perfectly capable of exercising an English power if on its true construction it does so. In the recent case of *In re Waite*,[16] again a case of a general power, my brother Danckwerts made observations which seem to show that he would apply the English rules of construction to the foreign document. So far as validity is in question and the question of capacity, I agree with him, but if he intended to go further and import the instrument exercising the power into the English law for all purposes, I take leave respectfully to doubt his conclusion. Anyhow, he was not dealing with this question.

None of the cases, in my judgment, really touches the point which I have to deal with here. This is a special power given by an English will, and the instrument exercising such a power must, therefore, for many purposes, be read back into the English will because the appointor is not disposing of property in which he himself has an interest, but is merely, so to speak, the agent of the donor exercising a power of selection. See Lord Romer's observations in *Muir* v. *Muir*.[17] From this it is argued that the words exercising the power must be read for all purposes into the English will, and be given such effect as the law of England would give them. I do not agree with this. The fact that a Scots will is written in the English language makes it none the less a foreign instrument. This particular will contains a number of terms of art only to be understood by reference to the Scottish law, and I think the general principle must still apply that in questions of construction, as opposed to questions of validity and capacity, the English court must find the true meaning of the appointor from the words he has used in the frame in which he has used them. This testator made his will with an eye, so to speak, turned exclusively on the Scottish legal system, and the document can only be understood by reference to that system. It would therefore, in my judgment, be wrong to pick out the words alleged to constitute the appointment and give them an effect which the English law would give them, for the testator, making his will in Scottish form and using Scottish terms of art, must be supposed to have meant them to signify that which they would signify to a Scottish court. If this be right, then the English court must ascertain the effect which the Scottish court would give to the relevant words. This is not a case like the French cases, where the foreign system has no

[14] [1916] 1 Ch. 502, 507.
[15] [1908] 1 Ch. 560.
[16] [1957] 2 W.L.R. 1024; [1957] 1 All E.R. 629.
[17] [1943] A.C. 468, 481.

knowledge of powers and must, therefore, refer back to the English one. As I have said, Scots law is as familiar as English with powers. Scottish law is a question of fact in an English court and, when I turn to the evidence, that is contained in the opinions of two Scottish lawyers, both of whom opine that a will in the form of the son's will here would, according to Scottish principles, be held to be a valid exercise of the English power, having regard to the fact that reference is made to property "over which I may have the power of disposal at the "time of my death." One of the Scots lawyers expresses the view that in Scotland the case of *In re Knight* [18] would have been decided the other way. I have considered two of the Scots cases cited, namely *Alexander's Trustees* [19] and *Gemmill's Trustees* v. *Shields*,[20] and they seem to me to justify the conclusion of the Scottish lawyers. One of these, it is true, takes the view that the question is a difficult one on which Scottish trustees might well seek the opinion of the Scottish court. Nevertheless, he expresses his opinion to agree with that of the other Scottish lawyer, who, for his part, has no doubts to put forward. In the circumstances I must, dealing with the question, as I do, as one of fact, accept the conclusion at which both arrive, and hold that the Scottish will must be taken to have operated to exercise the special power given to the testator by the English will of the father so far as it can do so, and notwithstanding that the execution is excessive. In the case of the power to appoint to a wife, this only extended to one-half the income, and the exercise can only be valid to that extent. As to the power to appoint to issue, this, if exercised, operated in favour of the son's children, the same persons as take in default of appointment. The children, therefore, take the income of the half of the fund not appointed to their mother in any event. It is uncertain whether the question of the validity of the deferment of vesting sought to be imposed by the Scottish instrument will arise. It has not been argued before me, and I do not propose to decide it at present.

I propose, therefore, to answer question 1 of the summons by declaring that the trust disposition exercised the power in the case of the wife to the extent of one-half.

Declaration accordingly.

Solicitors for all parties: *Bird & Bird.*

K. R. A. H.

[18] [1957] Ch. 441.
[19] 1917 S.C. 654.
[20] 1936 S.C. 717.

[HOUSE OF LORDS.]

H. L. (E.)† 1957 Nov. 20, 21. 1958 Jan. 23.

ESCOIGNE PROPERTIES LTD. . . . Appellants;

AND

INLAND REVENUE COMMISSIONERS . Respondents.

Revenue — Stamp duty — Conveyance or transfer on sale — Company having contracted for purchase of property agrees to re-sell to second company—Conveyance to second company by executors of original vendor when first company beneficial owner of not less than 90 per cent. of other company's share capital—Whether "the effect" of conveyance to transfer a beneficial interest from one company to another—Whether conveyance executed in pursuance or in connexion with arrangement whereunder beneficial interest had been previously conveyed or transferred—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 58 (4), *Sch. I—Finance Act,* 1930 (20 & 21 *Geo.* 5, *c.* 28), *s.* 42—*Finance Act,* 1938 (1 & 2 *Geo.* 6, *c.* 46), *s.* 50.

Statute—Construction—Object of Act—Relevance of specific instances intended to be covered by it.

By section 58 (4) of the Stamp Act, 1891: "Where a person "having contracted for the purchase of any property, but not "having obtained a conveyance thereof, contracts to sell the same "to any other person, and the property is in consequence conveyed "immediately to the sub-purchaser, the conveyance is to be charged "with ad valorem duty in respect of the consideration moving from "the sub-purchaser. . . ."

By section 42 of the Finance Act, 1930: "(1) Stamp duty "under the heading 'Conveyance or Transfer on Sale' in the "First Schedule to the Stamp Act, 1891, shall not be chargeable "on an instrument to which this section applies: . . . (2) This "section applies to any instrument as respects which it is shown ". . .—(*a*) that the effect thereof is to convey or transfer a "beneficial interest in property from one company with limited "liability to another such company; and (*b*) that . . . one of the "companies is beneficial owner of not less than 90 per cent. of "the issued share capital of the other company."

By section 50 (1) of the Finance Act, 1938: "Section 42 "of the Finance Act, 1930, . . . shall not apply . . . unless it is "shown to the satisfaction of the Commissioners of Inland Revenue "that the instrument was not executed in pursuance of or in "connection with an arrangement whereunder—(*a*) the considera- "tion for the transfer or conveyance was to be provided directly or "indirectly by a person other than a company which at the time "of the execution of the instrument was associated with either the "transferor or the transferee; or (*b*) the beneficial interest in the "property was previously conveyed or transferred directly or "indirectly by such a person as aforesaid."

In 1950 C entered into an agreement to sell certain properties to company No. 1 in consideration of an allotment of shares in that company. The agreement was duly stamped and the shares allotted to C, but no conveyance or transfer of the properties to company No. 1 was executed either by C or, after C's death in 1951, by his executors. In 1954 company No. 1 orally agreed to

† *Present*: Viscount Simonds, Lord Reid, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning.

sell the properties to the appellants, company No. 2, in consideration of an allotment of shares in the appellant company. In November, 1954, at a time when company No. 1 was the beneficial owner of not less than 90 per cent. of company No. 2's issued share capital, C's executors at the direction of company No. 1 executed five instruments conveying or transferring the properties to company No. 2, which duly allotted the agreed number of shares to company No. 1. The instruments were presented to the Inland Revenue Commissioners for adjudication under section 12 of the Stamp Act, 1891. The commissioners were of the opinion that the instruments were within the definition of "conveyance on sale" in section 54 of the Act and were liable to stamp duty under the heading "Conveyance or Transfer on sale" in the first Schedule to that Act assessed ad valorem, by virtue of section 58 (4) of the Act, upon the value of the shares allotted by the appellant company to company No. 1. They assessed stamp duty accordingly:—

Held, that whatever was the effect of section 42 of the Act of 1930 on the instruments in question, they were excluded from relief by the provisions of section 50 of the Act of 1938. The commissioners were well justified in not being satisfied that the instruments in question were not executed in pursuance of or in connexion with an arrangement having the result described in section 50 (1) (*a*); it would be unreasonable to regard the final transaction as unconnected with the earlier transactions.

Per Lord Keith, Lord Somervell and Lord Denning. The instruments in question were not exempted by section 42 of the Act of 1930.

Per Lord Somervell. The instruments were stampable in respect of the transfer of the equitable interest as passing from the original vendor to the sub-purchaser.

Per Lord Denning. Each conveyance was by a seller who had contracted to sell it for value to one of the associated companies. On consideration of the intention of Parliament there was no reason why any of the instruments should be exempted from duty because the conveyance was not to the purchasing company but to its associated company at its direction.

Per Lord Keith. The facts are not apt to fit *the* effect of the instruments but only *an* effect of them.

Per Viscount Simonds and Lord Reid. The instruments in question fell within the exemption in section 42 of the Act of 1930. They had the effect of conveying or transferring the beneficial interest in the several properties from the old company to the appellant company. In determining whether an instrument has the prescribed effect, it need not be asked whether it was the main or real or substantial effect or whether it had any other effect.

Decision of the Court of Appeal [1957] 1 W.L.R. 174; [1957] 1 All E.R. 291 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal from an order dated December 17, 1956, of the Court of Appeal allowing an appeal by the respondents, the Commissioners of Inland Revenue, from an order dated June 28, 1956, of the Chancery Division (Vaisey J.) in favour of the appellant company, Escoigne Properties Ltd., on a case stated by the respondents under section 13 of the Stamp Act,

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1891, for the opinion of the court as to the stamp duty chargeable on five instruments presented to them by the appellant company for adjudication under section 12 of that Act. The question of substance for determination on this appeal was whether those five instruments were exempt from ad valorem stamp duty.

The facts are fully set out in the opinion of Viscount Simonds.

John Pennycuick Q.C. and *John Warner* for the appellant company.

A. G. N. Cross Q.C. and *E. B. Stamp* for the respondents.

The following cases were referred to in argument: *Inland Revenue Commissioners* v. *G. Angus & Co.*[1]; *In re Harvey*[2]; *Potts' Executors* v. *Inland Revenue Commissioners.*[3]

Their Lordships took time for consideration.

January 23, 1958. VISCOUNT SIMONDS. My Lords, in my opinion this appeal should be dismissed. The appellant company claim that five instruments, to which I shall refer in greater detail, are not subject to the stamp duty payable on conveyances or transfers on sale. They can only succeed if they establish, first, that the instruments fall within section 42 of the Finance Act, 1930, and, secondly, that they are not excluded from relief by the provisions of section 50 of the Finance Act, 1938. In my opinion, whatever conclusion may be reached on the first point they must fail on the second.

In the year 1950 the late Samuel Cohen was the owner of a number of freehold and leasehold properties in the counties of London and Middlesex. On June 30 of that year he entered into an agreement with Samuel Cohen (Properties) Ltd., which I will call "the old company," for the sale to them of such properties subject to the incumbrances then affecting them. The agreement was stamped with a ten shilling stamp and was adjudged duly stamped. The consideration, apart from the liabilities assumed by the old company, was £9,998 to be satisfied by the allotment to Cohen or his nominees of 9,998 fully paid shares of £1 each of the old company. These shares were duly allotted on or about June 30, 1950, but no conveyance or assignment of any of the properties was executed by Cohen. He died on June 21, 1951, and his will was duly proved on February 29, 1952.

On August 26, 1954, the appellant company, Escoigne Properties Ltd., was incorporated with a capital of £10,000 divided into 10,000 shares of £1 each, and shortly thereafter entered into separate bargains with the old company for the purchase of

[1] (1889) 23 Q.B.D. 579; 5 T.L.R. 697.

[2] (1889) 60 L.T. 710.

[3] [1951] A.C. 443; [1951] 1 T.L.R. 152; [1951] 1 All E.R. 76.

the said properties or some of them for shares of the appellant company. The value of these shares far exceeded their nominal value and were issued at a premium of £10 per share. Five separate instruments were accordingly executed to give effect to these bargains, the executors of Cohen joining in them by the direction of the old company as beneficial owners in order to convey or transfer the still outstanding legal estate or interest to the appellant company. These instruments were then presented for adjudication, the appellant company claiming that they were not liable to any stamp duty under the heading " conveyance or transfer on sale " in Schedule I to the Stamp Act, 1891. Immediately before the execution of these instruments the old company owned not less than 90 per cent. of the issued share capital of the appellant company.

This claim was rejected by the respondents, the Commissioners of Inland Revenue. On a case stated for the opinion of the court their determination was reversed by Vaisey J., but his decision was in turn reversed by the Court of Appeal. The determination therefore stands unless this appeal succeeds.

I must now look at the relevant sections and, first, at section 58 (4) of the Stamp Act, 1891, which provides that " where a " person having contracted for the purchase of any property " but not having obtained a conveyance thereof, contracts to sell " the same to any other person, and the property is in conse- " quence conveyed immediately to the sub-purchaser, the " conveyance is to be charged with ad valorem duty in respect of " the consideration moving from the sub-purchaser." I refer to this subsection because, apart from the section of the Finance Act, 1930, on which the appellant company relies, each of the instruments in question would clearly be liable to stamp duty under the heading " conveyance or transfer on sale " in Schedule I to the Stamp Act, 1891, and the duty chargeable would be an ad valorem duty in respect of the consideration moving from the appellant company to the old company.

I turn next to section 42 of the Finance Act, 1930, which provides that the stamp duty to which I have referred shall not be chargeable on an instrument to which that section applies, namely to any instruments " as respects which it is shown to " the satisfaction of the Commissioners of Inland Revenue— " (*a*) that the effect thereof is to convey or transfer a beneficial " interest in property from one company with limited liability to " another such company; and (*b*) that . . . one of the companies " is beneficial owner of not less than 90 per cent. of the issued " share capital of the other company." Upon this section the appellant company rely. It is common ground that the second condition is satisfied. Issue is joined on the first.

My Lords, the case for the company can be stated very shortly and simply. Here are instruments prima facie liable to conveyance stamp duty. But they have this operation, that they convey or transfer the beneficial interest in the several properties

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from the old to the appellant company. I have used the word "operation" but I might as well have used the word "effect" which is found in the section. They are therefore instruments the effect whereof is as stated: the first condition also is therefore satisfied. This contention is countered by the Crown in two or more ways which do not, I think, when analysed, materially differ. The primary argument before the Court of Appeal I take from the judgment of the Master of the Rolls. "There is no doubt," he said,[1] "that the transactions are "within the terms of the subsection if the words 'the effect "'thereof' are, as company No. 1 say, equivalent to 'are "'effective to.' But the Crown, pointing to the definite article, "say that the words signify that the true and real effect or "purpose of the instruments must be the specified result "achieved; in other words, that the phrase 'the effect thereof' "means 'the substantial effect thereof'." This contention or, I should perhaps say, this way of stating their contention was, if not abandoned, relegated to second place by learned counsel for the Crown on this appeal. But whatever place it takes, I do not see how it can be supported. The language of the statute is clear. It demands nothing more than an answer to the simple question: "Does the instrument have the prescribed "effect?" If it has, then the condition is satisfied. It need not be asked what is the main or real or substantial effect or whether it has any other effect. If such a question were asked, it would often be so difficult to answer that I should hesitate to say that such a test had been laid down by Parliament unless I was driven to it by unambiguous language. So far is this from being the case that the difficulty is only created by an illegitimate introduction of words not to be found in the subsection.

Before I come to what I conceive to be nothing else than another way of stating the same argument, I would remind your Lordships that instruments, not transactions, are liable to stamp duty, that the instruments here in question would be liable to conveyance or transfer duty and (so far as is relevant) to no other duty but for section 42 of the 1930 Act, and that counsel for the Crown rightly disavowed any claim to invoke section 4 (*a*) of the Stamp Act, 1891, under which a single instrument may be deemed for purposes of stamp duty to be several instruments.

I will state the argument in the words of Romer L.J.[2]: "The conveyances and assignments were certainly effectual to "pass the properties company's beneficial interests in the pro-"perties to the appellant company. They achieved, however, in "addition to this, another and different purpose, viz. to com-"plete the contract of 1950 (which would, as an independent "transaction, have attracted ad valorem duty) and to introduce "the appellant company as sub-purchasers. This involved the "joinder of Mr. Cohen's executors as parties to the instruments

[1] [1957] 1 W.L.R. 174, 177; [1957] 1 All E.R. 291.
[2] [1957] 1 W.L.R. 174, 182.

" and the vesting by them in the appellant company of the legal " estate in the properties. The instruments accordingly had a " dual effect, the conveyance or transfer of a beneficial interest " by one associated company to another and the getting in of the " legal title, in completion of the earlier contract of sale, which " was still outstanding in a third party. By reason of this " composite object of the relevant instruments, and their conse- " quent width and scope, it cannot, therefore, be said, in my " judgment that, ' the effect ' thereof was that envisaged by " section 42."

My Lords, no one could fail to be impressed by the cogency of this statement. But I think that, when analysed, it comes to this, that the instruments do not have the prescribed effect because they have some other effect also. In other words, the true construction of the section demands the writing in before " effect " of " main " or " real " or " substantial " or " only." As I have already said, I see no justification for doing so. Nor can I accept the view that it is relevant what other effect the instrument has. It was, I think, conceded that the operation of the section would not be ousted if its further effect was to convey the legal estate outstanding in a trustee third party. It appears to me to be altogether too fine a distinction to say that it is ousted because the legal estate is conveyed in pursuance of some antecedent bargain. And it is, of course, quite irrelevant that, if the parties had carried out the transaction or transactions by a different instrument or instruments, other duties might be exigible.

The argument for the Crown assumed yet another form before this House. Learned counsel referred to the fourth of his formal reasons in the respondents' case and said that that was what he really relied on. I quote it: " Because on its true construction " section 42 operates only to exempt an instrument from such " ad valorem duty as it would otherwise attract as an instrument " the effect whereof is to transfer a beneficial interest in pro- " perty from one associated company to another: it does not " exempt an instrument from such ad valorem duty as it attracts " as a conveyance or transfer on sale by a third party." He expanded this reason by saying that the subsection was to be read as if it ran as follows: " This section applies to any instrument " *in respect of the conveyance or transfer on sale of such a* " *beneficial interest as is hereinafter mentioned* as respects " which . . . ." My Lords, I can see as little justification for writing in these as any other words. I do not think that their inclusion has any different effect from that of writing in any of the adjectives I have indicated before the word " effect." But the argument in this form does serve to expose what is, in my opinion, its flaw. The instrument is ex concessis a single instrument and is not to be deemed anything but a single instrument. As such, it would bear one stamp, the ad valorem conveyance stamp. But the words which it is proposed to write

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in can only proceed upon the basis that there is one stamp in respect of the conveyance or transfer on sale of the sort of beneficial interest to which the section relates and another stamp in respect of something else: from the former the instrument is free, to the latter it becomes subject. This denies the concession that it is a single instrument subject to one stamp only.

I conclude, then, that the appellants are right on their first contention, but that does not mean that they succeed in this appeal, for they have also to establish that the relief given by the earlier Act is not taken away by section 50 of the Finance Act, 1938. In my opinion, they fail to do this. For under the latter section the relief in question is not given to any instrument "unless it is "shown to the satisfaction of the Commissioners of Inland "Revenue that the instrument was not executed in pursuance of "or in connection with an arrangement whereunder . . . (*b*) the "beneficial interest in the property was previously conveyed or "transferred directly or indirectly by . . . a person [other than "a company which at the time of the execution of the instru-"ment was associated with either the transferor or the trans-"feree]," that is to say, by a person who can conveniently be called a stranger, in this case Cohen or his representatives.

My Lords, in my opinion, the commissioners were well justified in not being satisfied that the instruments in question were not executed in pursuance, or in connexion with an arrangement whereunder the ensuing result followed. I do not ignore that they found as a fact that at the date of the 1950 agreement the appellant company was not in contemplation as a sub-purchaser of the property. But I respectfully agree with the Master of the Rolls that it is non-realistic to suppose that Cohen intended that the legal estate should remain outstanding indefinitely in himself or his representatives. The old company was formed very shortly before the contract for sale. The arrangement was thus initiated. It would, I think, be unreasonable to regard the final transaction by which Cohen's executors joined in the instruments in question to convey the legal estate as unconnected with the earlier transactions. The words "or in "connexion with" are wider than "in pursuance of," and appear to me to be well chosen to cover such a series of acts in the law as are to be found here.

It was, however, urged that the section did not apply inasmuch as the beneficial interests in question were not previously conveyed or transferred directly or indirectly by a stranger. I lay no stress on the words "directly or indirectly" but I cannot avoid the conclusion that, when Cohen entered into the 1950 contract and received the consideration therefor, and the beneficial interest in the property accordingly passed to the old company, it was his act by which it passed, and it would be too narrow a construction to say that nevertheless it was not conveyed or transferred by him.

On this ground, I think, the appeal should be dismissed with costs.

LORD REID. My Lords, I agree with the speech which has just been delivered by my noble and learned friend, Viscount Simonds, but as there is a difference of opinion among your Lordships on the first point, perhaps I ought to state my reasons shortly in my own words. The question turns on the proper interpretation of the words "the effect." There are many contexts in which these words could properly be held to mean "the only effect" or even "the only substantial effect" using the word "substantial" as meaning something which is not negligible. But that interpretation is not possible here. Where a company, which already has the legal title, conveys property to an associated company, section 42 admittedly applies although the conveyance, besides conveying or transferring the beneficial interest, also conveys the legal title and contains covenants which may be of great importance. These other effects are not negligible, but admittedly their presence does not exclude the operation of the section. It appears to me that "an effect" or "the only effect" are the only two possible interpretations of the words "the effect" unless one is to write in qualifying words, which seems to me to be unwarranted. Therefore, as "the only "effect" is excluded, I must choose the other possibility, "an effect."

These instruments have a twofold effect; they transfer the beneficial interest from the old company to the appellant, and they convey the legal title from Mr. Cohen's executors to the appellant. Instruments having a twofold effect are dealt with by section 4 of the Stamp Act, 1891: an instrument coming within that section is treated as two separate instruments. Admittedly section 4 cannot be applied to this case but, nevertheless, the respondents are seeking to have the matter decided as if it did, and as if the exemption in respect of one of the effects left the other subject to stamp duty.

Section 42 is plainly a defective section. To cure one defect it was found necessary to pass section 50 of the Finance Act, 1938. I see no reason to strain the language of the section to prevent the emergence of another defect.

LORD KEITH OF AVONHOLM. My Lords, I would, if necessary, be prepared to hold that the terms of section 42 of the Finance Act, 1930, do not relieve the appellant from liability to pay ad valorem stamp duty. In any event, I agree that the appellant is caught by the terms of section 50 of the Finance Act, 1938.

My Lords, under section 42 of the Act of 1930 we are concerned only with stamp duty in respect of conveyance or transfer on sale. An instrument which comes into this category may contain other clauses which will attract additional stamp duty under the Schedule to the Stamp Act, but we are not concerned

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with any such question in this case. The only question under section 42 is whether the instrument here is one the effect whereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company. Now if one is asked what is the effect of the instrument here it would only be a half answer to say it conveys a beneficial interest in property from one company limited liability to another such company. It also conveys the legal title to the property from Samuel Cohen's executors to the appellant company. It thus fails in two respects to meet the words of the statute. It introduces a third party, who is neither an agent nor a trustee of the old company, into the instrument of conveyance, and it conveys the legal title as something separate from the beneficial interest. The question, then, is whether such an instrument is within the statutory provision. I have come to the view that the learned Lords Justices of the Court of Appeal were right in holding that it does not. When the facts are considered it is seen that they are not apt to fit *the* effect of the instrument and fit only *an* effect of the instrument, speaking again solely from the point of view of a conveyance or transfer on sale. That is not, I think, sufficient to satisfy the statute. I find some support also for this view on a consideration of the terms of subsections (4) and (6) of section 58 of the Stamp Act, 1891. These subsections show that where an original seller is introduced to complete a sale to a sub-purchaser the legislature is concerned to secure that ad valorem duty is paid on the consideration moving from the sub-purchaser. The transaction embodied in the instrument here is truly, as I see it, a conveyance or transfer from the original seller to a sub-purchaser which attracts duty under subsection (4) of section 58. The instrument of conveyance is not, in my opinion, brought within the exemption in section 42 of the Act of 1930 and duty is therefore payable.

On the questions arising on section 50 of the Act of 1938 I have nothing to add to what has already been said.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, under section 13 of the Stamp Act, 1891, the determination of the court was required on the stamp duty chargeable on five instruments of conveyance and assignment, particulars of which are set out in the case stated.

By an agreement dated June 30, 1950, Samuel Cohen agreed to sell to Samuel Cohen (Properties) Ltd. freehold and leasehold properties (subject to certain incumbrances), which included the subject-matter of the instruments in question. The consideration was to be satisfied by the issue of shares. These shares were allotted but the contract was not completed by any conveyance or transfer. The beneficial interest passed to the purchaser.

Samuel Cohen died on July 21, 1951. In 1954 Escoigne Properties Ltd. was formed and terms were arranged without

there being any written contract for the sale to them of the properties in question. The beneficial interest was in Samuel Cohen (Properties) Ltd., the legal estate in the personal representatives of Samuel Cohen. The instruments transfer both these interests to Escoigne Properties Ltd.

The first question is whether these instruments are exempted from stamp duty under the provisions of section 42 of the Finance Act, 1930. If they are so exempted, then is that exemption taken away by section 50 of the Finance Act, 1938?

I can state quite shortly my reasons for agreeing with the Court of Appeal that these instruments were not exempted under section 42 of the Finance Act, 1930.

It is common ground that the agreement of June 30, 1950, did not require an ad valorem stamp either when it was signed or when, the consideration being paid, the equitable interest passed under it to the old company. It is also common ground that, if it had been later completed by a conveyance of the legal estate, that conveyance would have been subject to an ad valorem stamp although the conveyance did not itself pass the interest valued. In other words, the conveyance on completion is stampable in respect of the value and transfer of the equitable interest although that has already been transferred and does not require the conveyance to vest it in the purchaser.

In the present case the conveyance and other instruments come within section 58 (4). But for that subsection, it might have been suggested or held that double duty was payable, first on the completion of the sale to the purchaser and secondly on the completion of the sale to the sub-purchaser although carried out by the same instrument. Both transfers are covered by the one conveyance and the one stamp.

Section 42, in my opinion, relieves an instrument which would otherwise be stampable in respect of the transfer of the equitable interest from one associated company to another. That interest might have already passed under an agreement for sale prior to the instrument of conveyance or transfer. The instrument would be relieved because in such a case, as I have said, the instrument is to be stamped in respect of the value and transfer of the equitable interest, although that has previously passed.

In the present case, therefore, the instruments are stampable in respect of the transfer of the equitable interest as passing from the original vendor to the sub-purchaser. That is the effect of the instrument in relation to stamp duties. It is, therefore, not within the relieving words which must be confined to instruments which attract duty by reason of the transfer from one associated company to another. This attracts duty by reason of the transfer from the original vendor to the sub-purchaser.

If I am wrong about that, then the taxpayer fails under section 50 of the Finance Act, 1938. I think the instruments in question were executed in pursuance of or in connexion with an "arrangement." The onus is on the taxpayer to satisfy the

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commissioners that they were not so executed. There is the further question referred to by Romer L.J. Was the equitable interest conveyed or transferred by Samuel Cohen? The agreement, it is said, on its face was an agreement to sell under which the property would not pass until completion. Therefore it cannot be said there was a transfer of the equitable interest by Mr. Cohen: it passed by operation of law. I cannot accept this line of reasoning. In some cases the law prescribes the conditions which must be fulfilled for property to pass from vendor to purchaser. Subject to this, parties may make express provision as to the passing of property from vendor to purchaser, or, if no such provision is made, leave it to be dealt with by implication of law. In all cases, however, the transfer is, in my opinion, a transfer by the vendor within the ordinary meaning of these words.

I would dismiss the appeal.

Lord Denning. My Lords, in order that any of these five instruments should be exempt from stamp duty under section 42, it must be shown that "the effect thereof" is to convey or transfer a beneficial interest from the old company to the new company.

What is the meaning of the words "the effect thereof"? Various interpretations are suggested. Do they mean "the *only* "effect thereof" or "the *substantial* effect thereof" or "*an* "effect thereof"? I do not think they mean any of those things. It is a mistake to dignify these suggestions by calling them "interpretations." They are only substituted words: and as soon as you start substituting words for those used by Parliament, you run into difficulty. If you say that the words "the "effect thereof" mean "the *substantial* effect thereof," you lay yourself open to the criticism that you are writing into the statute qualifying words which are not to be found there. If you say that the words "the effect thereof" mean "*an* effect thereof," you can be accused of altering the words of the statute, which no one has a right to do.

I prefer to start with the proposition affirmed by my noble and learned friend, Lord Reid, in *Goodrich* v. *Paisner*[3]: "No "court is entitled to substitute its words for the words of the "Act." I look upon the suggested interpretations only as attempts to elucidate it. When searching for the meaning of a statute, it is natural to try to put it into your own words—so as to express its meaning as it appears to you. But you must be careful not to write your own words into the statute as if they were part of it. It may well be that no words of yours convey the meaning of Parliament quite so well as the words which Parliament itself has chosen. You can often appreciate the meaning of a section—get the feel of it, so to speak—without being able to translate it into other words with exactly the same

[3] [1957] A.C. 65, 88; [1956] 2 W.L.R. 1053; [1956] 2 All E.R. 176.

meaning. At the conclusion of the argument the function of the court is to apply, not its own words, but the words of the statute to the given situation.

I return, therefore, to the question: What is the true meaning of section 42 as it stands? This cannot be answered by simply looking at the words of the statute and nothing else. A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used: and what was the object, appearing from those circumstances, which Parliament had in view. That was emphasized by Lord Blackburn in *River Wear Commissioners* v. *Adamson* [4] and by the Earl of Halsbury L.C. in *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs and Trade Marks* [5] in passages which are worth reading time and again. But how are the courts to know what were the circumstances with reference to which the words were used? and what was the object which Parliament had in view? especially in these days when there are no preambles or recitals to give guidance. In this country we do not refer to the legislative history of an enactment as they do in the United States of America. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people. Thus one of the best ways, I find, of understanding a statute is to take some specific instances which, by common consent, are intended to be covered by it. This is especially the case with a Finance Act. I often cannot understand it by simply reading it through. But when an instance is given, it becomes plain. I can say at once "Yes, that is the sort of thing Parliament intended to "cover." The reason is not far to seek. When the draftsman is drawing the Act, he has in mind particular instances which he wishes to cover. He frames a formula which he hopes will embrace them all with precision. But the formula is as unintelligible as a mathematical formula to anyone except the experts: and even they have to know what the symbols mean. To make it intelligible, you must know the sort of thing Parliament had in mind. So you have to resort to particular instances to gather the meaning.

I would apply this method to discover the meaning of section 42 of the Finance Act, 1930. Two instances spring to mind which, by common consent, are covered by that section. The first instance is where a company, which is the absolute owner of property, sells it to an associated company in which it holds more than 90 per cent. of the shares. The transfer is effected by a simple conveyance by the one company to the other. Such

[4] (1877) 2 App.Cas. 743, 763–765. [5] [1898] A.C. 571, 575–576; 14 T.L.R. 527.

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a conveyance is exempt from stamp duty: because "the effect "thereof" is to transfer the beneficial interest in the property from the one company to the other. The means of achieving that effect is by conveying the legal estate. The second instance is when the one company is not the absolute owner of property but has only equitable interest with the legal estate outstanding in a trustee: and the company then transfers its equitable interest to its associated company. Such a transfer is exempt from stamp duty because "the effect thereof" is to transfer the beneficial interest from the one company to the other. The means of achieving it is by a transfer of the equitable interest.

Those instances show what was the object of section 42. It was to give relief from stamp duty on an instrument by which one company transfers property to its associated company: provided that the association is so close that the transfer is little more than a change in the nominal ownership, with the underlying control remaining the same: and a 90 per cent. shareholding is made the test of closeness.

The object of the statute being thus ascertained, it is plain to my mind that the present instruments do not come within it. None of them is a transfer from one associated company to another. Each is a conveyance of property by a third person—by a seller who had contracted to sell it for value to one of the companies. If it were conveyed by the seller to the original purchasing company, it is clear that stamp duty would be payable on the conveyance. Why should there be any difference when it is conveyed, not to the purchasing company, but to its associated company at its direction? There is no possible reason for Parliament exempting any of these instruments from stamp duty. No one can suppose that it intended to do so. If these instruments do not come within the class of instrument which Parliament had in view—as I am clear they do not—then we should not hold them to be exempt from stamp duty unless the words compel it—and I am clear they do not. I find myself, therefore, in agreement with the Court of Appeal that these instruments are not exempt under section 42.

Even if this view were wrong, there remains section 50 of the Finance Act, 1938. This is a section which I would not be able to understand unless I was first given an instance of what it was intended to cover. Mr. Pennycuick provided this by telling us of the device of the "dummy bridge company" which some people had evolved to avoid paying stamp duty. They took advantage of section 42 by forming a small company which was a puppet in their hands. It was done in this way: If company A wished to sell property to company B for £100,000 and avoid stamp duty, company A would form a small "bridge" company of 100 £1 shares in which it held all the shares. Company A would convey the property to the "bridge" company for £100,000 but the price would be left owing. By reason of section 42 that conveyance would be exempt from stamp duty.

Then company A would sell the 100 shares in the "bridge" company to company B for £100: and stamp duty of a trifling amount would be paid on that transfer. The "bridge" company would then convey the property to company B for £100,000 on the terms that the £100,000 should be paid direct to company A. By reason of section 42 no stamp duty would be payable on that conveyance. So the sale from company A to company B was completed without paying any stamp duty on the £100,000. The success of that device was not due to any defect in section 42. It was due to the cleverness of the persons who managed to bring the conveyances within section 42 beyond any doubt.

The object of section 50 was to put a stop that device: and it succeeded. If anyone were to resort to it after 1938, both conveyances would be liable to stamp duty. The first conveyance would be caught by subsection (1) (*a*). The second by subsection (1) (*b*).

The question is whether section 50 is effective to catch the five instruments in the present case. Romer L.J. thought it was not. He did not think these instruments came within subsection (1) (*b*) because the beneficial interest was not previously transferred "by" Mr. Cohen. All that Mr. Cohen did was to contract to sell the legal interest. The beneficial interest passed by operation of law. That, in a sense, is true. If I were to look at the words of the statute alone and take the word "by" literally, I might be of the same opinion as Romer L.J. But when I look at the mischief which this section was passed to remedy, I come to a different conclusion. The mischief was that some people had resorted to various devices by which they took advantage of section 42 to avoid stamp duty. I do not think the courts should give a narrow construction to section 50 so as to make room for another such device. The word "by" is capable of a wider construction which we should adopt. If these instruments were exempt, it would open the door to widespread avoidance of stamp duty on property deals. All that would be necessary would be to incorporate two puppet companies, make the contract in the name of one and take the conveyance in the name of the other, and no stamp duty would be payable. Faced with this device, I call to mind the resolution of the judges in *Heydon's Case* [6]: "the office of all the Judges is always to make "such construction as shall suppress the mischief, and advance the remedy"; and the words of Lord Selborne L.C. in *Caledonian Railway Co.* v. *North British Railway Co.*[7]: "The more literal "construction ought not to prevail, if . . . it is opposed to the "intentions of the Legislature, as apparent by the statute." It is not so much a choice between a literal construction and a liberal construction. It is rather a case of remembering that every statute must be read in the light of the circumstances in which it was made and the object it was passed to achieve.

[6] (1584) 3 Co.Rep. 7a, 7b.

[7] (1881) 6 App.Cas. 114, 122.

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When that is borne in mind, I have no doubt these instruments, if within section 42, are nevertheless caught by section 50.

I would therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Nicholson, Graham & Jones; Solicitor of Inland Revenue.*

F. C.

[PRIVY COUNCIL.]

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ABDUL CADER ABDEEN . . . . . APPELLANT;

AND

ABDUL CAREEM MOHAMED THAHEER AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Specific performance — Contract — Land—Roman-Dutch law— Legal right to demand performance of contract — Overriding discretion of court to refuse — Right excluded by substituted obligation for damages.

Roman-Dutch Law — Specific performance — Whether absolute right — Distinction between Roman-Dutch and English law.

Vendor and Purchaser—Specific performance—Contracting out of right —Clause in contract fixing liquidated damages for failure to complete.

Unlike the law of England, where courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance of contractual obligations in appropriate cases, under Roman-Dutch law every party who is ready to carry out his term of the contract prima facie enjoys a legal right to demand performance by the other party; and this right is subject only to the overriding discretion of the court to refuse the remedy in the interests of justice in particular cases.

An agreement for the purchase by the appellant from seven joint owners of certain house property in Colombo provided in clause 8: "In the event of the purchaser being ready and willing "to complete the said sale in terms hereof and the vendors failing, "refusing or neglecting to execute . . . the deed of transfer . . . "then . . . the vendors shall . . . pay to the purchaser a sum of "Rs.15,000 as liquidated and ascertained damages and not as "penalty." Two of the joint owners having refused to execute any conveyance, the appellant began proceedings against them to enforce specific performance of their share of the premises. He contended that clause 8 stipulated not for an alternative or substituted method of performance of the contract but only for damages for breach of it, and that that was no bar to a decree for specific performance:—

Held, that the prima facie right of the appellant to demand specific performance was excluded by the terms of the contract,

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* *Present*: LORD OAKSEY, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD BIRKETT and the RT. HON. L. M. D. DE SILVA.

particularly clause 8, which constituted a substituted obligation and the sole obligation on the vendors in the event of the failure to secure a conveyance of the whole property to the appellant by reason of any of the contingencies contemplated by the parties in that clause. A refusal or failure by one vendor would be sufficient to bring clause 8 into operation.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL (No. 20 of 1956) from a judgment of the Supreme Court of Ceylon (June 10, 1955), reversing a judgment of the District Court of Colombo (November 1, 1951).

The following facts are taken from the judgment of the Judicial Committee: The case arose out of a contract of purchase and sale dated October 3, 1947, of certain house property in Colombo. The appellant was the purchaser. The vendors were seven joint owners of 151 shares out of 192 undivided shares of this land. The joint owners of the other 41 shares were four minors who were not parties to the contract. Their curators were subsequently authorized by the court to sell their shares. Of the seven part joint owners, parties to the contract, five executed, on January 2, 1948, an appropriate deed of conveyance in the appellant's favour. The other two refused to execute any conveyance and give vacant possession because they could not get another house. On March 17, 1948, the appellant commenced proceedings in the District Court of Colombo seeking a decree against those two vendors to execute in his favour a conveyance of their share of the premises in question. Before those proceedings were taken one of the recusant vendors had transferred his share to his minor children without valuable consideration and they were accordingly made parties to the proceedings. The District Judge held that that transfer was ineffective to interfere with the purchaser's rights. That was not now in question in the case.

The only question before the Board was whether the appellant was entitled to enforce specific performance against the recusant defendants. The District Court (Sinnethamby D.J.) held that he was. The Supreme Court (Gratiaen, Pulle and Sansoni JJ.) held that he was not. The question fell to be determined on the language of the contract considered in the light of the Roman-Dutch law ruling in Ceylon in the matter of specific performance.

The contract was as follows: "This agreement is made third "day of October, one thousand nine hundred and forty-seven "between Abdul Careem Mohamed Thaheer [and six others] all "of No. 43, Barnes Place, in Colombo, in the Island of Ceylon "(hereinafter called and referred to as 'the said vendors' which "term as herein used shall where the context so requires or "admits mean and include the said Abdul Careem Mohamed "Thaheer [and the six others], their and each of their respective "heirs, executors and administrators) of the one part and Abdul "Cader Abdeen of Colombo aforesaid (hereinafter called and "referred to as 'the said purchaser' which term as herein used

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" shall where the context so requires or admits mean and include " the said Abdul Cader Abdeen, his heirs, executors and adminis- " trators of the other part.

" Whereas the vendors are seised and possessed of or other- " wise well and sufficiently entitled jointly to an undivided " one-hundred and fifty-one upon one-hundred and ninety-two " (151/192) parts or shares from and out of all those premises in " the Schedule hereto particularly described.

" And whereas Zainul Abdeen, Umma Faiza, Hussain Lafir " and Abdul Careem Mohamed Abdul Cader, (minors,) all of " No. 43, Barnes Place aforesaid are jointly entitled to the " remaining forty-one upon one-hundred and ninety-two (41/192) " parts or shares from and out of the said premises in the said " schedule hereto particularly described.

" And whereas the vendors have agreed to sell and to cause to " be sold and the purchaser has agreed to buy the said premises " in the said Schedule hereto particularly described at the price " and upon the terms and conditions hereinafter set forth.

" Now this agreement witnesseth as follows:—

" 1. The vendors will sell and cause to be sold and the " purchaser will subject expressly to the provisions of clauses 4 " and 5 hereof buy the said premises in the said Schedule hereto " particularly described together with all and singular the rights, " privileges, easements, servitudes and appurtenances whatso- " ever thereto belonging or appurtenant thereto or used or enjoyed " therewith.

" 2. The price shall be the sum of rupees ninety-two thousand " (Rs. 92,000/–) of which a sum of rupees twelve thousand five " hundred (Rs. 12,500/–) by way of deposit has been paid to the " vendors by the purchaser (the receipt whereof the said vendors " do hereby admit and acknowledge) and the balance shall be " paid on the date the purchase is completed.

" 3. The sale shall be completed on or before the 31st day of " December, 1947, by the purchaser: (*a*) tendering to the vendors " for execution at the office of Mr. John Wilson, proctor and " notary, 365, Dam Street, Colombo, a transfer in the customary " form of the said premises hereby agreed to be sold in favour " of the purchaser or his nominee or nominees the same to be " attested by the purchaser's or his nominee or nominee's notary. " The vendors in and by the said deed of transfer shall warrant " and defend the title to the said one-hundred and fifty-one upon " one-hundred and ninety-two (151/192) parts or shares of the " said premises in the said Schedule hereto particularly described " and enter into other usual covenants; (*b*) paying to the vendors " and depositing to the credit of curatorship proceedings in the " District Court of Colombo relating to the estates of the said " minors the balance purchase price of rupees seventy-nine " thousand five-hundred (Rs. 79,500/–) and thereupon the " vendors shall execute and cause to be executed at the cost and

" expense of the purchaser the deed of transfer in favour of the " purchaser or his nominee or nominees as aforesaid.

" 4. Vacant possession of the said premises in the said " schedule hereto particularly described shall be given by the " vendors to the purchaser at least one day prior to the execution " of the said deed of transfer.

" 5. The vendors shall deduce to the satisfaction of the said " Mr. John Wilson a good and indefeasible title to the said " premises in the said schedule hereto particularly described.

" 6. The purchaser shall give to the vendors at least seven " days' notice of the date on which the purchaser intends to com- " plete the sale so as to enable the vendors to give to the " purchaser vacant possession as aforesaid of the said premises in " the said schedule hereto particularly described.

" 7. In the event of the purchaser dying prior to the said 31st " day of December, 1947, these present shall stand cancelled and " determined and the vendors shall forthwith pay to the legal " representatives of the purchaser the said deposit of rupees " twelve-thousand five-hundred (Rs. 12,500/–).

" 8. In the event of the purchaser being ready and willing to " complete the said sale in terms hereof and the vendors failing, " refusing or neglecting to execute and cause to be executed the " said deed of transfer as aforesaid then and in such case the " vendors shall repay forthwith to the purchaser the said deposit " of rupees twelve-thousand five-hundred (Rs. 12,500/–) together " with interest thereon at five per centum per annum from the " date hereof to date of payment and shall also pay to the " purchaser a sum of rupees fifteen-thousand (Rs. 15,000/–) as " liquidated and ascertained damages and not as penalty.

" 9. In the event of the vendors deducing a good and inde- " feasible title to the satisfaction of the said Mr. John Wilson " and being ready and willing to execute or cause to be executed " prior to the 31st day of December, 1947, the said transfer and " to give vacant possession as aforesaid and the purchaser failing, " refusing or neglecting to complete the purchase as aforesaid the " purchaser shall pay to the vendors a sum of rupees fifteen- " thousand (Rs. 15,000/–) as liquidated and ascertained damages " and not as penalty and the vendors shall refund to the pur- " chaser the said deposit of rupees twelve-thousand five-hundred " (Rs. 12,500/–)."

1958. January 14, 15. *Stephen Chapman Q.C.* and *R. K. Handoo* for the appellant.

The respondents did not appear and were not represented.

No authorities were referred to in argument.

February 11. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above and continued: In the admirable judgment of Gratiaen J. there

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appears this passage, which their Lordships entirely accept: "In "this country, the right to claim specific performance of an "agreement to sell immovable property is regulated by the "Roman-Dutch law, and not by the English law. It is important "to bear in mind a fundamental difference between the jurisdic- "tion of a court to compel performance of contractual obligations "under these two legal systems. In England, the only common "law remedy available to a party complaining of a breach of "an executory contract was to claim damages, but the courts "of chancery, in developing the rules of equity, assumed and "exercised jurisdiction to decree specific performance in appro- "priate cases. Under the Roman-Dutch law, on the other hand, "the accepted view is that every party who is ready to carry "out his term of the bargain prima facie enjoys a legal right to "demand performance by the other party; and this right is "subject only to the overriding discretion of the court to refuse "the remedy in the interests of justice in particular cases."

Proceeding from this starting point, the judge reaches the conclusion that the prima facie right of the purchaser to demand specific performance is excluded by the terms of the contract between the parties, particularly by clause 8, which he holds constitutes a substituted obligation and the sole obligation upon the vendors in the event of the failure to secure a conveyance of the whole property to the purchaser by reason of any of the contingencies contemplated by the parties in clause 8. He continues in a further passage which their Lordships would again quote in full: "It is only in the absence of agreement to the "contrary that the Roman-Dutch law confers on a purchaser "under an executory contract the right to select one of two "alternative legal remedies under the Roman-Dutch law, "namely, specific performance *or* damages. But we have here "a categorical stipulation that if the primary obligation is not "fulfilled for any reason whatsoever, two specified sums shall "immediately become due. To my mind, the stipulated return "of the deposit, being part of the purchase price, necessarily "implies that the primary obligation to sell is then to be regarded "as having come to an end. This negatives an intention that "the purchaser could still demand, if he so chose, specific per- "formance. It is also significant that, when one considers the "relevant issue of mutuality, clause 9 provides that, should the "purchaser default for any reason, he would, though liable to "pay an agreed sum to the vendors as liquidated damages, be "entitled to a refund of his earlier deposit. Clause 9 equally "denies to the 'vendors' by necessary implication the alternative "legal remedy of specific performance."

In his very full and able argument for the appellant Mr. Chapman urged that clause 8 stipulated not for an alternative or substituted method of performance of the contract but only for damages for breach of the contract and that this was no bar to a decree for specific performance. For reasons, however, which

do not materially differ from those which found favour with Gratiaen J., their Lordships are unable to accept the contention for the appellant. Their Lordships will state these reasons shortly under four heads.

First, where the right in general of a party to insist on specific performance of his contract or to claim damages is so clear under the Roman-Dutch law, their Lordships have difficulty in appreciating why the parties should introduce into the contract the detailed and meticulous provisions of clauses 8 and 9 merely to fix the amount of damages in the event of the court finding itself unable or unprepared to give decree of specific performance.

Secondly, the general framework of the contract suggests that clauses 7, 8 and 9 were designed to introduce modifications of what would otherwise be, subject to certain minor conditions, the unqualified obligation to sell or cause to be sold the property in question. Clause 7 is a clear modification of the legal consequences ordinarily following on a contract of sale, and clauses 8 and 9 are capable of a similar interpretation. Each of the clauses relates to a specific event or events which may follow the signing of the contract and provides for the consequences to follow thereon.

Thirdly, clause 8 makes no distinction between failure, refusal, or neglect to execute or cause to be executed the deed of transfer. The same consequences are to follow from any of these events. Failure might have proceeded, though in this case it did not, from the refusal of the court to sanction and authorize a sale by the curators of the minor part-owners. In such an event the purchaser's only remedy would be under clause 8. The view of the Supreme Court was that this was a substituted obligation on the vendors who, having undertaken to cause a transfer to be executed, would be liable to pay to the purchaser the agreed sum of damages. Their Lordships see no reason to dissent from this view, and it is impossible in their opinion to differentiate between such a failure and a refusal of one of the parties to execute a transfer, which it is to be noted again results in a failure of the other vendors to cause a transfer to be executed.

Lastly, clause 8 provides that on the occurrence of any of the events contemplated the vendors shall repay "forthwith" to the purchaser the deposited sum with interest at the rate of five per centum per annum. This, in their Lordships' view, points strongly to the construction that in the events contemplated the bargain for a sale has come to an end and has been replaced by the pecuniary stipulations in the clause. It is further significant, as Gratiaen J. points out, that there is a corresponding mutuality of obligation on the purchaser in clause 9 in the event of his failing, refusing or neglecting to complete the purchase.

It remains to notice a contention which may not have been submitted to the Supreme Court but which was pressed before their Lordships' Board. It is expressed in the sixth ground of appeal as follows: "Because even if clause 8 be so construed as

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"to mean that the purchaser's sole remedy upon default by the "vendors was the recovery of the sum named therein as "liquidated damages yet the default contemplated and, indeed, "so expressed, was a default by all the vendors rendering them "all jointly and severally liable, and not by only some of them "for which all the vendors (i.e., those in default and those who "were not) were to be liable." In their Lordships' view this point fails at the outset because in fact there was a failure on the part of all the vendors, as has already been indicated, either to execute or "to cause to be executed" the deed of transfer. But their Lordships think that in any event a refusal or failure by one vendor would be sufficient to bring the clause into operation.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Solicitors: *Lee & Pembertons.*

C. C.

[COURT OF APPEAL.]

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Feb. 7.
Jenkins, Sellers and Pearce L.JJ.

REGIS PROPERTY CO. LTD. *v.* DUDLEY.

Landlord and Tenant — Rent restriction — Rent limit — Appropriate factor — Tenant's liability for repairs under terms of tenancy — Concurrent liability at common law — "Fair wear and tear" — Services—Reasonable charge—Depreciation of plant—Profit—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *ss.* 1, 2, *Sch. I, paras.* (1), (2) *and* (3).

Landlord and Tenant—Repairs—Covenant—"Fair wear and tear"—Meaning.

The landlords of a block of flats made application in the county court for orders determining the increase of rent permissible under the Rent Act, 1957,* in respect of one of the flats.

* Rent Act, 1957, s. 1: "(1) Subject to the following provisions of this Act the rent recoverable for any rental period from the tenant under a controlled tenancy shall not exceed the following limit, that is to say a rent of which the annual rate is equal to the 1956 gross value of the dwelling multiplied by two (or, if the responsibility for repairs is such as is specified in Part I of the First Schedule to this Act, by the appropriate factor specified in the said Part I), together with—(*a*) the annual amount, ascertained in accordance with the Second Schedule to this Act, of any rates for the basic rental period, being rates borne by the landlord or a superior landlord; and (*b*) such annual amount as may be agreed in writing between the landlord and the tenant or determined by the county court to be a reasonable charge for any services for the tenant provided by the landlord or a superior landlord during the basic rental period or any furniture which under the terms of the tenancy the tenant is entitled to use during that period. (2) The limit on the rent recoverable under a controlled tenancy for any rental period (hereinafter referred to as 'the rent limit') shall be subject to adjustment from time to time under sections 3 to 5 of this Act and to reduction as provided by Part II of the First Schedule to this Act in case of disrepair."

First Schedule, Part I: "1.—(1) The following provisions shall have effect in ascertaining the rent limit by reference to the 1956 gross

The flat in question was let unfurnished, at an inclusive rent of £139 16s. 9d. per annum, which, owing to an increase of rates, had been increased to £145 12s. 5d. It was entered in the 1956 valuation list at a gross value of £54 per annum and a net value of £39, and therefore, being situate in London and the net value not exceeding £40, the flat remained under control. The obligations of the tenant under the lease were, inter alia, to keep the interior of the flat in good and substantial repair and clean sanitary condition, fair wear and tear and damage by accidental fire excepted.

The county court judge fixed the appropriate factor at $1\frac{2}{3}$, holding that the liability of the landlords and tenant for repairs was about equal. He disallowed charges for replacement or depreciation of certain services and also a claim of 10 per cent. overall profit on all items of cleaning and maintenance.

On appeal by the landlords:—

Held, (1) that the Act gave no specific guidance as to the principles on which the court was to determine the appropriate factor, but it was plain that it must be guided by the extent of the burden, short of full repairing liability, cast on the tenant by the terms of the letting. The fixing of the exact figure was a matter of discretion. Repairs which were the responsibility of the tenant under the express terms of the agreement should be taken into account notwithstanding that he might be under a concurrent liability for them at common law. The judge had estimated the tenant's liability for repairs at a figure which the court regarded as generous, with a consequential lowering of the appropriate factor to $1\frac{2}{3}$, but it was not possible to say that he was wrong in so doing.

(2) That in computing a reasonable charge for services some allowance must as a rule be made for depreciation of wasting assets, in order to arrive at a reasonable charge. This was not a pure question of fact, and the judge was not entitled to disregard those items as a matter of discretion. Depreciation and not replacement was the correct element to be considered, and the yearly figure of depreciation should be arrived at with respect to each category of plant by taking the actual costs of such plant when originally installed and dividing it by the number of years comprised in its actual past and estimated future life.

(3) That in the computation of a reasonable charge for services there should be allowed to the landlords a fair figure by way of profit in the particular circumstances. Prima facie some profit should be allowed in a reasonable charge. The landlords had the ultimate responsibility and it was fair that they should have some profit to compensate for this. Had the Act otherwise intended it would have used words based on "cost" instead of reasonable charge.

"value. (2) If under the terms of "the tenancy the tenant is respon- "sible for all repairs, the appropriate "factor shall be four-thirds. (3) If "under the terms of the tenancy the "tenant is responsible for some, but "not all, repairs, the appropriate "factor shall be such number less "than two but greater than four- "thirds as may be agreed in writing "between the landlord and the tenant "or determined by the county court."

Para. 2 (1): "In the foregoing "paragraph the expression 'repairs' "does not include internal decorative 'repairs. . . ."

By section 25 the "appropriate 'factor" is defined as "the number "by which the 1956 gross value is to "be multiplied in determining the "rent limit"; and the "basic rental "period" is defined as being "the "rental period comprising the com- "mencement of this Act . . ." The Act was passed on June 6, 1957, and by section 27 (1) it came into force at the expiration of one month thereafter.

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REGIS PROPERTY CO. LTD. v. DUDLEY.

APPEALS from Judge Sir Gerald Hargreaves, sitting at West London County Court.

The plaintiffs, Regis Property Co. Ltd., appealed from three orders made on August 29, 1957, by the county court judge under the Rent Act, 1957, with regard to flat No. 248, Chelsea Cloisters, S.W.3, of which the defendant, Henry Dudley, was the tenant. The proceedings were brought on the basis that the decision of the court might give guidance on various principles involved in the Act in respect of a large number of flats owned by the landlords, and the landlords had indemnified the tenant against the costs.

The flat was one of a block of 804 flats built in 1939, and consisting of a basement and 10 floors. It was let unfurnished and contains two rooms, a kitchenette, a hall, and a bathroom. The landlords supplied a wireless set, a refrigerator and a gas cooker. They also provided central heating with radiators and towel rails, constant hot water, and a lift, also lighting and cleaning the common parts of the premises. The flat was let to the tenant on April 10, 1956, by a written agreement, on a monthly tenancy at an inclusive rent of £139 16s. 9d. per annum, payable monthly. By July 6, 1957, when the Act of 1957 came into force, the rent, owing to an increase of rates, had been increased to £145 12s. 5d. per annum. The gross value of the flat appeared in the 1956 valuation list as £54 per annum and the net rateable value £39. Therefore, being situate in London and the net rateable value not exceeding £40, it remained under the control provided by the Act of 1957.

By their applications to the county court, the landlords sought to obtain determinations under the Act of (a) the amount of the appropriate factor, (b) the amount of a reasonable charge for services provided by them, and (c) the resultant rent which they could properly charge, so that they might give the appropriate notice of increase under section 2 of the Act.

The county court judge held that the tenant's liability for repairs was about equal to that of the landlords, and he fixed the appropriate factor at $1\frac{2}{3}$. In computing a reasonable charge for services he disallowed certain items in respect of replacement or depreciation of boilers, lifts and electrical wiring and fittings in the passages, and also disallowed a 10 per cent. overall profit on service maintenance and replacements which the landlords claimed.

The landlords appealed.

Neil Lawson Q.C. and *B. J. Galpin* for the landlords.
Ian Campbell Q.C. and *G. Augustithis* for the tenant.

The following cases were cited in argument, in addition to those referred to in the judgment: *Gutteridge* v. *Munyard* [1]; *Haskell* v. *Marlow* [2]; *Regis Property Co.* v. *Redman* [3]; *Davies* v.

[1] (1834) 1 Moo. & Rob. 334.
[2] [1928] 2 K.B. 45; 44 T.L.R. 171.
[3] [1956] 2 Q.B. 612; [1956] 3 W.L.R. 95; [1956] 2 All E.R. 335.

Davies [4]; *Miller* v. *Burt* [5]; *Lurcott* v. *Wakely and Wheeler* [6]; *Stanley* v. *Towgood* [7]; *Lister* v. *Lane and Newsham* [8]; *Manchester Bonded Warehouse Co.* v. *Carr* [9]; *Warren* v. *Keen.* [10]

Cur. adv. vult.

February 7. PEARCE L.J. read the judgment of the court, in which he stated the facts and continued: In the case of controlled houses the Rent Act, 1957, has departed from the principle of the standard rent. The landlord is allowed, on compliance with the somewhat complicated provisions as to notices of increase contained in section 2 of the Act, to charge a rental calculated, in the way mentioned below, on the 1956 gross value of the dwelling-house, together with certain additions for services provided by the landlord and for rates where the landlord is responsible for them.

There are thus three elements in the permitted rent. 1. The basic rent, which is the gross value multiplied by a figure (termed " the appropriate factor ") ranging from two where the tenant is under no responsibility for repairs to four-thirds where the tenant is responsible for all repairs, the intermediate figure appropriate to any case in which the tenant is partially, but not wholly, responsible being such as may be agreed between the parties in writing or determined by the county court. 2. The rates which the landlords bear. 3. A reasonable charge for services which may be agreed in writing or determined by the county court.

In this case the appellant landlords made three applications to the county court to obtain determinations under the Act of: (a) the amount of the appropriate factor; (b) the amount of a reasonable charge for services provided by them; and (c) the resultant rent which they could properly charge, so that they might give the appropriate notice of increase under section 2 From the orders made on each application the landlords now appeal.

[His Lordship read section 1 (1) and (2) and First Schedule, Part I, para. (1), of the Act of 1957, and continued:] By paragraph 2 (1) of the same Part of the same Schedule: " In the fore- " going paragraph the expression ' repairs ' does not include " internal decorative repairs. . . ." The subsection then deals with matters not material to this appeal. By section 25 the " appropriate factor " is defined as the number by which the 1956 gross value is to be multiplied in determining the rent limit; and the " basic rental period " is defined as being " the rental period " comprising the commencement of this Act." The Act was passed on June 6, 1957, and by section 27 (1) it came into force at the expiration of one month thereafter.

[4] (1888) 38 Ch.D. 499.
[5] (1918) 63 S.J. 117.
[6] [1911] 1 K.B. 905.
[7] (1836) 3 Bing.N.C. 4.
[8] [1893] 2 Q.B. 212; 9 T.L.R. 503.
[9] (1880) 5 C.P.D. 507.
[10] [1954] 1 Q.B. 15; [1953] 3 W.L.R. 702; [1953] 2 All E.R. 1198.

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It may be noted that while sections 3 and 4 of the Act respectively provide for the adjustment of the rent limit to meet variations in rates or in the amount which it is reasonable to charge for services, there is no provision for the alteration of what we have termed the basic rent (i.e., the rent so far as fixed by applying the appropriate factor to the 1956 gross value) save in respect of improvements under section 5. The basic rent in the present case would be £108 with an appropriate factor of two and £72 with an appropriate factor of four-thirds. It may also be noted that the allowance of a reasonable charge for services in fixing the rent involved a fundamental departure from the earlier Acts. Broadly speaking, before 1957 any question affecting the landlord's right to increase his rent by any allowance for repairs or charge for services rendered was based on the landlord's actual expenditure. There is here a dispute: (a) As to what is the appropriate factor in this case, and (2) as to what is a reasonable charge in this case.

The question of what is the appropriate factor turns on the repairing obligations of the tenant. Having regard to those obligations, at what figure between the figure two, which would have been applicable if he had been under no obligation to repair, and the figure of one and one-third, which would have been applicable if he had been under full repairing obligations, should the appropriate factor be set? The Act gives no specific guidance as to any principles on which the court is to make that determination, but it is plain that it must be guided by the extent of the burden, short of full repairing liability, cast on the tenant by the terms of the letting in deciding whether the just rent is near the upper limit of two or the lower limit of one and one-third or somewhere else between those two figures. The fixing of the exact figure is, in our view, a matter of discretion. Here, the judge fixed it exactly half-way between those limits on the ground that the burden of the tenant's liability for repairs was roughly equal to that of the landlords'. If he is correct in his view as to their respective burdens this court plainly should not interfere. If, however, the judge came to an erroneous conclusion as to the nature and extent of the tenant's or landlords' legal obligation as to repairs, it follows that his discretion would have been exercised on a wrong basis and it would be proper for us to vary his conclusion.

Under clause 1 of the tenancy agreement the flat is expressed to be let "Together with the use of all the fixtures and fittings "therein and together with the right in common with the land- "lord and the tenants of the other flats in the said building and "all others having the like right to use for purposes only of "ingress to and egress from the flat the entrance hall passages "stairs and passenger lifts of the said building . . ." and subject to reservations which include the right for the landlords to enter the flat at all reasonable times for the purpose of inspecting and repairing the same.

The obligations of the tenant under the agreement are, inter alia, as follows: Under clause 2 (C): "To keep the interior of "the flat together with all the fixtures and fittings now or "hereafter therein (including the doors windows sanitary and "water apparatus thereof) in good and substantial repair and "clean sanitary condition (fair wear and tear and damage by "accidental fire excepted), and so to deliver up at the end or "sooner determination of the tenancy." Under clause 2 (E): "To observe and perform the rules and regulations specified in "the schedule thereto or any reasonable modification thereof or "additions thereto made from time to time by the landlord for "the proper conduct of the building and of which notice shall be "given to the tenant in writing or left for the tenant at the flat. "The tenant shall accept as final and binding the landlord's "decision upon any matter arising out of the said rules and "regulations or any such modifications thereof or additions "thereto."

Rule and Regulation (1) provides: "Tenants shall keep all "baths sinks cisterns and waste and other internal pipes in or "connected with their flats clean and open and in proper repair "and order and shall be responsible for all damage occasioned "to their own or other flats through any breach of this rule or "through the improper use or negligence of themselves or their "servants or through the stopping up or bursting of the said "baths sinks cisterns or pipes due to the negligence of the tenants "or their servants and shall carry out during the tenancy any "works required to the internal water pipe fittings apparatus, "etc., to comply with any notices served by the Metropolitan "Water Board or the local sanitary authority."

The obligations of the landlords under the agreement are, inter alia, as follows: Under clause 3 (B): "To pay the rates ". . . charged on or payable in respect of the flat . . . together "with the sum payable in respect of the wireless relay service "to the flat." Under clause 3 (C): "To supply and use its best "endeavours to maintain at all times at its own cost an efficient "service of hot water for domestic purposes through the central "heating installation and for the heating of the radiators to the "flat through the central heating installation . . ." Under clause 3 (D): "To light the staircase landings and corridors of "the building . . ."

As to the tenant's responsibility for repairs, the judge read rule 1 as being subject to the fair wear and tear clause in 2 (C), and held that the landlord could not put on the tenant under rule 1 any obligation which would be excluded by an express fair wear and tear clause. He also held that in fact the landlords had taken upon themselves to repair washers, etc., and, by sending a notice to tenants, had in practice modified the effect of rule 1. That notice reads as follows: "Re Water Taps. In "cases where taps require washering (that is to say where water "continues to drip when the tap is turned off) or re-seating

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" (where there is noise or vibration when the tap is turned) " tenants are particularly requested to report this to the Porter's " Lodge, when the landlords will be pleased to effect repairs " without charge to the tenant."

The judge heard a considerable body of evidence. In particular he had before him two experienced surveyors, Mr. Dale, on behalf of the landlords, and Mr. Russell Davies, on behalf of the tenant. Mr. Dale had the advantage of actual figures spent by the landlords on this and similar flats in respect of exterior repairs, and actual figures spent by the landlords for interior repairs in respect of comparable furnished flats where they had a liability for them. In the result the judge held that the landlords were liable in this case for: (a) all exterior repairs; (b) all interior repairs necessitated by fair wear and tear; and (c) plumbing repairs for which they had assumed responsibility under the notice to tenants that I have read. He held that the tenants' responsibility under 2 (C) and regulation 1 was only to do repairs that were not due to fair wear and tear, i.e., repairs due to a wrongful act or inadvertence of the tenant. He assessed these as about equal to the landlords' responsibility for repairs.

In his judgment he said: " Mr. Dale's evidence is based upon " a mathematical calculation of annual expenditure by the " applicants over a period of five years in the case of Chelsea " Cloisters. It appears to me to amount to this. The landlord's " liability should be arrived at by allowing the sum of £5 10s. " for the flat in respect of the exterior and common parts of " Chelsea Cloisters, so far as they are part of the 'dwelling' " under the interpretation clause of the Act (excluding, therefore, " the restaurant and squash court, and everything in fact which is " not included in a dwelling) and taking £4 (later agreed by the " parties at £4 5s.) as the yearly sum attributable to the interior " repairs of the flat. Mr. Dale deducts from this figure 10s. 6d. " for the tenant's four-thirds liability under clause 2 (C) of the " agreement, which contains the fair wear and tear clause, and " also £2, that being his estimate of the tenant's liability under " schedule 1 of the rules and regulations attached to the tenancy " agreement. This means that the landlord's liability for repairs " to the flat amounts to £5 10s. plus the figure of £4 5s. less " the £2 10s. resting upon the tenant, which reduces the £4 5s. " to £1 15s. In other words, the landlord's liability is £7 5s., " whereas the tenant's liability will be 10s. 9d. (about) under " clause 2 (C) of the agreement, plus another £2 under the regulations, which makes the tenant's liability £2 10s. 9d. in all. " That is a proportion of 14 to 6 as between the landlord and the " tenant."

In dealing with the other evidence the judge continued: " So far as expenditure on the exterior and common parts of the " building is concerned, I take the view that Mr. Dale's figures " are more probably, indeed almost certainly, correct, and I " allow £5 10s. for this item. So far as the repairs to the flat

" itself are concerned I will accept Mr. Dale's figure of £1 15s., " which is based on actual expenditure by the landlord over five " years (that is to say, £4 5s. less the tenant's liability of " £2 10s.) as correct. That leaves a total to the landlord of " £5 10s. plus £1 15s., or £7 5s. in all. That is the sum total " of the landlord's liability for repair of the flat. In my view, " however, the tenant's liability should be put at a far higher " figure than the £2 10s. that Mr. Dale allows, even taking into " account the fair wear and tear clause, as, of course, I must do. " My reason for forming this opinion is that in the case of a flat " such as this, where most of the fixtures and fittings are metal " or porcelain, or where all are indoors, the fair wear and tear " will be very small and may be regarded in some cases as " almost negligible. The main articles that will have to be " replaced by the landlord under the fair wear and tear clause " are the electric light bulbs and the washers on the taps. These " latter the landlord has specifically undertaken to be responsible " for by circulating the undated slip to which I have already " referred, although it appears to me that under the fair wear " and tear clause the landlord will be liable for this in any case. " The tenant, however, remains liable for all the rest of the repairs " inside the flat. I have in mind such items as the following: " (a) keeping waste pipes unblocked, and (b) repairing basins " cracked by dropping articles into them, for example, tooth " glasses, bottles, hairbrushes or tumblers; breaking the chain " or the handle, or whatever the contrivance is, of the lavatory " cistern, chipping the bath enamel; repairing damage to the " walls, caused, for example, by driving in nails or rawlplugs for " pictures and photographs; breaking the bath panel or a window " pane; damage to the fittings of the kitchenette; damage to the " woodwork from cigarette ends where more serious than mere " decoration can repair; and, more rarely, damage from the " flooding of his own or adjoining flats. All these are the sort of " things that happen in flats, and they cannot be regarded as " fair wear and tear. I take the view that even allowing for " the fair wear and tear clause the tenant's liability should be " assessed at not less than £7 7s. per annum in all. This view " does not necessarily conflict with Mr. Dale's figures, because " tenants who do damage which is obviously not fair wear and " tear have no motive for reporting it, and are more than likely " to put it right without the landlord knowing anything about it. " If they do report it the landlord's manager will probably tell " them that the landlord is not responsible for the carelessness " of the tenant. As I take the view, therefore, that as nearly " as I can form an estimate, the cost of repairs to the dwelling " is shared about equally between the landlord and tenant, I " hold the appropriate factor to be $1\frac{2}{3}$ of the gross value."

Mr. Lawson argues that the learned judge was in error in taking that view; that on a proper reading of the agreement and the Act the tenant's liability should, by virtue of the fair wear

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and tear exception, be considered nominal; and further, that one must exclude all liability of the tenant that does not arise solely under the agreement. The tenant would be liable for damages caused by acts of negligence at common law, but this liability should not be regarded as a liability for the purpose of this investigation, since the Act specifically refers to the tenant's responsibility under the terms of his agreement. Moreover, he argues, it is wrong on common sense grounds to credit the tenant, so to speak, with repairs that are due to his own negligence, since this is putting a premium on negligence. The only repairs that can properly be debited to the tenant are those which are not fair wear and tear, yet are not sufficiently blameworthy to be described as negligence or to make the tenant liable at common law apart from the covenant. If these arguments are correct, the judge has, as a matter of law, put the wrong weights into the scales, and therefore this court should alter his findings.

The question of what effect the wear and tear exception has on the tenant's liability has been much canvassed before us. The cases are not altogether easy to reconcile and no doubt each case must largely depend on its particular facts. We think that the clearest definition is that which was given by Bruce J. in *Terrell* v. *Murray*,[1] where he said: "That it was a little curious "that there was no very satisfactory authority as to the meaning "of the words fair or reasonable wear and tear. He could not "agree with Mr. Bosey when he said that no meaning ought "to be given to the words at all, nor could he agree that they "had no operation in regard to the outside of the premises. The "meaning of the covenant in his opinion was that the tenant was "bound at the end of the tenancy to deliver up the premises "in as good condition as they were in at the beginning subject "to the following exceptions, that was to say, dilapidations "caused by the friction of the air, dilapidations caused by "exposure, and dilapidations caused by ordinary use."

That definition was adopted by Sankey J. in *Citron* v. *Cohen*.[2] To that definition we would add the words of Lord Evershed M.R. in *Brown* v. *Davies*,[3] with reference to a fair wear and tear exception: "I do not think it necessary or right that I should "attempt to give an exposition of the exact scope of this pro-"vision. I am satisfied to put it no higher than that if proof is "given that the tenant is not keeping the premises in a fair and "tenantable manner and not keeping the interior clean and well "repaired and decorated, then at the very least the tenant must "establish that the matters complained of ought to be attributed "to dilapidation or damage resulting from reasonable wear and "tear and to nothing else."

Romer L.J. said[4]: "The truth is that, in order to find out "the scope and effect of a qualified covenant to repair, you have

[1] (1901) 17 T.L.R. 570.
[2] (1920) 36 T.L.R. 560.
[3] [1957] 3 W.L.R. 818, 825; [1957] 3 All E.R. 33.
[4] [1957] 3 W.L.R. 825, 828.

" got to look at the document as a whole, and it appears to me " to be going far beyond anything that was said by any of the " judges in *Taylor* v. *Webb* [5] to say that you merely have to find " an exception for reasonable wear and tear to reduce the scope " of the covenant to practically nothing at all."

The tenant's repairing covenant in this case being only in respect of the internal repairs, no consideration of the effect of the weather comes into it; and by the terms of the Act any element of decorative repair has to be eliminated from it for the purposes of this inquiry. We do not feel able to accept the view that the fair wear and tear exception in clause 2 (C) should be read without qualification into rule 1, since it seems inappropriate to the obligations in regard to various specific matters imposed by the rule. On the other hand, clause 2 (C) expressly applies the fair wear and tear exception to " sanitary and water apparatus," and it is difficult to hold that the rule wholly displaces the exception with regard to the very same matters. If that was the intention the references to negligence in the rule would appear to be superfluous. The solution may perhaps be that the exception qualifies the requirement of the rule as to keeping the pipes, etc., open and in proper repair and condition to the extent of absolving the tenant from liability from major works of replacement or repair (as distinct from ordinary current maintenance in regard to such matters as replacement of washers) where such works are necessitated by the ordinary effects of reasonably careful use as distinct from careless treatment or abuse.

But the judge's view on this question was in favour of the landlord, whose only complaint on this part of the case is that the judge, while rightly construing the agreement in regard to the application of the exception of fair wear and tear, was wrong in holding that upon the construction of the agreement the tenant was liable for anything more than a nominal share of the liability for repairs. On the other hand, the tenant, while submitting that upon the true construction of the agreement the exception of fair wear and tear does not apply to rule 1 of the schedule, is content to accept the figure at which the judge arrived. In these circumstances it seems to us that for the purpose of our decision we can assume, while by no means deciding, that the judge was right in applying the fair wear and tear exception to rule 1, and proceed to consider whether on that footing we can properly hold that he set the tenant's share of the liability for repairs too high and consequently made the appropriate factor too low.

The judge held that there was an appreciable amount of repair necessitated by what he described as " the sort of things that " happen in flats and cannot be regarded as fair wear and tear," of which he gave the instances that we have already read. In our view it cannot be said that there was no evidence on which he could so find. The question is whether in law he could

[5] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

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properly throw those occurrences into the tenant's scale as matters for which the tenant was responsible under the terms of the agreement. They were in fact matters for which he was so responsible. Mr. Lawson argues that the tenant's liability for them at common law makes it incorrect to describe them as a responsibility under the terms of the agreement. We cannot accept that argument. Such repairs are in fact a responsibility under the express terms of the agreement. The fact that there may be a concurrent liability at common law does not alter that fact. If one applies the test of common sense and practice, one can hardly imagine a landlord claiming against a tenant in respect of them other than under the express covenant.

It is true that the judge has estimated such tenant's repairs at a generous figure (a higher figure, perhaps, than that at which we would ourselves have been inclined to put them) with a consequential lowering of the appropriate factor. But we cannot go so far as to say that he was wrong in so doing. This is a county court appeal, and on questions of fact the judgment is not open to appeal. For these reasons, we are of opinion that this court should not alter the appropriate factor.

The next question is what is a reasonable charge for services. The Act does not define services. Lord Goddard C.J. in *Reg.* v. *Paddington North and St. Marylebone Rent Tribunal, Ex parte Perry*,[6] said: "The contractual services set out are central "heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases. Every "one of those seems to me to be a contractual service. If the "landlord has contracted to provide a lift, the maintenance "comes under services, because the lift has to be worked. It is "a service for the tenant. I should have thought that one of "the most important services is the provision of a lift. The non-"contractual services provided are porterage, cleaning common "parts, removal of refuse, pest control, floor coverings to com-"mon parts. The only one about which I should have thought "there was the least question is the floor covering to common "parts; but that is as much a service as heating and lighting "the staircase; it is an amenity which gives a better appearance "to the place."

The parties have very sensibly tabulated and to a large extent agreed a large number of items which have to be considered in arriving at a reasonable charge. These items include (as one would expect) various items for wages of porters, depreciation of carpets on stairs, fuel for central heating and the like. Two questions have been raised in the appeal in connexion with a reasonable charge for services. The first is in respect of replacement or depreciation of boilers, hot water service, lifts, radiators, towel rails and electrical wiring and fittings for use in the passages. In respect of all these the judge disallowed a depreciation or replacement item in computing the reasonable charge.

[6] [1956] 1 Q.B. 229, 236; [1955] 3 W.L.R. 744; [1955] 3 All E.R. 391, 395.

The second arises in respect of the landlords' claim to be allowed an element of profit on all the items of cost and, in particular, certain items of cleaning and maintenance which are carried out by a wholly owned subsidiary of the landlords. The judge disallowed the 10 per cent. overall profit which the landlords claimed.

So far as the first point is concerned, it seems to us that, once it is conceded (as it must be and is in this case) that the plant in question is necessary in order to provide the services, some provision for its depreciation or replacement must be included in any computation of the reasonable charge for those services. In 1956 the landlords spent £5,000 in renewing the boilers; in 1955 they spent £3,500. They have not brought these sums into account since, in their view, it would be capricious and unscientific to take particular years; they prefer to put forward an item representing an average annual allowance for depreciation, or sinking fund for replacement, calculated on the estimated life of the plant. In our view, no computation of a reasonable charge can be made without taking some such item into consideration. The life of plant used in providing a service is one of the important matters to be considered in finding out both what the provision for the service costs and what is a reasonable charge for it.

The judge held that these items were almost as much a part of the original building as the roof and staircase. "They "belong" he said, "rather to what is actually let to the tenant, "that is they appear to be part of the dwelling rather than to be "part of the services supplied with it." He also held that they were really items for replacement and were "a charge against "the present tenants for the benefit of the landlord in many "years' time." With respect to the judge, we think this is an erroneous view. With any wasting asset such as plant some allowance must as a rule be made for depreciation if one is to arrive at a reasonable charge. We cannot accede to the argument that this was a pure question of fact and that here the judge was entitled to disregard those items as a matter of discretion. In our view, he was wrong in excluding depreciation or replacement from consideration.

He also held the view that if any such item were allowed, the appropriate basis would be replacement rather than depreciation, and that "replacement" as distinct from "repair" could not reasonably be regarded as a service to the tenant. But the question is not whether a provision for depreciation or replacement is a service to the tenant, but whether a provision in one or other of these forms for the wearing out of the plant can properly be allowed as part of the cost of providing the services for the provision of which the plant is required. The landlords' claim under this head is in fact based on the estimated cost of replacement which, in view of the great increase in prices

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which has taken place since 1939, would be much more favourable to them than an allowance based on a yearly depreciation allowance calculated on the original cost. As the judge observed, the replacement basis "from the point of view of "prudent business dealing" is "the only safe way of calculating "a sinking fund." But it does not follow that the whole of the yearly provision which prudent business dealing might dictate can reasonably be charged against the tenant as part of the cost of the services which he enjoys.

As we understand the evidence, the landlord's calculation involves (a) estimating the total cost of providing at present prices new plant comparable to the existing plant; (b) estimating the period to be taken as representing the future life of the existing plant from the present time onwards; and (c) dividing the estimated cost at present prices of new plant of each category by the number of years representing the estimated future life of the existing plant of each category. The resulting figure with respect to each category of plant is then brought into the computation of the cost of providing the services rendered by means of the plant. It seems to us that this method of calculation places too heavy a burden on the tenant. It saddles him with the proportion attributable to his flat of the cost of providing the landlords with new plant which in fact may never be provided during his tenancy. The matter is not free from argument but it is, we think, concluded by the fact that the landlord can always apply to the court under section 4 to increase his charge if and when he instals his expensive new plant. In our view, depreciation and not replacement is the correct element to consider under this heading, and the yearly figure of depreciation should be arrived at with respect to each category of plant by taking the actual cost of such plant when originally installed (whether in 1939 or at some later date), and dividing it by the number of years comprised in its actual past and estimated future life.

In our view, the figure allowed for depreciation should not take into account the hot towel rails and radiators in the flat. Although they are an indispensable adjunct to the hot water service, yet they were in fact expressly let as part of the fixtures in the flat and, as such, fall to be dealt with in matters relating to the rent, and not as an item in estimating what is a reasonable charge for the provision of hot water. We understand that once the principle is decided the parties will have no difficulty in calculating the resulting figures, and we are not to be concerned with the details. It seems, therefore, that it will not be necessary to send the case back for rehearing.

There remains the question whether there should be allowed to the landlords any item of profit and, if so, how it should be calculated. The landlords claim that 10 per cent. on the total costs should be allowed as profit. They urge that this is a small percentage compared to the common run of commercial profits.

They point out that if their figures were accepted in toto the charge to the tenant would still be reasonable, namely, 24s. per week for central heating, wireless, porters, lifts, and cleaning, heating and lighting of communal parts of the building, whereas in fact the judge allowed about 15s. per week, which they say is unreasonably low.

The judge considered an observation of Goddard L.J., delivering the judgment of the Court of Appeal in *Bell Property Trust Ltd.* v. *Hampstead Assessment Committee*,[7] that quarter sessions had allowed a deduction for profit on the ground that "the landlords would not provide these services and amenities "for the bare cost, but would want a return on their outlay," and that that seemed very reasonable to the court. The judge went on to say: "To the credit of the landlords in the present "case I do not think this consideration applies, as it is conceded "that they are good landlords, anxious for the comfort and "welfare of the tenants. They are unlikely, I feel, to reduce "their services unless they are allowed a profit on them. On "the whole, therefore, I take the view that dealing as I am "with a new Act of Parliament I am intended by the legislature "to be free to decide either way whether a reasonable charge for "services should in this particular case include a profit or not. "If it had been intended that I should not be free to include "profit the simplest way would have been to allow merely the "actual cost of services, instead of using the phrase 'a reason-"'able charge,' and I must, therefore, decide whether in the "present case a reasonable charge for services should include a "profit on such services.

"I have come to the conclusion that in this particular case "it should not, and my reasons are the following: (i) that even "at the present rent Chelsea Cloisters is not being run at a loss, "and can show a profit after setting aside a fund for replace-"ments and after meeting rates; (ii) that what is more important "still is that the sum allowed for repairs under the Act, that is "to say the difference between £54 plus one-third (that is £72), "and twice £54 (that is £108), which is £36, of which I am "allowing one-half to the landlord and one-half to the tenant, "will show them a greatly increased profit, as a result of this "Act, on what they are now making. Generally speaking, the "result of the Act, without allowing a profit on the cost of the "services, will be to add very considerably to the profit already "being made by the landlord out of the running of Chelsea "Cloisters, and this profit, naturally and quite properly, will be "at the expense of the tenant. The further reason is that a "profit on some of the services appears to me to be made by "the appellants' Maintenance Company, and that should not be "made twice over. Consequently, in this particular case, I "have come to the conclusion that a reasonable charge for "services should not include a profit on them."

[7] [1940] 2 K.B. 543, 556; 57 T.L.R. 10; [1940] 3 All E.R. 640.

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The last reason given by the judge seems to us an adequate reason for not allowing any profit on the items of maintenance done under contract by the landlords' wholly owned subsidiary company. The evidence seems to us to establish that that company having made a full (but fair) charge, including a profit to themselves, then gave to the landlords a rebate consisting of the resulting profit to that company. As the judge allowed the subsidiary company's full charges, it followed that the rebates received by the landlords constituted a profit to them in respect of those items.

So far as concerns other items, however, we do not feel that the two reasons given by the judge are valid reasons for allowing no profit. We find no clear evidence that the unit of Chelsea Cloisters (which is one of many properties owned by the landlords) was in fact not being run at a loss. There was certainly no evidence that the controlled tenancies therein were not being run at a loss. But in any event this could not, we think, be a good reason for eliminating a profit element. Profit is a normal element in a reasonable charge. The landlord has the ultimate responsibility and it is fair that he should have some profit to compensate for this. Moreover, the sums expended in providing the services could if not so expended be profitably employed in some other direction. Had the Act otherwise intended we think that it would have used words based on "cost" instead of the words "reasonable charge."

Nor could the fact that the increase in rent under the Act was substantial be a good reason. The permitted rent was still a controlled rent far lower than the economic rent which the flats could command. There is nothing in the Act to suggest an intention that permitted increases or the fact that a landlord was not running at a loss should affect the amount of "a reasonable "charge."

Each case must depend on its own circumstances. But holding, as we do, that prima facie some profit should be allowed in a reasonable charge, we see nothing in the facts of this case to justify the court in not allowing some profit on services other than those of the maintenance company. We can envisage unusual circumstances in which it would be proper to disallow any profit in computing a reasonable charge, e.g., when owing to uneconomical management the addition of a profit margin makes the resulting charge higher than is reasonable. But there is no such suggestion in this case.

A convenient method of allowing a profit is by allowing a percentage on the overall costs. What percentage would be a fair one in this particular case? Many considerations apply in deciding such a point. Though one naturally wishes to encourage landlords to provide services, it must be remembered in this case that the services are a subsidiary activity of landlords and have for them the collateral advantage of making their property attractive. In this aspect the landlords are in a wholly different

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position from a company whose main activity is in providing services, not to their own tenants, but to the public at large, and whose commercial raison d'être is based on profit derived from that source. We think that in the computation of a reasonable charge in this case there should be allowed to the landlords a 5 per cent. profit (simple interest basis) on all items other than the item of maintenance by their subsidiary company and the item of depreciation on boilers, hot water service, lift and electrical wiring and fittings for use in the passages. We wish to emphasize strongly that the figure we have allowed for profit in this case is one that seems to us in our discretion, and purely as a question of fact, to be a fair figure in the particular circumstances. We have fixed a figure in order to save the costs of a further hearing before the judge and it is not intended as any guide to what other tribunals should decide in other cases.

It must be remembered that in deciding the appropriate factor or computing what is a reasonable charge a broad approach is necessary. It is impossible to seek to define any hard and fast rules or considerations. The most for which one can hope is an approximate estimate of what is fair and reasonable in the particular case. Too much precision and rigidity is apt to defeat this object. As we have differed from the judge in some matters we should perhaps add that we have been very greatly helped by the full, careful and clear judgment in which he dealt with complicated and difficult problems.

JENKINS L.J. We dismiss the appeal on the "appropriate "factor," and remit the other two matters to the county court in order that the figures, if not agreed between the parties, may be fixed by the county court on the principles stated in our judgment.

Appeal dismissed as to appropriate factor, but allowed on other two points.
Leave to appeal to House of Lords.

Solicitors: *Stikeman & Co.; Graham Page & Co.*

A. W. G.

[COURT OF APPEAL.]

PYX GRANITE CO. LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

[1954 P. No. 3415.]

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Dec. 9, 10, 11, 12;
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Feb. 7.
Lord Denning, Hodson and Morris L.JJ.

Town and Country Planning—Development—"Authorized by Act"—Private Act enacting that heads of agreement between parties "are "hereby confirmed and made binding" on parties—Whether provisions binding as a contract or as a statute—Whether permission required—Quarrying—Permission granted subject to conditions

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imposed by Minister — Whether conditions related to permitted development valid without provision for compensation — Malvern Hills Act, 1924 (14 & 15 *Geo.* 5, *c.* xxxvi), *s.* 54, *Sch.* 4 — *Town and Country Planning Act*, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 14, 15, 17, 26, 27 — *Town and Country Planning General Development Order*, 1950 (*S.I.* 1950, *No.* 728), *arts.* 3 (1), 4 (1), *Sch. I, Class XII.*

Town and Country Planning—Development—Conditions—Validity.

Practice and Procedure — Declaratory judgment — Town and Country Planning — Development — Declaration — Whether jurisdiction to grant declarations ousted by statute—Town and Country Planning Act, 1947, *ss.* 14, 15, 17.

Statute—Construction—Jurisdiction of High Court—Not to be taken away save by clear words.

Crown Practice — Certiorari — Inferior tribunal—Minister—Town and Country Planning—Development—Validity of conditions—Whether certiorari will lie—Town and County Planning Act, 1947, *s.* 14.

A private Act of Parliament, the Malvern Hills Act, 1924, promoted to preserve the amenities of the hills against depredations by quarrying, provided by section 54 [1] that "for the protection" of the plaintiff company (which carried on extensive quarrying operations in the area affected by the Act, both on their own freehold and over licensed land) "the following provisions shall unless "otherwise agreed in writing between the company the Conservators and the Malvern Council have effect (that is to say):— "The heads of agreement as set forth in the Fourth Schedule to "this Act are hereby confirmed and made binding" on the parties "and the provisions of this Act shall only apply to and affect the "undertaking property or rights of the company subject to the "provisions of the said heads of agreement."

The heads of agreement were incorporated, with some variation, in a deed executed in December, 1925, after the passing of the Act. Under the deed the company gave up their rights to quarry many acres of the licensed land in return for a promise by the conservators that the company's rights to quarry on their freehold land and on some 23 acres of licensed land should remain undisturbed.

The Town and Country Planning General Development Order, 1950,[2] made under the Town and Country Planning Act, 1947, provides, so far as material (by article 3 (1) read with Class XII of the First Schedule to the Order), that "development authorized

[1] Malvern Hills Act, 1924, s. 54: "For the protection of the Pyx "Granite Company Limited (in this "section referred to as 'the com-"'pany') the following provisions "shall unless otherwise agreed in "writing between the company and "the Conservators and the Malvern "Council have effect (that is to say): "The heads of agreement as set forth "in the Fourth Schedule to this Act "are hereby confirmed and made "binding on the company and the "Conservators and the Malvern "Council and the provisions of this "Act shall only apply to or affect "the undertaking property or rights "of the company subject to the "provisions of the said heads of "agreement."

[2] Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), Article 3: "(1) Subject to the sub-"sequent provisions of this Order, "development of any class specified "in the First Schedule to this Order "is permitted by this Order and may "be undertaken upon land to which "this Order applies, without the "permission of the local planning "authority or the Minister. . .": Sch. I, Pt. I, Class XII: "Develop-"ment authorized by any local or "private Act of Parliament or by any "Order approved by both Houses of "Parliament, being an Act or Order "which designates specifically both "the nature of the development there-"by authorized and the land upon "which it may be carried out."

"by any local or private Act of Parliament" may be undertaken without permission.

By these proceedings the company claimed declarations that the development which they proposed to carry out on their freehold and licensed land was "authorized" by the Malvern Hills Act, 1924, and that accordingly two ministerial decisions, in 1949 and 1953, refusing them permission in respect of part of their proposed development and granting permission subject to certain conditions in relation to other parts of their operations were of no effect; and, further, that the conditions imposed by the Minister, exercising his powers under section 14 of the Act of 1947,[3] were invalid, as

[3] Town and Country Planning Act, 1947, s. 14: "(1) Subject to the "provisions of this and the next "following section, where application "is made to the local planning "authority for permission to develop "land, that authority may grant per- "mission either unconditionally or "subject to such conditions as they "think fit, or may refuse permission; "and in dealing with any such appli- "cation the local planning authority "shall have regard to the provisions "of the development plan, so far as "material thereto, and to any other "material considerations. (2) Without "prejudice to the generality of the "foregoing subsection, conditions may "be imposed on the grant of permis- "sion to develop land thereunder— "(*a*) for regulating the development "or use of any land under the control "of the applicant (whether or not it "is land in respect of which the "application was made) or requiring "the carrying out of works on any "such land, so far as appears to the "local planning authority to be ex- "pedient for the purposes of or in "connexion with the development "authorized by the permission; (*b*) "for requiring the removal of any "buildings or works authorized by "the permission, or the discontinu- "ance of any use of land so author- "ized, at the expiration of a specified "period, and the carrying out of any "works required for the re-instate- "ment of land at the expiration of "that period; and any permission "granted subject to any such con- "dition as is mentioned in paragraph "(*b*) of this subsection is in this Act "referred to as permission granted "for a limited period only."

S. 15: "(1) The Minister may give "directions to any local planning "authority . . . requiring that any "application for permission to develop "land, or all such applications of "any class specified in the directions, "shall be referred to the Minister "instead of being dealt with by the "local planning authority, and any "such application shall be so referred "accordingly. (2) Where an appli- "cation for permission to develop "land is referred to the Minister "under this section, the provisions "of subsections (1) and (2) of the "last foregoing section shall apply ". . . in relation to the determina- "tion of the application by the "Minister as they apply in relation "to the determination of such an "application by the local planning "authority: Provided that before "determining any such application "the Minister shall, if either the "applicant or the local planning "authority so desire, afford to each "of them an opportunity of appear- "ing before and being heard by a "person appointed by the Minister "for the purpose. (3) The decision "of the Minister on any application "referred to him under this section "shall be final."

S. 17: "(1) If any person who "proposes to carry out any operations "on land or make any change in the "use of land wishes to have it "determined whether the carrying out "of those operations or the making "of that change in the use of the "land, would constitute or involve "development of the land within the "meaning of this Act, and, if so, "whether an application for permis- "sion in respect thereof is required "under this Part of this Act . . . he "may, either as part of an applica- "tion for such permission, or without "any such application, apply to the "local planning authority to deter- "mine that question. (2) The fore- "going provisions of this Part of this "Act shall . . . apply in relation to "any application under this section "and to the determination thereof "as they apply in relation to applica- "tions for permission to develop land "and to the determination of such "applications: Provided that where it "is decided by the Minister under "any of the said provisions that any

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restrictions on the continuance of an existing use which could be imposed only under section 26 of the Act of 1947 with compensation as provided by section 27 of that Act.

The defendants raised preliminary objections that the court had no jurisdiction to grant the declarations asked for, since (a) by the combined effect of sections 15 and 17 of the Act of 1947[3] the decision of the Minister on an application to determine whether permission was required "shall be final" and the only method of determining such a question was that provided by section 17 (1) (whereby a person "may . . . apply" to the local authority to determine it); and (b) the wide discretion conferred by section 14 on the Minister to impose conditions disentitled the company from coming to the court for a declaration that the conditions were invalid:—

Held, (1) (Hodson L.J. dissenting) that nothing in section 17 or in the Act excluded the jurisdiction of the court to grant declarations; and section 17 did no more than provide an optional method of having the question determined by the Minister.

Barraclough v. *Brown* [1897] A.C. 615; 13 T.L.R. 527 distinguished.

Decision of McNair J. in *Francis* v. *Yiewsley and West Drayton Urban District Council* [1957] 2 Q.B. 136; [1957] 3 W.L.R. 919; [1957] 1 All E.R. 825 applied.

Per Hodson L.J. Planning is the creature of statute, and Parliament has provided its own method for the determination of the question here involved, giving by section 17 exclusive jurisdiction to the local authority and the Minister; this court, cannot, therefore, be asked to make the declaration sought. No significance is to be attached to the use of the word "may"; the same permissive word "may" was contained in the statute under consideration in *Barraclough* v. *Brown* (supra).

(2) (Morris L.J. dissenting) that the company required permission, for the development was not "authorized" by the Malvern Hills Act, 1924, but by the subsequent agreement of December, 1925. Authorization by Act of Parliament requires the need for sanction, and the Act of 1924 did not authorize the company to do anything. The effect of section 54 of that Act was to make the provisions of the heads of agreement as binding as a contract, not as binding as a statute.

Reg. v. *Midland Railway Co.* (1887) 19 Q.B.D. 540 applied.

Per Morris L.J. Parliament, by section 54 of the Act of 1924, gave formal approval and sanction to the activities of the company, and thereby "authorized" a piece of elaborate and detailed planning which constituted development.

(3) That the conditions imposed by the Minister were valid as being fairly and reasonably related to the permitted development.

Per Lord Denning. Remedy by declaration was clearly available on this issue, but *quaere* whether certiorari would have lain.

Per Hodson L.J. It was doubtful whether the Minister's decision on this issue could properly be impeached by declaration. That could have been done by certiorari.

Rex v. *Hendon Rural District Council, Ex parte Chorley* [1933] 2 K.B. 696; 49 T.L.R. 482 considered.

operations or use to which an application under this section relates would constitute or involve development of the land, or that an application for permission is required as aforesaid in respect thereof, that decision shall not be final for the purposes of any appeal to the court under the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that use."

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APPEAL from Lloyd-Jacob J.

The facts, in chronological order, were as follows. In 1924 a private and local Act of Parliament, the Malvern Hills Act, 1924, was promoted on a bill by the Malvern Hills Conservators, a body constituted and incorporated under earlier private Acts, to obtain greater powers to preserve the amenities of a place of great natural beauty. The preamble to the Act stated that "whereas in recent years the amenities of the Malvern Hills "have been seriously interfered with by quarrying operations "and by the erection of buildings sheds machinery and plant "and their operations are being extended in such manner as to "threaten to destroy the value of the Malvern Hills as objects "of public interest" the conservators asked for further powers of "protecting controlling and dealing with" the hills.

The Bill was opposed on its passage through Parliament by, inter alia, the plaintiff company, Pyx Granite Company Ltd., an existing quarry undertaking with extensive vested interests in the area concerned. They were the owners in fee simple at all material times of 11 acres of the land (the "Tank Quarry"), five acres of which have never yet been quarried and contain stone sufficient to last 100 years; and they also had various licences to work other extensive quarryable areas. Negotiations took place during the passage of the Bill with various interested parties, and by sections 26 and 27 of the Act, Parliament empowered the Minister of Health, on the application of the conservators, to make orders prohibiting quarrying on any particular part of the Hills, but provided that the conservators should pay compensation to the owners affected by such orders.

The particular negotiations between the plaintiff company, the conservators and the Malvern Council resulted in extremely detailed "heads of agreement" being drawn up and set out in the Fourth Schedule to the Act, and by section 54 of the Act [1] were "hereby confirmed and made binding" on the parties.

The heads of agreement contemplated that a formal agreement would be executed; and after some differences between the parties, which were only resolved after a decision of the Court of Appeal on June 24, 1925, a deed was executed on December 14, 1925, by the Malvern Council, the conservators, and the company, under which the company gave up their right to quarry on a considerable area of land in return for a promise by the conservators that the company's rights to quarry on their freehold property (the Tank Quarry) should not be prejudiced or affected by the deed and that the company should have the right to quarry on some 23 acres of land licensed to them by the council.

On November 17, 1947, before the coming into force of the Town and Country Planning Act, 1947, the company applied to the Malvern Council for permission to develop the land for quarrying purposes. The provisions of the Town and Country Planning, England and Wales Interim Development Order

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(S.R. & O., 1946, No. 1621), made under the Town and Country Planning Acts, 1932 to 1944, were then in operation; and on January 14, 1948, the Minister of Town and Country Planning "called in" the company's application for decision. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948; and by a letter on September 5, 1949, the Minister granted the company permission to win and work the minimum amount of granite required to ensure safety on the North Quarry part of the licensed lands by removal of a sufficient weight of rock to secure stabilization of a threatened slip, and to leave a trimmed face at a safe angle of repose, subject to three conditions.

In July, 1952, a public local inquiry was held by the Minister to inquire into the various applications for quarrying in the Malvern Hills. At the inquiry the plaintiff company informed the Minister that their quarrying operations were "development" within the meaning of the Act of 1947, which was permitted unconditionally by virtue of section 54 of the Malvern Hills Act, 1924, as "development authorized by any local or private Act "of Parliament . . ." and falling within the provisions of article 3 and Class XII of the First Schedule to the Town and Country Planning General Development Order, 1950 [2] (S.I. 1950, No. 728) (which revoked and replaced by identical provisions so far as material the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958)). The company accordingly invited a dismissal of their application by the Minister on the ground that no development permission was required.

By a letter dated September 30, 1953, the Minister stated that he was advised that notwithstanding the provisions of the Malvern Hills Act, 1924, and of the Order of 1950, permission was required by the company for the continuance of the operations in question and that he must deal with the application on its merits. He refused the company permission to win and work granite in respect of parts of the company's freehold land because he wished to preserve the skyline; and he also refused permission to work a spur of the licensed land because it screened the workings. He granted permission to win and work granite in a defined part of the freehold land until June 30, 1966, subject to conditions, which, so far as relevant, were (1) that crushing and screening should only be operated between such hours as might be agreed, and that steps should be taken to control the emission of dust therefrom, and (2) that all plant, machinery and foundations should be removed when they were no longer required, and that the site be left in a tidy condition.

On December 21, 1954, the company issued the writ in the present proceedings, claiming declarations (1) that the winning and working of stone by them in certain lands and quarries at Malvern was development within the meaning of the Town and Country Planning Act, 1947, for which there was unconditional

planning permission; (2) that the purported decision of September 5, 1949, by the Minister of Town and Country Planning, and the purported decision dated September 30, 1953, by the Minister of Housing and Local Government, were of no effect and invalid and in no way affected the company's rights to win and work pursuant to the said unconditional permission; (3) alternatively, that certain conditions purported to be imposed by the purported decisions of the Minister were of no effect and invalid; and they also asked for an injunction to restrain the Worcestershire County Council (the second defendants) from acting as the local planning authority on the said decisions.

The defendants claimed by the defence, inter alia, on a preliminary objection, that as the combined effect of sections 15 and 17 of the Town and Country Planning Act, 1947,[3] provided statutory procedure for the determination of any question as to whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for which permission would be required, and enacted that any decision of the Minister made on an application under section 17 (1) "shall be final," the court had no jurisdiction to grant the declarations asked for. Secondly, they claimed that the development sought by the company was not "authorized" by the Malvern Hills Act, 1924, and accordingly permission was necessary. Thirdly, they claimed that the discretion conferred on the Minister by section 14 (1) and (2) (*a*) entitled him to impose conditions and the company was not therefore entitled to declarations in respect of those conditions.

Lloyd-Jacob J., in his judgment on April 16, 1957, held that he had jurisdiction to grant declarations, and granted declarations in favour of the company accordingly.

The Minister and the council appealed.

G. D. Squibb Q.C., *Rodger Winn* and *Andrew Leggatt* for the Minister of Housing and Local Government and the County Council of the Administrative County of Worcester.

J. Ramsay Willis Q.C. and *William Scrivens* for the company.

The following cases were referred to in the course of the argument: *Reg.* v. *Midland Railway Co.*[4]; *Barraclough* v. *Brown*[5]; *Barnard* v. *National Dock Labour Board*[6]; *Taylor (formerly Kraupl)* v. *National Assistance Board and Law Society*[7]; *Evans* v. *E. Hulton & Co. Ltd.*[8]; *Herron* v. *Rathmines and Rathgar Improvement Commissioners*[9]; *Attorney-General* v. *North Eastern Railway Co.*[10]; *Rex* v. *Hendon Rural*

[4] (1887) 19 Q.B.D. 540.
[5] [1897] A.C. 615; 13 T.L.R. 527.
[6] [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113.
[7] [1957] P. 101; [1957] 2 W.L.R. 189; [1957] 1 All E.R. 183; 46 T.L.R. 489.
[8] (1924) 131 L.T. 534.
[9] [1892] A.C. 498.
[10] [1915] 1 Ch. 905.

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District Council, Ex parte Chorley [11]; *In re 42–48 Paddington Street* (*sub nom. London County Council* v. *Marks & Spencer Ltd.*) [12]; *Ealing Borough Council* v. *Minister of Housing and Local Government* [13]; *Hanson* v. *Radcliffe Urban District Council.* [14]

Cur. adv. vult.

Lord Denning: The Malvern Hills are of great natural beauty. They are also an important source of granite for roads. The Pyx Granite Company have the right to quarry in two areas of the Hills. The questions in this case are two: first, whether the company have to obtain the permission of the planning authority before breaking fresh surface; second, if permission is necessary, what conditions can the planning authority lawfully impose?

The Minister of Housing and Local Government says that the company are not entitled to win and work granite from the Hills except with the special permission of the local planning authority, that is, the Worcestershire County Council, or of the Minister. The Minister is ready to grant permission to the company to quarry to a limited extent, but no more.

There are two quarryable areas concerned. One is the Tank Quarry area. It is the freehold property of the company. It is the most important of the Malvern quarries, and is 11 acres in extent. There are five acres of it not yet touched which contain sufficient stone to last 100 years. The Minister, by a letter dated September 30, 1953, refused permission to work a tract of this land because he wished to preserve the skyline; and he also refused permission to work a spur of the land because it screened the workings. He has granted permission to work the remainder, but only until June 30, 1966.

The other is the North Quarry area. It is owned by the Malvern Council, but they have granted to the company licences to work it until June 24, 1960. It is 23 acres in extent, but is in a dangerous state. There is a fault which has threatened to cause a large fall of rock. The Minister, by a letter dated September 5, 1949, has granted to the company permission to win and work the *minimum* amount of granite required to secure safety, but by the letter of September 30, 1953, he has refused permission for any other working.

The Pyx Granite Company contend that the Minister's letter refusing permission is of no validity at all. They say that they do not require special permission to work these areas because they were authorized to work them by a local or private Act of Parliament, namely, by the Malvern Hills Act, 1924. They say

[11] [1933] 2 K.B. 696; 49 T.L.R. 482.
[12] [1953] A.C. 535; [1953] 2 W.L.R. 932; [1953] 1 All E.R. 1095, H.L.; affirming [1952] 1 All E.R. 1150.
[13] [1952] Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639.
[14] [1922] 2 Ch. 490; 38 T.L.R. 667.

that development so authorized comes within the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958) [revoked and replaced by the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), para. 3 and Class XII of which are in terms and effect, so far as material, identical with the corresponding provisions of the Order of 1948] which makes special permission unnecessary. The Minister has rejected this contention, and the company now bring this action asking the court to declare that they are in the right about it.

Mr. Squibb takes a preliminary objection. He says that the court has no jurisdiction to entertain this claim for a declaration, and he relies on *Barraclough* v. *Brown*[1] for the purpose. The only procedure open to the company is, he says, by application under section 17 of the Town and Country Planning Act, 1947, which provides that "if any person who proposes to carry out "any operations on land . . . wishes to have it determined . . . "whether an application for permission in respect thereof is "required under this Part of this Act having regard to the pro-"visions of the development order, he may . . . apply to the "local planning authority to determine the question."

It is as well to see what the procedure of section 17 entails. Take a company which wants to know whether permission is required for its proposed development. The company can apply to the county council to know whether permission is required or not. If the county council decides that permission is required, the company can appeal to the Minister, or the Minister can "call in" the application to be determined by himself in the first instance. If the Minister decides (either on appeal or at first instance) that permission is required, there is no appeal to the courts from his decision at that stage, but his decision is not final. The company can test the correctness of it in a roundabout way. They can ignore his decision, and carry out their operations without permission; and then, when the county council serve an enforcement notice, the company can appeal to a court of summary jurisdiction and ask for the notice to be quashed on the ground that no permission was required—see section 23 (4) (*a*)—and thence, by applying for a case to be stated, the company can obtain the ruling of the High Court. See what this means. The company would have to do the work at much expense without having any decision of the courts as to their rights, and at the risk of being ordered to pull it down if they were wrong.

So much for the remedy under section 17. Is it the only remedy? That depends on the true interpretation of the Act. I take it to be settled law that the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words. In *Barraclough* v. *Brown*,[1] the words were sufficiently clear. In that case Parliament had,[2] "by plain implication,

[1] [1897] A.C. 615; 13 T.L.R. 527. [2] [1897] A.C. 615, 622.

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"enacted that no other court has any authority to entertain or "decide these matters"; see *per* Lord Watson. That is shown by the recent case of *Francis* v. *Yiewsley and West Drayton Urban District Council*,[3] where a man was aggrieved by an enforcement notice served under the Act of 1947. He said it was invalid. The Act gave him a remedy by way of appeal to a court of summary jurisdiction. Section 23 (4) said "he may" appeal. The planning authority argued that that was the only remedy. But McNair J. and this court held that the existence of the statutory remedy did not bar him from seeking a remedy by declaration. McNair J. said[4]: "It is a fundamental rule "that if a subject is to be deprived of a right of coming to these "courts it must be in clear words." I entirely agree.

Applying this principle, I find nothing in the statute to bar recourse to a declaration. Section 17 is, no doubt, a convenient remedy. It enables a ruling to be obtained from the Minister in a way which is simple and inexpensive. But it is not the only remedy. Section 17 says that "he may" apply to the local planning authority, not that he *must* do so. The proposed work may be of such importance that the developer may desire the ruling of the High Court before starting on it. The only means of getting such a ruling is by an action for a declaration, and I see nothing in the Act to bar it. In my opinion, the preliminary objection fails.

I turn, therefore, to the substantial dispute. The company says that the working of these areas is covered by the general development order, and does not need the permission of the local planning authority or of the Minister. The general development order permits any development to be carried out if it is "development *authorized* by any local or private Act of Parlia- "ment . . . being an Act or Order which designates specifically "both the nature of the development thereby authorized and the "land upon which it may be carried out"; see Article 3 and class XII of the First Schedule to the Order of 1950. The company say that the development of these areas is authorized by the Malvern Hills Act, 1924, but the Minister disputes it.

The dispute depends on the true effect of the Act of 1924. It appears from the recitals that the amenities of the Malvern Hills were threatened by quarrying operations. Parliament desired to save the beauty of the Hills. But the quarry owners had vested rights of quarrying which they claimed should not be taken away without compensation. There seems to have been much negotiation in the course of the Bill through Parliament. In the result, Parliament, by sections 26 and 27 of the Act, empowered the Minister, on the application of the Malvern Conservators, to make orders prohibiting quarrying on any particular part of the Hills;

[3] [1957] 2 Q.B. 136; [1957] 3 W.L.R. 919; [1957] 1 All E.R. 825.

[4] [1957] 2 Q.B. 136, 148.

but the conservators had to pay compensation to the owners affected. This obligation to pay compensation would have a restrictive effect on attempts to preserve the Hills. The conservators might not be able to afford to buy out some quarry owners such as the Pyx Granite Company. Negotiations therefore took place between the company, the Malvern Conservators, and the Malvern Council, as a result of which "heads of "agreement" were drawn up, under which the company were to give up their right to quarry many acres of land over which they held a licence, and were to limit their rights of quarrying to 23 acres of licensed land. (This was outside their freehold property which was not affected by the Act.) The heads of agreement were confirmed and made binding by section 54 of the Act which provided that: "For the protection of the Pyx Granite "Company Limited . . . the following provisions shall unless "otherwise agreed in writing between the company and the Con- "servators and the Malvern Council have effect (that is to say):— "The heads of agreement as set forth in the Fourth Schedule "to this Act are hereby confirmed and made binding on the "company and the Conservators and the Malvern Council and "the provisions of this Act shall only apply to or affect the under- "taking property or rights of the company subject to the provi- "sions of the said heads of agreement." The heads of agreement contemplated that a formal agreement should be executed; and after some differences (which were only resolved after a decision of the Court of Appeal on June 24, 1925) a deed was executed on December 14, 1925, by the Malvern Council, the Malvern Conservators and the company. By this deed the company agreed not to quarry in any part of the Malvern Hills except their freehold property, and the quarryable areas there defined; and it was agreed that the company's rights to quarry stone on their freehold property were not to be prejudiced or affected by the deed.

The upshot of it all was that by agreement the company gave up their right to quarry on a considerable area of land in return for a promise by the Malvern Conservators and the Malvern Council that the rights of the company to quarry stone on their freehold property and on some 23 acres of licensed land should be left undisturbed. This amounted, I think, to an implied agreement *by the Malvern Conservators and the Malvern Council* authorizing the company to quarry stone within those limits. But was this authorized *by the Act*? The company say that it was authorized by virtue of section 54. The Minister disputes it.

This is a difficult question, and I can well understand the approach of the judge to it. Seeing that the heads of agreement were "confirmed and made binding" by the Act, it looks as if the provisions thereof (express or implied) were authorized by the Act. But we were referred to a case which was not cited to the judge and which throws a different light on the problem.

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It is *Regina* v. *Midland Railway*,[5] and the speech of Lord Cairns in *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*,[6] which was quoted in it. That case shows that there are two ways in which Parliament can give validity to the provisions of an agreement not yet formally completed. It can make the provisions *as binding as a contract*, simply dispensing with the execution by the parties; or it can make the provisions *as binding as a statute*, giving them the same force as if enacted in the statute itself. What has Parliament done here? It seems to me that section 54 does no more than make the heads of agreement as binding as a contract.

At that time the heads of agreement had not been executed by the parties, but they were nevertheless "confirmed and made "binding" on the parties, who could "otherwise agree" in writing. That is typical of a contractual bond. The section goes on to say that the provisions of the Act are only to apply to the company's undertaking "subject to the provisions of the said "heads of agreement." That is no more than saying that the provisions are to be regarded as a "contracting out" of the Act with the sanction of Parliament. The last paragraph of the heads of agreement contemplated that a formal agreement should be prepared and executed by the parties. This was done on December 14, 1925, by a deed which thenceforward replaced the heads of agreement. In these circumstances, I think the provisions of the heads of agreement cannot be regarded as equal to a statute, or as carrying the authority of Parliament, but only as of contractual force. The development of these quarryable areas was authorized by the agreement, but not by the Act of Parliament. It does not come, therefore, within the general development order, but needs the special permission of the local planning authority, or the Minister.

This is not the end of the case, because the company long ago took steps to safeguard their position. On November 17, 1947 (while the earlier Planning Acts were in force), they applied to the Malvern Council for permission to develop the land for quarrying purposes. On January 14, 1948, the Minister "called "in" the company's application for decision by himself in so far as it concerned the winning and working of minerals by surface working. When the Act of 1947 came into operation, the company's application was, by the statute, to be treated as if it was made under that Act. A local inquiry was held. By the letters of September 5, 1949, and September 30, 1953 (to which I have already referred) the Minister granted permission in respect of part of the land, but imposed conditions to which the company object. The conditions required that the company should take away their plant and machinery when they had finished, and so forth. The company say that the conditions are invalid in whole or in part, and seek a declaration to that effect.

[5] (1887) 19 Q.B.D. 510. [6] (1874) L.R. 2 Sc. & Div. 347.

Mr. Squibb on this part of the case takes another preliminary objection. There is nothing here corresponding to section 17 on which he previously relied. But he relies on the wide discretion given by section 14 of the Act of 1947 to the planning authority to impose conditions, and says that this discretion is not open to proceedings for a declaration. He read us passages from *Barnard* v. *National Dock Labour Board*,[7] and sought to deduce therefrom that the remedy by declaration only lies where there is no jurisdiction, not where it is wrongly exercised. I do not think there is any such limit to the remedy by declaration. The wide scope of it can be seen from the speech of Viscount Kilmuir L.C. in *Vine* v. *National Dock Labour Board*,[8] from which it appears that if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

Mr. Squibb also said that if the conditions are invalid, the only remedy is by certiorari, and not by declaration, thus implicitly admitting that there ought to be a remedy, but that the company had pursued the wrong form of it. He assumes that certiorari would lie to quash; but I am by no means sure about this. Certiorari is confined to judicial acts; and it can be argued that the Minister, when granting planning permission, is not acting judicially, but administratively, and that his decision is, therefore, not subject to certiorari. Mr. Squibb said that it is sufficiently near a judicial decision to be the subject of certiorari, and referred us to *Rex* v. *Hendon Urban District Council, Ex parte Chorley*.[9] But since that case there have been the decisions of the Privy Council in *Nakkuda Ali* v. *M. F. Des Jayarake* [10] and of the Divisional Court in *Rex* v. *Metropolitan Police Commissioner, Ex parte Parker* [11] which have restricted the scope of this remedy.

It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency, as this court had occasion to point out in *Reg.* v. *London County Council Education Committee Staff Sub-Committee, Ex parte Schonfeld*,[12] which was not reported on this point. It applies to administrative acts as well as judicial acts whenever their validity is challenged because of a denial of justice, or for other good reason. It is clearly available to enable the court to declare whether conditions imposed by a licensing authority are valid, no matter whether that

[7] [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113.
[8] [1957] 2 W.L.R. 112; [1956] 3 All E.R. 939.
[9] [1933] 1 K.B. 696; 49 T.L.R. 482.
[10] [1951] A.C. 66, 78; 66 T.L.R. (Pt. 2) 214.
[11] [1953] 1 W.L.R. 1150; [1953] 2 All E.R. 717.
[12] [1956] 1 W.L.R. 430; [1956] 1 All E.R. 753n. (C.A. Feb. 28, 1956).

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authority is acting judicially or administratively; see *Associated Provincial Picture Houses* v. *Wednesbury Corporation.*[13]

There are very good reasons here for entertaining a claim for a declaration. If these conditions are valid, they operate as a land charge, and must be entered in the register of land charges. It may be very important for the owner, or any proposed purchaser, to know whether they are valid or not before he commits himself to the proposed development. No statutory remedy is available for the purpose, and the best, if not the only, remedy is by way of a declaration. In my opinion, therefore, this preliminary objection also fails.

This brings me to the question whether the conditions imposed in this case are valid or not. The particular conditions to which the company object are those concerned with the plant and machinery which has been used in the quarries for years—not for actually winning the stone and getting it out of the ground, but for crushing it and putting it into a marketable state. The company say that they do not need permission to use this plant and machinery because they are using it in the same way as it was used before 1947. Yet the Minister has imposed conditions such as these: (1) He requires that crushing and screening shall only be operated between such hours as may be agreed, and that steps shall be taken to control the emission of dust therefrom. (2) He requires that all plant, machinery and foundations shall be removed when they are no longer required, and the site left in a tidy condition.

The Minister claims to impose these conditions under the general power contained in section 14 (1), or alternatively under the special power contained in section 14 (2) (*a*). The company say that if the Minister wishes to impose such conditions, he can only do it under the powers contained in section 26 which give a right to compensation under section 27.

The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose "such conditions as they think fit," nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction: see *Sydney Municipal Council* v. *Campbell*[14]; *Roberts* v. *Hopwood*[15] and *Smith* v. *East Elloe Rural District Council.*[16]

This principle was applied in a planning case where the London County Council gave permission for some manufacturers

[13] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.
[14] [1925] A.C. 338, 343.
[15] [1925] A.C. 578, 613; 41 T.L.R. 436.
[16] [1956] A.C. 736, 762, 763; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855.

to erect a new factory on a new site, but sought to impose a condition that their existing works on the old site should close down as soon as the new factory was brought into use. This condition was desirable in the interests of the over-all planning of the area. But the Minister was advised (rightly, I think) that the condition could not properly be imposed as it was, in part, an attempt to suppress existing development by depriving the manufacturers of the right to use their existing factory; and that suppression of an existing use of this kind could only be achieved by an order under section 26 [17]; see the Bulletin of Selected Appeal Decisions (VII/12). The Pyx Granite Company say that the conditions to which they object here are invalid for a similar reason, namely, as an attempt to impose conditions on the continuance of an existing use which can only be achieved by an order under section 26.

The judge thought that the company were right on this point, and it is only after much hesitation that I differ from him. I cannot shut my eyes to the fact that this plant and machinery is ancillary to the getting of stone from the quarries. The company win the stone from the working face, and for that operation they certainly have to get permission. Then they crush the stone and screen it, not actually at the place where they are excavating, but very near to it. If the question depended on the general words of section 14 (1) there might be a doubt whether the conditions were valid; but the special words of section 14 (2) were inserted so as to clear up any doubts about section 14 (1), and they seem to me to cover this case. These conditions require " the carrying " out of works " on land under the control of the company—although it is not the land in respect of which the application for permission relates—and they can properly be regarded as expedient " in connexion with " the permitted development.

I see no reason to attribute to the Minister any ulterior object. He evidently takes the view that if the company wish to win and work stone from these quarries for some years to come, they should take steps to ensure that there is as little nuisance as possible either from the blasting operations or from the ancillary operations of crushing and screening the stone; and they should clear up the place when they have finished. There is nothing unfair or unreasonable about that. After all, if the company do not wish to accept the permission on those conditions, their remedy is not to work the quarry. But if they do continue to work the quarry, they can fairly be expected to comply with these conditions. It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away. It might well be that that could only be done by an order under section 26. But here the plant and machinery is on the spot, and the conditions are so closely " in connexion with " the permitted development as to be valid. In my opinion, therefore,

[17] Hill's Complete Law of Town and Country Planning (4th ed.), 2nd Cumulative Supplement, pp. 489–490.

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although there is no technical barrier to the granting of declarations, the company have not succeeded in establishing a case for them. I would allow the appeal accordingly.

Hodson L.J. The first question is whether or not the court can grant the declaration first made by the judge. Section 17 (1) of the Town and Country Planning Act, 1947, provides statutory proceedings for the determination of any question whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for which, having regard to the provisions of any development order, permission is required to be obtained by application. A person who proposes to carry out operations *may*, in the words of the section, "either as part of an application for such permission, or without "any such application, apply to the local planning authority to "determine that question."

The effect of section 17 (2) read with its prior provisions section 15 (1) (2) and (3) is that any decision of the Minister given on an application made under section 17 (1) to determine the above question is final, save and except that provision is made for appeal against an order made for the enforcement of planning control.

In these circumstances, the principles laid down in *Barraclough* v. *Brown* [18] are, in my judgment, applicable. The headnote of this case reads as follows: "Where a statute gives a right "to recover expenses in a court of summary jurisdiction from a "person who is not otherwise liable, there is no right to come to "the High Court for a declaration that the applicant has a right "to recover the expenses in a court of summary jurisdiction; he "can only take proceedings in the latter court." Lord Herschell said [19]: "It would be very mischievous to hold that when a party "is compelled by statute to resort to an inferior court he can "come first to the High Court to have his right . . . deter-"mined." Lord Watson said [20]: "It cannot be the duty of any "court to pronounce an order when it plainly appears that, in "so doing, the court would be using a jurisdiction which the "legislature has forbidden it to exercise."

The judge disposed of this objection by reference to the date of the original application to the Minister, which was prior to the date of the coming into force of the Act of 1947, videlicet 1948; but the material matter to be considered is this action for a declaration which was commenced by writ in December, 1954, and the jurisdiction of the court to grant a declaration must be considered independently of whether any application has or has not been made to the local planning authority under section 17.

The position of the court is the same, whether or not the local planning authority or the Minister has made a determination. Planning is itself the creature of statute, and Parliament

[18] [1897] A.C. 615.
[19] Ibid. 620.
[20] Ibid. 622.

has provided its own method for the determination of the question here involved, videlicet whether planning permission is required. No significance is to be attached to the use of the word "may," which is the only word apt for the purpose. Indeed, it would not be sensible to make it compulsory for persons to seek a determination if they did not consider it in their interest to do so. The same permissive word "may" is contained in the statute under consideration in *Barraclough* v. *Brown*, supra.

Although the section now in question is directed to a different purpose from that involved in that case, there is to my mind no distinction in principle. The declaration sought must look to the future just as the determination to be sought under section 17, and I can see no good ground for distinguishing this case on the ground that the declaration speaks in the present tense. It is said, further, by the plaintiffs that it is inconvenient as between vendor and purchaser not to know whether there was an enforcement notice, and that therefore it is in practice highly desirable to be able to obtain a declaration of this nature; but I do not find that this argument carries the matter any further. The risk of planning interference by the Minister cannot be avoided, and a safeguard is provided by section 17 itself. In my opinion, the legislature has by section 17 given exclusive jurisdiction to the local authority and the Minister, and this court cannot be asked to make the declaration sought.

If I am wrong as to this, the question is whether the appellants are entitled to succeed upon the ground that the respondents were not authorized by the Malvern Hills Act, 1924, to develop their land for the purpose of winning and working of minerals by surface working in their quarries. The respondents rely on the words of clause XII of the First Schedule to the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958), made pursuant to the Act of 1947, revoked and replaced by the Town and Country Planning General Development Order, etc., 1950 (S.I. 1950, No. 728), which contains, so far as material, an identical schedule of permitted development. Class XII contains this: "Development authorized by any local "or private Act of Parliament or by any Order approved by both "Houses of Parliament, being an Act or Order which designates "specifically both the nature of the development thereby autho- "rized and the land upon which it may be carried out." The sole question is whether there has been such an authorization.

It is to be observed, first, that the respondents required no statutory authority to work their undertaking. Secondly, the Malvern Hills Act, 1924, as its preamble shows, was an Act framed to preserve the amenities of the Malvern Hills, and to deal with the interference with those amenities by quarrying operations, and by the erection of buildings, sheds, machinery, and plant. By sections 25, 26 and 27 of the Act the conservators might make and enforce bye-laws to regulate quarrying in, upon or under the Malvern Hills, and regulate the erection of buildings,

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etc., and the Minister of Agriculture and Fisheries might make orders for the prohibition of quarrying. Sections 28, 29 and 30 deal with procedure and enforcement of orders of the Minister.

[His Lordship read section 54 of the Act of 1924, and continued:] The heads of agreement are set out in the Fourth Schedule and contain the following paragraph: "A clause to be "inserted in the Bill excluding the undertaking property and "rights of the company from its operation except that bye-laws "may be made with the approval of the Home Secretary (after "notice to the company) in regard only to blasting operations in "the company's quarries for the protection of the public."

No such clause was ever inserted, and in 1925 it was held by the Court of Appeal that, the legislature not having seen fit to insert this clause in the Act when it became law, the court could not, by a process of construction, produce the same result, so that the undertaking of the respondents remained subject to the powers conferred on the conservators of making bye-laws for the regulation of quarrying in the area subject to their jurisdiction. Thus the Act of 1924 did not exclude the respondents' land from its operation.

There is nothing in the Act which specifically authorizes the respondents to carry on their quarrying or any other activities, but it is argued that by countenancing these activities there has been an authorization within the meaning of class XII of the First Schedule to the Development Orders to which I have referred.

The provisions of the Act are restrictive, and there is nothing in the agreement which is part of the Act except a variation of the rights of the parties to the agreement not amounting in any sense to the giving to the respondents of any new authority to work. Statutory confirmation of the agreement does not put the parties in a different position from that which they would have occupied if they had made an agreement which had not been so confirmed. Rights conferred by agreement are none the less conferred thereby when the agreement is confirmed by Act of Parliament. Authorization involves the need for sanction, as is illustrated by section 22 of the Act of 1924 and the Second and Third Schedules thereto, where the conservators are specifically authorized to purchase quarries, etc., notwithstanding anything contained in certain earlier Acts.

This construction of the Act of 1924 as not in itself authorizing the respondents to do anything is, in my opinion, supported by the judgment of the Court of Crown Cases Reserved in *Reg.* v. *Midland Railway Co.*,[21] which was not referred to in the court below. The question there was whether, under section 8 of the Regulation of Railways Act, 1873, a difference between railway companies was, under the provisions of any general or special Act, required or authorized to be referred to arbitration. Two

[21] 19 Q.B.D. 540.

railway companies had agreed that all questions of difference arising out of their agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, and a private Act was subsequently passed to which the agreement was scheduled, and by which it was provided that the scheduled agreement should be confirmed and made binding. It was held that the right to refer to arbitration was derived from the agreement, and that the difference was not "required or "authorized to be referred to arbitration under the provisions of "any general or special Act" within the meaning of section 8. In other words, the recognition of the agreement was not an authorization to refer to arbitration.

The same situation exists here. The respondents were not authorized by the Act of 1924 to do anything, and the fact that their agreement with other parties has been embodied in an Act of Parliament does not amount to authorization. There is nothing here to correspond with the words in *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*,[22] referred to in the judgment of Stephen J.,[23] where the clause to be construed, after stating that the agreement was valid and obligatory, went on to provide that "the companies are hereby required to implement "and fulfil all the provisions and stipulations thereof."

The judgment of Wills J.,[24] in the case cited, begins as follows: "Broadly stated, and apart from technicality, the "question is whether in a case where an agreement between two "companies to which the Act of 1873 refers, containing a "reference clause, has been embodied in an Act of Parliament, "the necessity or the privilege, as the case may be, of having "their disputes referred to arbitration has been created by the "express command of the legislature, or is the offspring of "agreement between the parties, the action of Parliament "having been confined to the removal of obstacles, actual or "apprehended, to their power so to contract."

Wills J. answered the question by saying that the reference clause was the offspring of the agreement between the parties. The view of the court was clearly that the requisition or authority then in question was a requisition to do that which the companies were not called on to do otherwise, and an authority to do that which they were not authorized to do without the Act. In my judgment, the appellants are right in their submission that the respondents were not authorized within the meaning of the General Development Order.

It is also to be noticed that the Tank Quarry, part of the respondents' undertaking, was not, so far as the Schedule to the Act of 1924 and the plan annexed thereto shows, part of the Malvern Hills area, unless it can be said that the conservators have acquired an interest in it within the meaning of section 5 of the Act. There is, so far as I know, no evidence of this, but

[22] L.R. 2 Sc. & Div. 347.
[23] 19 Q.B.D. 546-547.
[24] Ibid. 549.

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it is not necessary to pursue this matter in view of the fact that the North Quarry is within the Malvern Hills area, and included in the Schedules to the Act.

The only remaining question is as to the conditions imposed by the Minister. I have nothing to add on this subject to the views expressed by my Lord as to the validity of the conditions generally. In any event it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constat but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the respondents would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them.

Moreover it is doubtful whether at this time the Minister's decision could properly be impeached by declaration. That could have been done by certiorari (see *Rex* v. *Hendon Rural District Council, Ex parte Chorley*[25]), but the time for this has long since passed. Such proceedings, if successful, could only, in my opinion, have led to the result I have indicated, namely, the quashing of the whole permission, and not the leaving of the permission standing shorn of all or some of its conditions. I would allow the appeal.

Morris L.J. When the company made application on November 17, 1947, for permission to develop their land with quarrying undertakings thereon, the Town and Country Planning Act, 1947, had been passed, but most of its provisions had not come into force. The provisions of the Town and Country Planning, England and Wales Interim Development Order (S.R. & O., 1946, No. 1621) were then in operation. That order was made under the Town and Country Planning Acts, 1932 to 1944. It was provided by section 10 of the Town and Country Planning Act, 1932, that the Minister should make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme applied.

In reference to the area now in question there had, on July 25, 1934, been a resolution to prepare a scheme. That resolution had been approved by the Minister on September 28, 1934. Interim development for the purposes of section 10 meant development between the date on which a resolution took effect and the date of coming into operation of a scheme. Under article 4 of the Order of 1946 certain development could be undertaken without the permission of the interim development authority. One such class of development included (with certain exceptions) development authorized by any Act of Parliament which specifically

[25] [1933] 2 K.B. 696.

designated the land on which the development could be carried out. Another class (see class V) included the carrying out by mining undertakers (subject to certain exceptions) on land comprised in their undertaking of any development required for the purposes of their undertaking.

The Minister in fact called in the company's application of November 17, 1947, on January 14, 1948. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948. That Act provides (see section 12) that permission is required under Part III of the Act in respect of any development of land which is carried out after the appointed day when the Act came into force. Under the Act, development is defined to mean (subject to certain exceptions) the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 13 of the Act required the Minister to provide by order for the grant of permission for the development of land under Part III of the Act, which permission, in the case of any development specified in the Order, might be granted by the Order itself, or in other cases might be granted by the local planning authority or in certain cases by the Minister.

On May 5, 1948, the Minister made the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958). On May 8, 1950, the Minister made the Town and Country Planning General Development Order, etc., 1950 (S.I. 1950, No. 728). [His Lordship read article 3 (1) of the Order of 1950 and continued:] Class XII of Schedule I refers to: "Develop- "ment authorized by any local or private Act of Parliament . . . "which designates specifically both the nature of the develop- "ment thereby authorized and the land upon which it may be "carried out."

If the development referred to by the company in their letter of November 17, 1947, comes within the words which I have just cited, then the company had permission for such development, and no further permission of the local planning authority or of the Minister was needed. When, at a much later date, that is, in July, 1952, an inquiry was being held, the company put forward their submission that they need not have applied for planning permission. They invited a dismissal of their application by the Minister on the ground that no further permission was required.

It may seem unfortunate that steps could not then have been taken to obtain the ruling of the court so that the uncertainty could then be resolved, and further unnecessary labour and inquiry avoided. Recourse to the courts was not, however, then sought, and the main question now to be determined is whether the company were permitted to do what they proposed without obtaining any special permission. Whether the provisions of the Order [No. 1621] of 1946, or of 1948 [S.I. 1948, No. 958], or of

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1950 [S.I. 1950, No. 728], are regarded, the principal issue is whether the development proposed by the company is development that was authorized by the Malvern Hills Act, 1924. It seems to me that the Malvern Hills Act, 1924, designated both the nature of the development to be carried out by the company and the land on which the development was to be carried out. The question is, therefore, whether that Act authorized the quarrying activities of the company.

The recitals in the preamble to the Malvern Hills Act, 1924, show that there was great concern to preserve the beauties of the Malvern Hills, and to limit the interference with the amenities of the area which must result from quarrying operations and the erection of buildings, sheds, machinery and plant. The company was an existing company engaged in the business of quarrying stone. The company was clearly interested, and the company opposed the Bill when it was introduced. There were certain manifest conflicts. On the one hand there was a desire to maintain natural beauty; on the other hand there was a necessity to obtain a certain output of stone. Those owning lands which contained valuable stone had an interest to develop their property commercially. Such interest might, if uncontrolled, run counter to the public interest of preserving the amenities of the Malvern Hills "for purposes of health recreation and enjoy-" ment and the prosperity and development of the district."

After negotiation, agreement was reached between the company and the promoters of the Bill. The settlement that was reached involved that the company should continue to quarry on their freehold land, should abandon their rights in regard to a certain area, and, while retaining existing rights on a part of the North Quarry area, should have transferred to them additional rights relating to other parts in the North Quarry area. The arrangements recorded in the Fourth Schedule to the Act of 1924 were most detailed. There was a plan which was signed by the Chairman of the Committee of the House of Lords to whom the Bill was referred. The first paragraph of the agreement set out in the Fourth Schedule recorded: "The company's rights of " quarrying to be limited (outside their freehold property) to the " quarryable area at North Malvern defined on a plan to be " signed by the Right Honourable the Lord Islington the Chair-" man of the Committee of the House of Lords to whom the Bill " is referred a copy of which is to be supplied by the conservators " to the company." The plan which was signed showed: (a) the company's freehold property; (b) other areas of the hill land on which the company were to quarry; (c) an area in reference to which the company had a lease, but in which they agreed to relinquish their quarrying rights. The effect of the agreement was that there was a limitation of the area which would be subject to quarrying by the company.

The heads of agreement provided, by clause 18, that the provisions were to be inserted in an agreement. An agreement

was entered into on December 14, 1925. Before that date there was litigation between the company and the conservators and the Malvern Urban District Council, which resulted in judgments in this court on June 24, 1925.[26] The principal issue in the litigation concerned the meaning and effect of clause 14 of the heads of agreement. It was held that that clause contained a transitory provision having no force or effect when the bill became an Act. It would appear from the judgment of Warrington L.J. that one of the chief matters in controversy was whether bye-laws would bind the company. Warrington L.J. said[26]: "The substantial point to be decided is whether, on the true construction of the Malvern Hills Act, 1924, the undertaking, property and rights of the plaintiffs are or are not subject to the powers by the Act conferred on the conservators of making byelaws for the regulation of quarrying in the area subject to their jurisdiction." It was held that the company would be so subject, though it may be noted that when later the agreement of December 14 was actually made, it was provided by paragraph 4 (*b*) as follows: "No byelaw made by the conservators under section 25 of the Act shall affect the company's quarries except such as may be made with the approval of the Home Secretary (after notice to the company) in regard only to blasting operations in the company's quarries for the protection of the public."

Section 22 of the Act of 1924 gave certain powers to the conservators to purchase certain lands, property and quarries described in the Second and Third Schedules to the Act. Those schedules included what are known as the "Foley Quarries." The interests which the Malvern Council were to transfer to the company so as to give additional quarries to the company related to the Foley Quarries. The agreement recorded in the Fourth Schedule gave to the conservators an option to purchase the company's undertaking as a going concern at the expiration of two years after written notice of intention should have been given to the company during the third, fourth or fifth year after the passing of the Bill.

It would have seemed strange if, after an agreement under which additional quarrying rights were secured to the company subject always to a provision that the conservators might exercise an option to purchase the whole undertaking, the conservators should have a general power given them by the Act to purchase quarries which would include the Foley Quarries. Section 54 of the Act gave "protection" to the company, and it was enacted that "the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

It was held in this court that section 22 of the Act was superseded by the special provisions of clauses 12 and 13 of the heads of agreement. Warrington L.J. said[26]: "Section 22

[26] Unreported, C.A. June 24, 1925.

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" contains a general power for the conservators to take certain " quarries including the Foley Quarries. The heads of agreement " by clauses 12 and 13 provide specially that the conservators " shall have the option to purchase at a certain time and on " certain terms the entire undertaking of the company. The " general provision of section 22 is superseded by the special " provisions of clauses 12 and 13."

Atkin L.J. concluded his judgment with the words: " I agree " that the special provisions in the rest of the heads of agreement " override the more general provisions of the statute, and that " the plaintiffs are entitled to the first declaration based upon " paragraphs 12 and 13 of the heads of agreement." The reference was, I think, to a declaration made by Romer J. in reference to one of the questions raised, which was propounded as follows [27]: " Whether notwithstanding the provisions of section " 54 of the Act and clauses 3, 12 and 13 of the Fourth Schedule, " the conservators are at present entitled to acquire the Council's " interest in the Foley Quarries under the provisions of section 22 " of the Act."

Romer J. had further decided that, pending any acquisition by the conservators of the company's undertaking as a going concern under clause 12 of the Fourth Schedule, the rights and interests of the company in the Gandolfi licences and in the Foley Quarries were not subject to the jurisdiction of the conservators under the provisions of sections 25 to 31 of the Act of 1924. That part of the decision of Romer J. was reversed in this court. It would appear that in this court there was some concentration on the applicability of section 25, which dealt with the power of making byelaws.

It does not seem to me to be wholly clear whether it was being decided that the powers under section 26 of the Act of 1924 could be exercised in reference to the quarrying areas defined in the Fourth Schedule. Section 26 of the Act gives power to the appropriate Minister, on the application of the conservators, to make orders prohibiting quarrying on any specified part of the Malvern Hills; any such order would be subject to a provision for the payment of compensation.

In view of the terms of section 54 that the provisions of the Act only apply to or affect the company subject to the provisions of the heads of agreement, and in view of the fact that the Fourth Schedule records detailed agreed arrangements in regard to the company's rights of quarrying, and in view of the fact that the company were being given " protection," it might seem strange if the conservators had power to apply for an order which would prohibit the company from quarrying. The words of Atkin L.J., [28] to which I have referred, and in particular the words " the special " provisions in the rest of the heads of agreement override the " more general provisions of the statute " might suggest that

[27] Unreported, C.A. June 24, 1925. [28] Ibid.

sections 26 and 27 were not applicable to the undertaking, property or rights of the company.

It is not, however, in my judgment necessary to consider this particular matter further, for the issue now arising is really whether the activities of the company were " authorized " by the Act of 1924. That Act was one which effected most carefully worked out planning in regard to the Malvern Hills. The conservators were given additional powers. The company agreed to a limitation and fixation of their rights. From their previously existing rights something was extracted, and to them something else was added. The company's rights were limited, outside their freehold property, to a defined quarryable area. It was implicit in the agreement made that the continuing rights of the company to quarry on their freehold area were recognized. The company were to supply the Council with stone for the repair of roads. The company were to put in repair a quarry road between certain defined points, and were to keep such road in repair. The company were to widen the quarry road to permit of a footpath by the side of it. The company were to be at liberty to make and use a tunnel under the area of land dividing their freehold property from the quarries which the council were handing over to the company. All this elaborately worked out detailed planning was, in my judgment, formally approved by Parliament when it provided by section 54 that, for the " protection " of the company, the Act should only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement. It seems to me that formal approval and sanction were given by Parliament to the activities of the company as planned and arranged within the scope of the agreement that was made. In this way the activities of the company which constituted " development " were, in a very real sense, " authorized " by the Act of 1924. Parliament enacted that the specific arrangements (under which the range of the company's activities was defined and limited) were confirmed and made binding on the company, the conservators and the Malvern Council. I feel impelled to the view that Parliament authorized the arrangements which it confirmed and made binding.

It was submitted that the decision in *Reg.* v. *Midland Railway Company* [29] negatived the view that in the present case development was " authorized " by the Malvern Hills Act, 1924. In that case an agreement had been entered into between the Midland Railway Company and two companies, the Great Western and the West Midland Railway Companies, which two companies were to be amalgamated. At a later date, by the Act of Parliament which effected the amalgamation, the previous agreement was " confirmed and made binding upon " the Midland and Great Western Railway Companies. The agreement had contained an arbitration provision. It was held that differences which later arose were not differences which " under the

[29] 19 Q.B.D. 540.

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" provisions of any general or special Act " were " required or " authorized to be referred to arbitration."

In that case, the agreement between the Midland Railway Company and the two other companies (who, for the purposes of the agreement, were to be considered as one company) was entered into on March 17, 1863; there were, under the agreement, various provisions for through rates and charges, and for through bookings, and for mutual interchange of traffic, and there was the provision for a reference to arbitration in manner provided by the Railway Companies Arbitration Act, 1859, of all disputed questions as to fares, rates and charges, and of other questions of difference arising out of the agreement. Later the Great Western Railway (West Midland Amalgamation) Act, 1863 (26 & 27 Vict. c. 113) amalgamated the Great Western and West Midland Companies. That Act was passed on July 13, 1863. By section 63, the agreement of March 17, 1863, was " confirmed " and made binding upon " the Midland and Great Western Railway Companies.

The Regulation of Railways Act, 1873, provided by section 8 for a reference to the Railway Commissioners of differences which, under the provisions of any general or special Act, were " required or authorized to be referred to arbitration." Certain differences arose. The Midland Railway wanted the differences referred to the Railway Commissioners, and relied on section 8 of the Act of 1873; they said that under the provisions of the Act of 1863, which was passed on July 13, 1863, the differences were " required or authorized to be referred to arbitration." The Great Western Railway wanted the differences settled under the machinery of the Arbitration Act, 1859, as the parties had provided for in their agreement made on March 17, 1863; they said that though that agreement had been " confirmed and made " binding upon " the Midland and Great Western Companies by the Act passed on July 13, 1863, that did not alter the fact that the companies had, by their agreement of March 17, chosen a particular form of reference, and accordingly that the differences were not such as " under the provisions " of the Act of 1863 were " required or authorized " to be referred to arbitration. The agreement between the parties which provided for arbitration was made four months before the Act was passed, and began on July 1, 1863. The Great Western Company succeeded. In examining the meaning of section 8 of the Act of 1873, Stephen J. said [30]: " It seems to me that its object is to enable the Railway " Commissioners to have questions referred to them for their " decision where the arbitration rests upon the authority of " parliament, where there is some special authority of parliament which requires or authorizes it; that is to say, cases in " which the railway companies could not by their own manner of " constitution and according to their own independent powers, do " the thing for themselves." The parties had, however, done it

[30] 19 Q.B.D. 545.

for themselves by their agreement of March 17. Wills J. said [31]: "If it was substantially the action of Parliament and the will of "the legislature which imposed on the parties the necessity, or "conferred on them the right, to go to arbitration, then Parliament may change the forum, and has elected so to do."

In the present case we are not concerned with the phrase "required or authorized," but only with the word "authorized." The word "authorized" appears in a great many statutory provisions. It does not mean the same as "required." Its meaning in any particular case must, I think, be deduced from the context, and must depend on the context. In some instances, statutes are merely permissive; see *Simpson* v. *Attorney-General*,[32] where a person was authorized and empowered to improve the passage for boats on a river. When the Trustee Act, 1925, refers to "authorized investments," that phrase means (see section 68) investments authorized by the instrument (if any) creating the trust for the investment of money subject to the trust, or by law. When the Moneylenders Act, 1927, refers to an "authorized name" or "authorized address," those expressions respectively mean (see section 15) the name under which and the address at which a moneylender is authorized by a certificate granted under the Act to carry on his business as a moneylender. In *Evans* v. *E. Hulton & Co. Ltd. and Another*[33] Tomlin J. pointed to the applicability of the dictionary definition of "to authorize," that is, "to give formal "approval to, to sanction, approve, countenance."

The word "authorized" must, therefore, be considered in its context and in its setting. I cannot think that in its context in planning regulations it need be limited to rights newly conferred by an Act of Parliament. I consider that it extends also to rights recognized and sanctioned by an Act of Parliament.

It is to be observed that section 35 of the Town and Country Planning Act, 1932 (following section 16 of the Town Planning Act, 1925), refers to an "authorized association," and by section 35 (1) an authorized association is defined to mean a society, company or body of persons with certain specified objects, and which satisfies certain conditions, and which is "approved" by the Minister.

In the context now being considered, it seems to me that the development which is referred to is development which Parliament has had under consideration, and has, in the case of operations which have not been begun, conferred a right to undertake them, or in the case of some operations already begun has recognized and sanctioned and approved their continuance. Parliament might, for example, do so by giving some exemption or protection from the application to them of certain provisions which Parliament is then enacting. Though, as mentioned hereafter, certain overriding powers are reserved to the Minister or

[31] 19 Q.B.D. 549.
[32] [1904] A.C. 476; 20 T.L.R. 761
[33] (1924) 131 L.T. 534.

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the local planning authority, it would seem reasonable that, subject to the exercise of those powers, there should be no need for further permission in the case of some development operations which constitute a carefully adjusted piece of planning, and which, having come under the consideration of Parliament, have received express recognition.

At the time of the passing of the Malvern Hills Act, 1924, the company had certain existing rights in reference to its freehold land; it also had rights under licences. When the conservators were asking for extended powers, they were opposed by the company. The company might have defeated the Bill. But a settlement was reached, and terms of agreement settled; those terms only became effective and operative when the Act was passed. The company was given "protection." It gave up some rights in the interests of good planning; it received new rights. The Act was only to apply to the company subject to the agreement.

In my judgment, applying the above-quoted language of Wills J., it was [34] "the action of Parliament and the will of the "legislature" which conferred protection on the company, which protection recognized their existing rights in reference to their freehold property, and governed and defined their other rights. In my judgment, Parliament decreed a settlement which took into account public interest on the one hand, and private interests on the other. Though that settlement was negotiated by those concerned, Parliament then sanctioned it and countenanced it. As a piece of planning, in my judgment, they "authorized" it. I would regard the development operations of the company after the date of the passing of the Act of 1924 as having been done with the recognition, sanction and approval of Parliament, and accordingly, when planning is being considered, as having been done with the authority of Parliament.

It is to be noted that article 4 (1) of the Order of 1950 [S.I. 1950, No. 728] provides as follows: "If either the Minister "or the local planning authority is satisfied that it is expedient "that development of any of the classes specified in the First "Schedule to this Order should not be carried out in any par-"ticular area, or that any particular development of any of those "classes should not be carried out, unless permission is granted "on an application in that behalf, the Minister or the local "planning authority may direct that the permission granted by "article 3 of this Order shall not apply to:—(*a*) all or any "development of all or any of those classes in any particular area "specified in the direction, or (*b*) any particular development "specified in the direction, falling within any of those classes; "Provided that, in the case of development of Class XII, no such "direction shall have effect in relation to development authorized "by any Act passed after the first day of July, 1948, or by any

[34] 19 Q.B.D. 549.

"order requiring the approval of both Houses of Parliament "approved after that date."

A direction could, therefore, have been made having the result that the company would have needed express permission to undertake development. The existence of this article (and see also article 4 of the Order of 1948 [S.I. 1948, No. 958]) would suggest that no unduly limited or restricted meaning should be given to the word "authorized."

It is to be remembered that wide powers of control are given by section 26 of the Act of 1947; orders made under section 26 may involve the payment of compensation under section 27. Inasmuch as the company came to terms with the conservators and the Council in 1924, and gave up certain rights that they had on the stated and recognized basis that they were continuing their rights of quarrying on their freehold land, and were being given "protection," it would seem to me to be a very unsatisfactory result if, without receiving compensation, they must cease operations in a few years' time. If new planning considerations and new policy demand some altered arrangements, it would seem but fair that they should be achieved by the exercise of powers that would entail the payment of compensation.

The appellants submit that the company are not entitled to apply to the court for a declaration. They submit that the only right which the company had was to make an application to the planning authority under section 17 of the Act of 1947. In my judgment, the wording of section 17 denotes that an option is given to seek a determination by the use of the procedure of the section, but that the right which is given is not to the exclusion of any other rights. I do not consider that there is any withdrawal or negation of the right to come to the court for a declaration.

In *Barraclough* v. *Brown*[35] certain rights were by statute given to undertakers of navigation. If a boat was sunk in the river, the undertakers were given power to follow various courses. One of such courses was expressed in the words: "or the under- "takers may, if they think fit, recover such expenses from the "owner of such boat, barge, or vessel in a court of summary "jurisdiction." If the undertakers adopted that course, they could only recover the expenses in a court of summary jurisdiction, and not by bringing an action in the High Court. The defendants, who were sued in the High Court, were under no liability to pay the expenses at common law; the liability, if it existed, was created by the words of the statute as quoted above. As Lord Herschell said[36]: "I do not think the appellant can "claim to recover by virtue of the statute, and at the same time "insist upon doing so by means other than those prescribed by "the statute which alone confers the right." Nor, if he was compelled by statute to go to the court of summary jurisdiction,

[35] [1897] A.C. 615, 616.

[36] Ibid. 620.

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could he go first to the High Court to ask for a declaration that he could recover, for that was the very matter relegated to the inferior court. The High Court could not deal with a matter which the legislature, by plain implication, had enacted should be exclusively committed to the summary court. In my judgment, there is no language in the Act of 1947 which debars the company from seeking the ruling of the High Court.

Though it is with diffidence that I arrive at a conclusion differing from my Lords, I consider that the judge was right in making the first declaration, and the first part of the second declaration. On this view, the questions which were argued in regard to the conditions and the right of the plaintiff company to seek a declaration as to them do not arise; but if I had shared the view that they do arise, I would have expressed my concurrence with the conclusions reached by Lord Denning. For the reasons which I have given, I would have dismissed the appeal.

Appeal allowed.
Leave to appeal to the House of Lords granted.

Solicitors—*Solicitor, Ministry of Health and Ministry of Housing and Local Government; Sharpe, Pritchard & Co. for W. R. Scurfield, Worcestershire County Council; Stephenson, Harwood & Tatham.*

M. M. H.

[chancery division.]

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Feb. 11.
Danckwerts J.

In re CASTIGLIONE'S WILL TRUSTS. HUNTER *v.* MACKENZIE and Others.

[1957 C. No. 1962.]

Company—Shareholder—Company itself—Direction in will to transfer company's own shares to company—Proposed transfer to nominees—Whether valid—Qualification of nominees.

A testator directed that 1,000 ordinary shares in C. E. & Co. Ltd. should be held on trust for his son for life, and if the son should die without issue the trustees of the will were to "transfer "them to C. E. & Co. Ltd. at the date of his death." There were certain restrictions on the transfer of shares in the articles of the company. On the death of the son without issue the court was asked to determine whether the shares should be transferred to nominees of the company (one of whom was qualified under the articles while the other was not), or whether they fell into the testator's residuary estate:—

Held, that although the company could not hold its own shares, since it could not be a member of itself, there could be a trust for the company under which certain persons, registered as holders of

the shares, held them on trust for the company as beneficiary; accordingly, the company was entitled to direct that the shares should be transferred into the names of nominees, who must be properly qualified under the company's articles of association to hold its shares.

Kirby v. *Wilkins* [1929] 2 Ch. 444 and *Cree* v. *Somervail* (1879) 4 App.Cas. 648 applied.

In re Buckingham (1944) 170 L.T. 53 considered.

ADJOURNED SUMMONS.

Edward James Castiglione, at the date of his death on December 18, 1940, was the registered holder of 9,003 ordinary shares in Castiglione, Erskine & Co. Ltd., a private limited company, incorporated on January 17, 1922, to take over the business of estate agents previously carried on by the testator in partnership.

He made his will on October 25, 1940, at a time when he was in Scotland, and the will was not in the usual form of an English will, but the testator therein declared that he was domiciled in England. He appointed his son and his son-in-law executors and trustees thereof and by the fourth to ninth directions inclusive, he directed his trustees to hold various parcels of his shares in the company on specific trusts for the benefit of his children.

The seventh direction, which is the material direction for the purposes of this report, was in the following terms: "To hold "1,000 shares in Castiglione, Erskine & Co. Ltd. in trust for the "liferent use of my son Austin Castiglione; I direct my trustees, "after his death, to divide these shares between his children who "survive him, or, should he die without lawful issue, to transfer "them to Castiglione, Erskine & Co. Ltd. at the date of his "death. . . ."

The rights relating to the transfer of shares in the company were regulated by article 4, which provided: "The right to "transfer shares in accordance with the provisions of Table A "shall be restricted as follows: . . . (B) Any share may be "transferred at any time by the holder to his or her wife or "husband, father or mother, or to any lineal descendant of such "father or mother, or to the wife or husband of any such lineal "descendant, or to the trustees for the time being of any "settlement made on the marriage of such member, or of any "person standing in such relation as aforesaid to such member, "for the purposes of such settlement, and any share of a "deceased holder thereof may be transferred by his executors or "administrators to the widow or widower of or any person "standing in such relation as aforesaid to such deceased holder, "being cestui que trust or specific legatee thereof, and shares "standing in the name of any deceased original holder thereof "may be transferred to or placed in the names of the trustees "of his will. Shares standing in the names of trustees of any "instrument, may, upon any change of trustees, be transferred "to the trustee for the time being of such instrument or to a

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"cestui que trust but not otherwise under the foregoing provisions. A share may at any time be transferred to any member of the company."

Austin Castiglione died on March 12, 1956, without issue, and the court was asked to determine whether on his death and on the true construction of the testator's will the 1,000 ordinary shares in Castiglione, Erskine & Co. Ltd.: (a) ought to be transferred to David Thomson Nicholl Turner and John Kenneth Macrae as the nominees appointed by Castiglione, Erskine & Co. Ltd., or (b) ought to be held as part of the residuary estate of the testator, or (c) ought to be dealt with in some other way.

Turner was a member of the company, but Macrae was not.

Raymond Walton for the plaintiff, trustee of the will.

James FitzHugh for the second, third and fourth defendants, residuary legatees.

E. J. A. Freeman for the fifth defendant, Castiglione, Erskine & Co. Ltd.

The first defendant, a residuary legatee, was not represented and did not appear.

All the cases cited in argument are referred to in the judgment.

Danckwerts J. In this case a point of some interest arises, which does not appear to have been decided hitherto, at any rate directly.

[His Lordship stated the facts and continued:] Austin Castiglione died on March 12, 1956, without leaving any issue, and accordingly the direction was effective to direct the trustees to transfer the shares to the company itself. The gifts to the other children were in rather similar terms with directions in one case that the shares should "revert" to the company, and in another case that the shares should be "made over" to the company. I do not think that that makes very much difference.

There is no doubt about the construction of the gift. It is plainly a direction requiring the trustees of the will to transfer the shares "to the company itself." It is contended that that is a direction contrary to law, which cannot therefore be carried out, and as a consequence that the shares in question fall into the ultimate residuary gift contained in the will.

In Jarman on Wills, 8th ed., vol. 2, p. 1055, there is a statement of the law in respect of this matter in the following terms: "The question whether a bequest of its own shares to a company "is valid appears never to have been decided, but there would "appear to be no reason why such a bequest should not be "effective. The company cannot, of course, be a member of "itself, but it could direct the shares to be held by nominees, "and such a transaction would not, it is suggested, offend against "any of the principles of company law." Three cases are

referred to in the note: *Cree* v. *Somervail*,[1] *Kirby* v. *Wilkins*[2] and *In re Buckingham*.[3]

The principle which has been well established by the cases is well known, namely, that a company may not traffic in its own shares, which I take to mean that a company may not buy its own shares. The question is whether there is anything in that principle which would be offended against by the direction in the present will.

I need not go through the first of the cases mentioned in Jarman because the material parts of it are set out in *Kirby* v. *Wilkins*,[4] which came before Romer J. in 1929. In that case there was a sale by promoters of a company of a business for £16,000 to be satisfied by the allotment to the promoters of 16,000 fully paid shares in the company. Then it was discovered that the vendors had over-valued some of the assets of the company and voluntarily they agreed, the company having paid more than £3,000 for the business than the sum which ought to have been paid, that the vendors would place at the disposal of the company 3,000 of the fully paid shares which were allotted to them. Those 3,000 shares were in due course transferred to Mr. Wilkins, the defendant in the action, who was chairman of the board of directors, upon trust for the company. It was then claimed in an action against the chairman that he held the shares as trustee for the individual shareholders, and they sought an injunction restraining him from voting at any meeting of the company as the holder of the shares. Romer J. held[5] "that "the transfer did not offend against any principle laid down by "any of the decided cases, and that the transaction was not "made invalid by reason of the transfer having been made to a "nominee on trusts which involved an obligation on the trustee "to vote in respect of the shares as the company might from "time to time direct."

After referring to *Trevor* v. *Whitworth*,[6] Romer J. summarized the principles which arose from that case, quoting from Buckley on the Companies Acts (10th ed., p. 140) he said[7]: "'The "'grounds of the decision in *Trevor* v. *Whitworth*[8] and the "'principles which it affirms may be summarized thus: (1) Pur-"'chase by a company of its own shares is not forfeiture or "'surrender or anything like it. Forfeiture is valid, the Act "'recognizes it: the company parts with no money, but resumes "'dominion of a share upon which something has been paid, "'and this because a further payment cannot be obtained. "'Surrender may be valid, e.g., where the company could "'forfeit and the member dispenses with the formalities. Each "'case of surrender must be determined upon its merits. "'Where money is paid or consideration given by the company

1 (1879) 4 App.Cas. 648.
2 [1929] 2 Ch. 444.
3 (1944) 170 L.T. 53.
4 [1929] 2 Ch. 444.
5 Ibid.
6 (1887) 12 App.Cas. 409; 3 T.L.R. 745.
7 [1929] 2 Ch. 447.
8 12 App.Cas. 409.

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" ' it is a purchase, and purchase is neither forfeiture nor " ' surrender.' The reference there to consideration given by " the company as opposed to money paid by the company has " reference, no doubt, to the decision of the Court of Appeal in " *Bellerby's* case,[9] in which the Court of Appeal pointed out " that where shares are surrendered to a company which are not " fully paid up, and in consideration of the company purporting " to release the transferors or surrenderers from their further " liability in respect of the shares, it is in effect the equivalent " of a purchase by the company of its shares, and is invalid." Then he continued with the statement in Buckley[10]: " To go " on with the statement in Buckley on the Companies Acts the " second principle is stated to be this: ' (2) The company cannot " ' be a member of itself. (3) The purchase of its own shares " ' is a reduction of capital. The Act, in sanctioning reduction " ' of capital under certain conditions and with certain restric- " ' tions, impliedly prohibits it unless the prescribed conditions " ' and restrictions are observed. (4) The Act impliedly prohibits " ' the return of capital to members. The payment of capital " ' to one shareholder is just as much a reduction of capital and " ' just as detrimental to the interests of creditors as the pay- " ' ment of the same amount to all the shareholders rateably. " ' (5) The transaction cannot be justified as " incidental " to " ' the company's objects, e.g., in a private company where it " ' is desired to keep the shares in the hands of a few. To the " ' creditor whose interests the Act intends to protect it makes " ' no difference what the object of the purchase is.' " Romer J. continued[11]: " Now, if that be a true statement of the principles " enunciated in the case of *Trevor* v. *Whitworth*,[12] and in my " view it is, adding perhaps thereto *Bellerby's* case,[13] it is difficult " to see which of those principles is infringed by the transfer " that has been made in the present case. The company has " not parted with one penny of its money, either in cash or " money's worth. The company does not become a member of " itself. The member of the company in respect of these 3,000 " shares is Mr. Wilkins, the defendant." Then he considered *Addison's* case,[14] to which I need not refer.

Then Romer J. referred to *Cree* v. *Somervail*,[15] one of the cases referred to in Jarman, and to a passage in the speech of Lord Hatherley in that case[16]: " There Lord Hatherley was " dealing with the possibility of shares in a company becoming " vested in a trustee for them without the company necessarily " becoming a purchaser of them, and he said this: ' As to their " ' being trustees for the company, that might be perfectly " ' legitimate and lawful, whatever view be taken of this case. " ' I am not, as I have said, pronouncing any opinion as to what

[9] [1902] 2 Ch. 14; 18 T.L.R. 582.
[10] [1929] 2 Ch. 448.
[11] Ibid.
[12] 12 App.Cas. 409.
[13] [1902] 2 Ch. 14.
[14] (1870) 5 Ch.App. 294.
[15] 4 App.Cas. 648, 661.
[16] [1929] 2 Ch. 450.

" ' would have happened if the nature of the transaction had " ' been different, if it had been for the purpose of merging the " ' shares. But those shares might have become vested in a " ' variety of ways in trustees for the company, without their " ' being necessarily the purchasers of them. For instance, Mr. " ' Thomson by his own will might, if he had thought fit, or if " ' he had thought that such a course was desirable for his own " ' purposes, have made a bequest of these very shares to certain " ' persons as trustees for the company, or he might have made " ' a bequest of them to the company itself, and the company " ' might have found trustees to hold the shares as trustees for " ' them, and to be answerable to third parties in respect of " ' them.' " Lord Hatherley seems to have considered a case which would cover the circumstances of the case with which I am here concerned. Then Romer J. said [17]: " It may be, how- " ever, and I think that in Buckley on the Companies Acts the " cases I have referred to are treated as authority for this, that " although a transfer of partly paid shares to a nominee of the " company leaves the transferor liable, because the company " cannot purchase its own shares, yet in the case last put the " transferee may himself be made liable. On the other hand I " cannot find in *Addison's* case [18] any clear authority for the " proposition that in the case of a transfer of fully paid shares " to a company without any consideration moving from the " company, the transfer is invalid." Romer J. eventually decided that the transfer of the shares in the case before him did not offend against any principle which he had laid down.

Therefore, in the quotation from Lord Hatherley in *Cree* v. *Somervail*,[19] and in the statement of Romer J. himself, there are statements which indicate that a gift to a company of shares in the company itself does not offend against any rule of law.

On the other hand, in a case before Simonds J. of *In re Buckingham* [20] in 1943, there are some statements which do not altogether seem to accept the principles laid down by Romer J. and Lord Hatherley. In that case the testatrix made a bequest in the following terms [20]: " ' I bequeath my shares in the com- " ' pany of D., Limited, to the said O. to receive the income " 'derived therefrom during her lifetime—the shares to remain " ' the property of D., Limited.' At her death she owned 60 " preference shares of £10 each in D., Limited. Two questions " were raised: First, whether, as a matter of construction, there " was a gift of the reversionary interest in the shares to the " company; secondly, if there was such a gift, whether it was a " valid gift having regard to the rule of law that a company " cannot be a member of itself. Held, that subject to the life " interest of O. the shares were undisposed of. If there had been " a valid bequest of the reversionary interest in the company, " the second question would have arisen. Notwithstanding the

[17] Ibid. 451.
[18] 5 Ch.App. 294.
[19] 4 App.Cas. 648.
[20] 170 L.T. 53.

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"dictum of Lord Hatherley in *Cree* v. *Somervail*,[21] that a testa-
"tor might make a bequest of its own share to a company,
"which was not disapproved by Romer J. in *Kirby* v. *Wilkins*,[22]
"this question required further consideration." Simonds J. said this[23]: "The question that I have to determine is whether there
"is a valid bequest in reversion, after the life interest of Gladys
"Mary Oswell, of the shares of the company of John Dobell,
"Limited, to the company. Now there are two questions, first of
"all a question of construction, namely: is there upon the true
"construction of this will a gift of the reversionary interest in
"the shares to the company? Secondly, if there is such a gift,
"is it a valid gift, having regard to the rule of law that a
"company cannot be a member of itself? I find it unnecessary
"to consider the second, and as I think very difficult, question,"
which, I may observe, is the one that interests me today.

Simonds J. continued[24]: ". . . having given to this provision
"the best consideration that I can, I find it impossible to say
"that by the words, 'the shares to remain the property of John
"'Dobell, Limited,' there is any sufficient indication of an
"intention on the part of the testatrix to make a gift of the
"shares." That was the end of the matter, but in the second paragraph of the page following Simonds J. said[24]: "There is
"a life interest in the shares to Gladys Mary Oswell and, subject
"to her life interest, the shares are not disposed of. If the
"words were adequate to create a gift of reversionary interest,
"I should have to consider the second question. Notwith-
"standing the dictum of Lord Hatherley in *Cree* v. *Somervail*[25]
"that a testator may bequeath its own shares to a company,
"which dictum was approved, or at any rate not disapproved by
"Romer J., as he then was, in *Kirby* v. *Wilkins*,[26] I think that
"is a question which still deserves the consideration of the court
"but it is unnecessary for me to do more than say that about it."
When one reads the whole of that passage, Simonds J. seems to have had some doubt about it, and he does not really advance the matter any further, but merely leaves it open.

I have to consider the question in the present case on this state of the authorities. It seems to me that it is quite plain that a company cannot hold its own shares because it cannot be a member, but it does not necessarily follow from that that it may not have a beneficial interest arising from the shares in some way or other. It appears to me quite plain from the decision of Romer J. in *Kirby* v. *Wilkins*[27] that there can be a trust under which certain persons on the share register of the company may hold the shares upon trust for the company beneficially. I think that must be taken to be established by that case.

In the present case the situation is that the shares are vested in the surviving trustees of the will. Therefore, at the

[21] 4 App.Cas. 648.
[22] [1929] 2 Ch. 444.
[23] 170 L.T. 53.
[24] Ibid. 54.
[25] 4 App.Cas. 648.
[26] [1929] 2 Ch. 444.
[27] Ibid.

moment, there is no rule of law which seems to be offended in the actual disposition of the shares. They are held upon trust for the company, and, as *Kirby* v. *Wilkins* shows,[27] that is entirely good in law.

On the other hand, what cannot be carried out is a transfer upon trust to the company itself of the shares in question. But is that an end of the matter? It does not seem to me that it is. I think that the person who is entitled to the benefit of the shares is entitled to direct that the shares should not be transferred to him directly but to any other person whom he shall name, and, if there is no other objection to the person to whom he directs the transfer, then the transfer may be good. Consequently, it seems to me that, in accordance with the principles laid down by Lord Hatherley and by Romer J., I must say that the company could direct a proper nominee to hold these shares for the company or as it should direct, and, therefore, the beneficial interest will be enjoyed by the company as in *Kirby* v. *Wilkins*,[28] so that the vote can be cast by the nominee at the meetings of the company as the company shall direct.

I have been careful, however, to say "proper nominee" because in this case the suggestion made by the company seems to me to be wrong. The company requested or suggested a transfer to be made to two gentlemen named Turner and Macrae. Turner is a member of the company, and Macrae is not. This being a private company, one finds, as one would expect, that there are restrictions on the transfer of shares. Clause 4 (2) of the company's articles of association restricts transfers in such a way as they are generally to be to members of the family. After mentioning various persons on the death of the deceased holder who stand in personal relationship to the deceased, the article says: "and shares standing in the name of any deceased "original holder thereof may be transferred to or placed in the "names of the trustees of his will." So far, so good. It continues: "shares standing in the names of trustees of any "instrument may, upon any change of trustees, be transferred "to the trustees for the time being of such instrument or to a "cestui que trust but not otherwise under the foregoing pro-"visions." Accordingly, it appears that shares standing in the name of the trustees of the testator's will might on any change of trustees be transferred to the trustees for the time being of the will, and, other things being all right, they might eventually be transferred to a cestui que trust taking under the terms of the will. But in this case the company has been created the cestui que trust and that cannot be done because of the rule of law which does not permit of a company holding its own shares. Whether or not new trustees could be appointed limited to these particular shares of which Austin Castiglione was receiving the income need not be considered. It seems to me that the last sentence of this article shows the way in which nominees may

[27] [1929] 2 Ch. 444. [28] Ibid.

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properly be constituted, and it indicates that the shares may at any time be transferred to any member of the company. Accordingly, there appears to be no objection to a transfer in the name of Turner being directed by the company, though there might be an objection to a transfer into the name of Macrae. It seems to me that the article limits the selection which the company may make of the nominees into whose names the shares may be transferred, but otherwise a transfer of shares may be made to nominees.

I answer the first question in this fashion, that the company is entitled to demand a transfer of shares into the names of nominees properly qualified in accordance with the articles of association of the company.

Declaration accordingly.

Solicitors: *W. E. Wise & Son; Rising & Ravenscroft for Bernard Kuit, Steinart & Ashby, Manchester; Vivash Robinson & Co. for Harold G. Walker, Bournemouth; Linklaters & Paines.*

[COURT OF APPEAL.]

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Feb. 6.

PIPER *v.* HARVEY.

[Plaint No. N. 1472.]

Lord Denning, Hodson and Pearce L.JJ.

Landlord and Tenant — Rent restriction — Possession application — Greater hardship—Whether proviso as to greater hardship repealed by Act of 1957*—Evidence of greater hardship—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para. (h), proviso—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *Sch.* 6, *para.* 21.

In 1951 a landlord purchased a bungalow subject to the Rent Restriction Acts, hoping to obtain possession of it as a residence for himself and his invalid wife. Being a landlord by recent purchase, he was unable to apply for possession until after the coming into force of the Rent Act, 1957, which by amending provisions enabled a landlord who had purchased a dwelling-house before November 7, 1956, to apply to the court for possession.

In the county court it was submitted for the landlord that the repeal and replacement of paragraph (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933,[1] by paragraph 21 of the Sixth Schedule to the Rent Act,

[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I [as amended by the Rent and Mortgage Interest Restrictions Act, 1939, Sch. I]: "A court shall . . . "have power to make or give an "order or judgment for the recovery "of possession of any dwelling-house "to which the principal Acts apply "or for the ejectment of a tenant "therefrom without proof of suitable "alternative accommodation (where "the court considers it reasonable so "to do) if—. . . (*h*) the dwelling-house "is reasonably required by the land-"lord (not being a landlord who has "become landlord by purchasing the "dwelling-house or any interest "therein after September 1, 1939), "for occupation as a residence for— "(i) himself; or (ii) any son or "daughter of his over eighteen years

1957,[2] had effected the repeal of the proviso regarding greater hardship.

By the evidence the landlord showed that he and his wife lived in one room in difficult conditions which gravely affected her health. The tenant, on whom lay the burden of proving greater hardship, did not show that he had made any strenuous efforts to obtain other accommodation:—

Held, (1) that the substituted provisions in paragraph 21 of the Sixth Schedule to the Act of 1957 did no more than alter the qualifying date for a landlord by purchase, since the proviso, although operating only on paragraph (*h*), was expressed to be a proviso to all the provisions of the First Schedule to the Act of 1933; accordingly the condition as to satisfying the court on "greater hardship" had not been repealed.

(2) That on the facts the only reasonable conclusion to which the court could come was that the tenant had not discharged the burden of proving greater hardship, and accordingly the order for possession should be made in favour of the landlord.

Chandler v. *Strevett*, 63 T.L.R. 1284; [1947] 1 All E.R. 164 applied.

APPEAL from Judge J. B. Herbert, sitting at Southend County Court.

In 1951 the plaintiff landlord, Charles Piper, bought a bungalow at Rayleigh, Essex, consisting of three living-rooms, a kitchen and a bathroom. The bungalow was within the provisions of the Rent Restriction Acts, and the defendant, one Harvey, had been the tenant of it for some years, paying a weekly rent of 10s. The landlord was unable to obtain possession of the premises as the law then stood, though he had bought it in the hope of obtaining possession of it as a residence for himself and his wife.

After the coming into force of the Rent Act, 1957, he brought proceedings in the county court, claiming that he was entitled to possession of the bungalow and that the tenant's tenancy had been duly determined by a notice to quit. He stated that the rateable value of the premises at that date was £18 and that he "reasonably requires the premises for occupation as a residence "for himself and his wife." The tenant by his defence claimed that "greater hardship" would be caused by making an order for possession than by refusing such order.

Before the county court judge the landlord gave evidence that

"of age; or (iii) his father or mother: "Provided that an order or judgment "shall not be made or given on any "ground specified in para. (*h*) of the "foregoing provisions of this Schedule "if the court is satisfied that having "regard to all the circumstances of "the case, including the question "whether other accommodation is "available for the landlord or the "tenant, greater hardship would be "caused by granting the order or "judgment than by refusing to grant "it."

[2] Rent Act, 1957, Sch. 6, para. 21: "For paragraph (*h*) of the First "Schedule to the Act of 1933 (which "relates to possession without proof "of alternative accommodation), the "following paragraph shall be sub-"stituted—"(*h*) the dwelling-house "is reasonably required by the land-"lord (not being a landlord who has "become landlord by purchasing the "dwelling-house or any interest there-"in after November 7, 1956) for "occupation as a residence for—(i) "himself; or (ii) any son or daughter "of his over eighteen years of age; "or (iii) his father or mother."

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he had bought the bungalow to live in it and for the benefit of his wife; that he had been bombed out during the war and in 1947 had gone to live at his brother's house, where he and his wife occupied one front room upstairs, sharing the kitchen with his brother's family; that his wife was suffering from mental illness and asthma; that she could not climb stairs; that they did not have access to the garden; and that his average earnings were £11 10s. a week. A doctor called on his behalf stated that the wife's mental condition caused her to stamp on the floor and hammer on the walls of the room they occupied, and that she would be better out of her present living conditions; that one of the treatments for her mental condition was occupational therapy, and that as she was keen on gardening, a garden would assist her health. The tenant, under examination-in-chief, said that he had been tenant of the bungalow for 17 years, occupying it with his wife, his son aged 20, and his daughter aged 18, who slept next door at the home of his mother-in-law. He said that he had tried with the local council to find other accommodation and had been on their list for a number of years. His son worked on road-making and his daughter was training for a profession and getting £1 a week. He himself earned £11 a week and the son contributed £2 a week to the household. In cross-examination the tenant said that he had applied to the council for accommodation years ago, and that the council had told them that "we could afford to buy."

The county court judge accepted the landlord's evidence and held that he was perfectly reasonable in asking for possession. But—holding, as he did, that the proviso to paragraph (*h*) in the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 [1] (requiring proof of "greater hardship"), had not been repealed by the substituted paragraph 21 of the Sixth Schedule to the Rent Act, 1957 [2]—the judge stated that despite having great sympathy with the landlord, he had to bear in mind the tenant's family of four, not to speak of the mother-in-law next door; and he continued: "For them to obtain other "accommodation is, and was, on the evidence, apparently almost "impossible unless by some miracle the local authority come to "their assistance." The problem narrowed itself largely to the question whether the need of the landlord's wife was so urgent that from the point of view of health it must override the hardship on the tenant if his family had to get out. On balance the judge held that the landlord's problem was not immediately urgent and that the scale came down in favour of the tenant, who had satisfied him that more unhappiness and hardship would be caused if he made the order for possession than if he refused. He accordingly refused to make the order asked for. The landlord appealed.

A. E. Holdsworth for the landlord.
Mark Smith for the tenant.

The following cases were referred to in argument: *Kelley* v. *Goodwin* [3]; *Briddon* v. *George* [4]; *Chandler* v. *Strevett* [5]; *Coplans* v. *King* [6]; *Rhodes* v. *Cornford* [7]; *Smith* v. *Penny* [8]; *Harte* v. *Frampton*.[9]

LORD DENNING stated the facts and continued: It was suggested by Mr. Holdsworth that as a result of the amending Act of 1957 it was quite enough if the landlord proved that he wanted the premises for occupation as a residence for himself, and that no question of greater hardship came into the matter. Mr. Holdsworth based his argument on the wording of the amendment in paragraph 21 of the Sixth Schedule to the Rent Act, 1957. He said that the effect of that paragraph was to replace paragraph (*h*) in the First Schedule to the Act of 1933 and to omit the proviso about greater hardship. He has referred us to the past history of this legislation, to the way in which amendments have been made, and to the punctuation, and has urged us to say that since 1957 the proviso about greater hardship has gone. He said that it was a difficult point and there have been decisions of county court judges each way on the matter.

Having heard the whole of the careful and able argument presented to us, I am quite satisfied that the provision about greater hardship still applies. Paragraph 21 simply inserts, instead of the old paragraph (*h*), the new words there set out. It does nothing more than alter the date about the landlord's purchase of the property. The proviso about greater hardship is not a proviso included in paragraph (*h*). It is a proviso to the whole Schedule. That is clear from the words "on any ground "specified in paragraph (*h*) of the foregoing provisions of this "Schedule." Being a proviso to the whole Schedule, it is still intact.

Having failed on this point by law, Mr. Holdsworth asks us to review the judge's findings on the facts. It is plain that the landlord now requires the bungalow for himself. The question is where the greater hardship lies. [His Lordship reviewed the evidence, and continued:] The question [on the tenant's evidence] immediately arises, what steps had he (the tenant) taken to try to get some other accommodation? According to the judge's note all he said about that was: "I have tried with the "council. I have been on their list for a number of years." When he was cross-examined, he said: "I applied to the council "years ago. They told us we could afford to buy."

What does that show? He did not give evidence that he had been round hunting for houses. He did not show that he had made any effort to buy another house, or get another house at all, apart from his action in going to the council years ago. The burden is on the tenant to show that there is greater hardship

[3] [1947] 1 All E.R. 810.
[4] [1946] 1 All E.R. 609.
[5] (1947) 63 T.L.R. 84; [1947] 1 All E.R. 164.
[6] [1947] 2 All E.R. 393.
[7] [1947] 2 All E.R. 601.
[8] [1947] K.B. 230; 62 T.L.R. 750; [1946] 2 All E.R. 672.
[9] [1948] 1 K.B. 73; 63 T.L.R. 554; [1947] 2 All E.R. 604.

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on him by having to move. The judge thought he had shown it. He said: "For them to obtain other accommodation is, and was, "on the evidence, apparently almost impossible unless by some "miracle the local authority come to their assistance. It may be "possible for them to obtain other accommodation here, but they "say they cannot."

The question for this court, which is not an easy one, is whether that is a reasonable and possible conclusion for the county court judge to come to having regard to all the evidence. It is undoubtedly the law that if it is just a matter of weighing the balance of hardship, that is a matter for the judge himself who hears the case, and is not a matter in which this court can interfere. This court can only interfere if on all the evidence there is only one reasonable conclusion to be come to, or, alternatively, if the judge has misdirected himself on the facts or on the evidence. Here it is a very close thing. But when I look at all the evidence and see the strong case of hardship which the landlord put forward, and when I see that the tenant did not give any evidence of any attempts made by him to find other accommodation, either to look for another house to buy or to rent, it seems to me that there is only one reasonable conclusion to be arrived at, and that is that the tenant did not prove (and the burden is on him to prove) the case of greater hardship. Although it is very rarely that this court interferes in a hardship case, this does seem to me to be a case where there is only one conclusion possible. I would therefore allow the appeal and give judgment for the landlord for possession.

HODSON L.J. I agree. On the question of construction I have no doubt that paragraph 21 of the Sixth Schedule to the Act of 1957 has the effect of substituting for paragraph (*h*) of the First Schedule to the earlier Act a new paragraph which is set out in extenso in the section (although it merely alters the date) and does not have the effect of repealing the proviso which was contained in the Act of 1933. The reason for that is clear from the language of the proviso itself, which begins with the words: "Provided that an order or judgment shall not be made "or given on any ground specified in paragraph (*h*) of the fore-"going provisions." Paragraph (*h*) is the only one on which the proviso has any operation; but the proviso itself is expressed to be a proviso to the whole "of the foregoing provisions," which indeed are numbered (*a*) to (*h*), so that the repeal of (*h*) does not have the effect of repealing the proviso. Mr. Holdsworth has gone through the history of this legislation and shown us how the situation of this provision or a similar provision has altered from time to time. Notwithstanding his argument, and particularly his pointing out to us that the date could easily have been altered without substituting an entirely new proviso, I am of opinion that the words are so clear that it is impossible to say that the proviso has gone.

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On the main question for consideration on this appeal, namely, whether the judge was wrong in coming to the conclusion that he did on greater hardship, I have in mind what this court has said in *Coplans* v. *King* [1] to the effect that the decision of the county court judge, when considering the balance of hardship, is to all intents and purposes final. It is not for the Court of Appeal to interfere when there is evidence on which the judge can reasonably come to the conclusion which he did.

Certain observations of Scott L.J. in *Chandler* v. *Strevett* [2] were criticized in *Coplans* v. *King*.[3] The two other members of the court in *Chandler* v. *Strevett* [4] were Bucknill L.J. and Somervell L.J., and the court had to deal with a similar problem. At the outset of his judgment Bucknill L.J. said what, I think, Lord Denning has just pointed out, and what I feel myself [5]: "This appeal raises the difficult question whether "there was any evidence on which the judge could come to the "conclusion from which the appeal has been made." Somervell L.J.[6] came to the conclusion which I have reached in this case, namely, that there is really only one possible answer on the issue of greater hardship, and that is in this case in favour of the landlord. The tenant has not been able to say anything more than the minimum which every tenant can say, namely, that he has in fact been in occupation of the bungalow, and that he has not at the moment any other place to go to. But he has not sought to prove anything additional to that by way of hardship in the way of unsuccessful attempts to find other accommodation, or indeed to raise the question of his relative financial incompetence as compared with the landlord. On the face of it the tenant's financial position, or that of his family, is very much superior to that of the landlord. The domestic position of the landlord is indeed a hard one. It is not even a case where he is occupying a house on his own; he is living with his invalid wife in an unfurnished room upstairs in a house which does not belong to him, and there is very strong evidence of hardship on his side; whereas I am bound to say that I can see no evidence on the other side which can be put into the scale to balance that. I would therefore allow the appeal.

PEARCE L.J. I agree.

Appeal allowed with costs.
Judgment below set aside and entered for plaintiff.
No order as to costs in court below.

Solicitors: *Daybell, Court-Cooper & Co., Ilford; Gibson & Weldon for H. Maxwell Lewis, Southend-on-Sea.*

M. M. H.

[1] [1947] 2 All E.R. 393.
[2] (1947) 63 T.L.R. 84; [1947] 1 All E.R. 164.
[3] [1947] 2 All E.R. 393, 394.
[4] [1947] 1 All E.R. 164.
[5] Ibid. 166.
[6] Ibid. 168.

[CHANCERY DIVISION.]

1958
Feb. 11, 12.

Danckwerts J.

In re RICHARDSON'S WILL TRUSTS. PUBLIC TRUSTEE *v.* LLEWELLYN EVANS' TRUSTEE.

[1957 R. No. 1289.]

Trust and Trustee—Protective trust—Forfeiture clause—Maintenance charged on protected interest by order of court—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 33.

Husband and Wife — Maintenance — Divorce — Secured payments — Whether order effects equitable charge—Maintenance charged on protected interest—Whether forfeited.

A testator bequeathed to his grandson, who later became bankrupt, a protected interest in a settled legacy under which he was entitled to the income during his life and until he attained the age of 35 years, when the interest become absolute, provided that he had not "attempted to do or suffer any act or thing or any "event has happened . . . whereby he would then or at any time "thereafter be deprived of the right to receive the capital or "income or any part thereof . . ." but that "if he has made "such attempt or sufferance or such event has happened" then the trustees were to hold the income thereof on protective trusts for his benefit during his life in accordance with section 33 of the Trustee Act, 1925.

On the petition of the bankrupt's wife a decree absolute of divorce was made against him on November 15, 1954; and by an order of the Divorce Division, dated June 3, 1955, an annual payment of £50 for her benefit was charged on his interest under his grandfather's will and it was ordered that "the deed necessary "to give effect to the said charge be settled by conveyancing counsel "of the court."

No such deed was ever executed. On October 24, 1955, the grandson attained the age of 35 years. On August 27, 1956, he was adjudicated bankrupt.

On a summons to determine the effect of the order of 1955 on the bankrupt's protected interest under the will, his trustee in bankruptcy contended that the order did not create a forfeiture of that interest:—

Held, that on the footing that the order was not completed by the execution of a deed, its effect was to create an equitable charge on the bankrupt's interest, and accordingly there was a forfeiture of the interest under the express terms of the will, and the trustee of the will held the property during the rest of the bankrupt's life on the discretionary trusts laid down in section 33 of the Trustee Act, 1925.

Hyde v. *Hyde* [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362 applied.

Adjourned summons.

This summons raised the question whether a forfeiture had arisen of the protected life interest of Douglas William Llewellyn Evans, who was now a bankrupt, under the will, dated July 5, 1930, of his grandfather, John Billingsley Richardson, who died on March 22, 1935, having regard to two orders made respectively

in 1954 and 1955 in divorce proceedings between the bankrupt and his wife.

By his will the testator gave £2,000 3 per cent. local loan stock to his trustees "upon trust to invest the same and to hold "the income from the investments for the time being representing "the same on protective trusts for the benefit of my grandson "Douglas William Llewellyn Evans during his life and until he "attains the age of 35 years in accordance with section 33 of "the Trustee Act 1925 [1] and on his attaining the age of 35 years "provided that he has not attempted to do or suffer any act or "thing or any event has happened (other than any advance under "any statutory or express power) whereby he would then or at "any time thereafter be deprived of the right to receive the "capital or income or any part thereof to pay the capital and "income to the said Douglas William Llewellyn Evans abso-"lutely and if he has made such attempt or sufferance or such "event has happened then I direct the said trustees to hold the "income thereof on protective trusts for the benefit of the said "Douglas William Llewellyn Evans during his life in accordance "with section 33 of the Trustee Act 1925 and if the said Douglas "William Llewellyn Evans shall die before attaining the age of "35 years or the protective trusts for his benefit after his attain-"ing that age shall come into operation then on his death I direct "the said trustees to hold the capital and income of the trust "fund upon trust for such of his children who shall attain the "age of twenty-one years equally between them and if there be "one such child then the whole to that one child . . ."

That contingent interest was represented in the present summons by David Byatt Seymour Llewellyn Evans, infant son of Douglas William Llewellyn Evans.

[1] Trustee Act, 1925, s. 33: "(1) "Where any income . . . is directed "to be held on protective trusts for "the benefit of any person (in this "section called 'the principal bene-"'ficiary') for the period of his life "or for any less period, then, during "that period (in this section called "the 'trust period') the said income "shall, without prejudice to any prior "interest, be held on the following "trusts, namely:—(i) Upon trust for "the principal beneficiary during the "trust period or until he . . . does "or attempts to do or suffers any "act or thing, or until any event "happens, other than an advance "under any statutory or express "power, whereby, if the said income "were payable during the trust period "to the principal beneficiary abso-"lutely during that period, he would "be deprived of the right to receive "the same or any part thereof, in "any of which cases, as well as on "the termination of the trust period, "whichever first happens, this trust "of the said income shall fail or "determine; (ii) If the trust afore-"said fails or determines during the "subsistence of the trust period, then, "during the residue of that period, "the said income shall be held upon "trust for the application thereof for "the maintenance or support, or "otherwise for the benefit of all or "any one or more exclusively of the "other or others of the following "persons (that is to say)—(*a*) the "principal beneficiary and his or her "wife or husband, if any, and his "or her children or more remote "issue, if any; or (*b*) if there is no "wife or husband or issue of the "principal beneficiary in existence, "the principal beneficiary and the "persons who would, if he were "actually dead, be entitled to the "trust property or the income there-"of . . . as the trustees in their "absolute discretion . . . think fit."

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In divorce proceedings between Douglas William Llewellyn Evans and his wife, a decree absolute of divorce was made on the petition of the wife against him on November 15, 1954. On October 13, 1954, an order had been made in the Probate, Divorce and Admiralty Division "That the respondent [that was Douglas "William Llewellyn-Evans] do secure to the above-named "petitioner for her life until further order as from the date upon "which the decree nisi herein be made absolute, the annual gross "sum of £50 upon security to be agreed or referred to a registrar." The materiality of that order was that maintenance of £50 per annum was fixed by it.

Subsequently, on June 3, 1955, the order was made which it was contended operated to create a forfeiture of Douglas William Llewellyn Evans' interest. By that order it was ordered "that "the above named respondent do charge his interest under the "will of his grandfather Dr. John Billingsley Richardson with the "payment of £50 per annum interim maintenance directed to be "secured by the respondent in favour of the petitioner pursuant "to the said order dated the 13th day of October, 1954, and that "the deed necessary to give effect to the said charge be settled "by conveyancing counsel of the court." No such deed was ever settled.

On October 24, 1955, Douglas William Llewellyn Evans attained the age of 35 years. On August 20, 1956, a receiving order was made against him, and he was adjudicated bankrupt on August 27, 1956. His trustee in bankruptcy was the first defendant.

The public trustee (who was the sole trustee of the trusts of the will) took out the present summons to have determined: (1) Whether, on the true construction of the testator's will and in the events which had happened, the trust property representing the settled legacy (a) vested for an absolute beneficial interest in Douglas William Llewellyn Evans on his attaining the age of 35 years on October 24, 1955, and accordingly was now held by the plaintiff upon trust for the first defendant, as trustee in bankruptcy of Douglas William Llewellyn Evans; or (b) by reason of the order of June 3, 1955, he forfeited his interest therein. (2) If the answer to 1 (b) be in the affirmative, whether the plaintiff had since the date of the order held the said trust property (a) during the life of Douglas William Llewellyn Evans on the discretionary trusts provided for in section 33 (1) (ii) of the Trustee Act, 1925 (being the principal beneficiary in relation thereto), and after his death as to capital and income thereof upon the trusts in the testator's will expressed then to take effect if the protective trusts for his benefit after his attaining the age of 35 years should come into operation; or (b) upon some other trusts.

Andrew Goodall for the plaintiff, the Public Trustee.

P. S. Rossdale for the trustee in bankruptcy of Douglas William Llewellyn Evans.

A. C. Sparrow for David Byatt, son of the bankrupt, an infant.

The following cases not referred to in the judgment were cited in argument: *Newton* v. *Newton* [2]; *Sidney* v. *Sidney* [3]; *In re Salting* [4]; *In re Mair* [5]; *In re Longman* [6]; *Mosey* v. *Mosey & Barker* [7]; *In re Westby's Settlement Trusts* [8]; *In re Gillott's Settlement* [9]; *In re Sartoris' Estates* [10]; *In re Haynes' Will Trusts*. [11]

DANCKWERTS J., having stated the facts, continued: In considering whether there has been a forfeiture, the first question is: What was the effect of the order of June 3, 1955, on the footing that it was never completed by the execution of any deed? The matter has been very well argued before me, and I have been taken through a number of cases. I am satisfied, upon three decisions, that clearly the effect of that order in itself was to create an equitable charge, if that were possible, upon the interest of Douglas William Llewellyn Evans under his grandfather's will. The cases in question are *Waterhouse* v. *Waterhouse* *; *Maclurcan* v. *Maclurcan* †; and *Hyde* v. *Hyde*.‡ In the last of those cases Barnard J. applied what previously had been no more really than the dicta of Lord Lindley in the *Waterhouse* case § and Chitty L.J. in *Maclurcan* v. *Maclurcan* ¶ that an order referring to specific property, in the manner of this order which I have to consider, did upon its date create an equitable charge upon the property to which reference therein was made.

That being so, the next thing to consider is: What was the effect of that order which created that equitable charge? There are two portions of the will which involve the question of forfeiture. First of all, there is the part which invokes section 33 of the Trustee Act, 1925, before the grandson had attained the age of 35, and then the part which describes what is to happen upon his attaining that age. As to the first part, the trusts of the will before he attains the age of 35 years must be taken to be expressed in this form: "Upon trust for the principal "beneficiary"—that is, the grandson—"during the trust period "or until he . . . does or attempts to do or suffers any act or "thing, or until any event happens (other than any advance under "any statutory or express power) whereby, if the said income

[2] [1896] P. 36; 12 T.L.R. 65.
[3] (1867) 17 L.T.(N.S.) 9.
[4] [1932] 2 Ch. 57.
[5] [1909] 2 Ch. 280.
[6] [1955] 1 W.L.R. 197; [1955] 1 All E.R. 455.
[7] [1956] P. 26; [1955] 2 W.L.R. 1118; [1955] 2 All E.R. 391.
[8] [1950] Ch. 296; 66 T.L.R. (Pt. 1) 515; [1950] 1 All E.R. 479.
[9] [1934] Ch. 97.
[10] [1892] 1 Ch. 11; 8 T.L.R. 51.
[11] [1949] Ch. 5; [1948] 2 All E.R. 423.
* [1893] P. 284.
† (1897) 77 L.T. 474.
‡ [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.
§ [1893] P. 284.
¶ 77 L.T. 474.

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" were payable during the trust period to the principal bene- " ficiary absolutely during that period, he would be deprived of " the right to receive the same or any part thereof." It seems to me that the effect of the order was to create, or attempt to create, an equitable charge on his interest under the testator's will. When this order was made, if he had been absolutely entitled, he would have been deprived of the right to receive part of the income, because part of the income was to be payable to his former wife to the extent of £50 a year. Consequently, it seems to me that there was a forfeiture at that date; but in any case under the express terms of the will he never succeeded in attaining his absolute interest, and the protective trusts which were to take effect during the rest of his life in accordance with section 33 of the Trustee Act, 1925, came into effect because the direction was, if such event had happened, that the protective, trusts were to come into effect, and the fund in question is referred to as the fund of which " he would then or at any time " thereafter be deprived of the right to receive the capital or " income or any part thereof." When therefore the order of the Divorce Division was made on June 3, 1955, an event happened whereby he would either then or at some time thereafter " be " deprived of the right to receive the capital or income " or any part of it.

An argument was put forward on behalf of the trustee in bankruptcy that I must construe the order made by the registrar of the Divorce Division, in accordance with the numerous cases on the subject which have come before the court, in such a way as to give effect to the order and avoid any forfeiture. It was argued that the proper way to construe the order was as a direction that upon attaining the age of 35 years, then, and not until then, the charge was to be operated upon the interests of the grandson under his grandfather's will. It seems to me that I am unable to do that. I have to deal with the order as I find it. Undoubtedly, on its terms, and on the cases to which I have been referred in which orders of this kind have been construed in the Probate and Divorce Division, the effect of such an order is to attempt at any rate to create an immediate charge. Of course, the result of the forfeiture provision in the will is that that attempt is unsuccessful, but that is the way in which the forfeiture provisions in the will operate. An event operates by which—if only there had been an absolute interest taken by the person in question—he would have been deprived of the income; but, owing to the forfeiture provision followed by the discretionary trust, he is in fact not necessarily deprived of the income but has received discretionary payments from the trustees under the protective trusts which follow. Consequently, I have come to the conclusion that, in the events which have happened in this case, by the time that David William Llewellyn Evans became bankrupt his interest under the will had been forfeited, and a discretionary

trust had come into effect. Consequently, the trustee in bankruptcy cannot take anything under the testator's will.

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Mr. Rossdale, on behalf of the trustee in bankruptcy, wished to argue as to the effect of sections 40 and 42 of the Bankruptcy Act, 1914, on the order of June 3, 1955; but, in my view, it is not open to me to consider this matter in the absence of the bankrupt's former wife, and, accordingly, I express no opinion upon that matter at all.

I will make a declaration that by reason of the order dated June 3, 1955, the life interest of Douglas William Llewellyn Evans under the terms of the testator's will was determined, and that he did not become entitled to an absolute interest upon the attainment by him of the age of 35 years, and that on the true construction of the will, and in the events which have happened, during the life of Douglas William Llewellyn Evans, the plaintiff as trustee holds the trusts of the property during the rest of the life of Douglas William Llewellyn Evans and the income thereof upon the discretionary trusts laid down in section 33 (1) (i) of the Trustee Act, 1925, and after the death of the said Douglas William Llewellyn Evans as to the capital and income thereof upon the trusts in the testator's said will expressed then to take effect if the protective trusts for his benefit after his attaining the age of 35 years should come into operation.

Declaration accordingly.

Solicitors: *Joynson-Hicks & Co. for Turner, Turner & Sheldon, Torquay; Tarry Sherlock & King; Kingsford Dorman & Co. for Williamson & Barnes, Deal.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

IAN STACH LTD. *v.* BAKER BOSLEY LTD.

1958
Feb. 3, 4.

Diplock J.

[1957 I. No. 1589.]

Sale of Goods—F.O.B.—Payment—Confirmed credit—Provision for shipment during specified period—Exact shipping date to be chosen by buyer—Buyer's delay in making credit available—Date by which credit to be opened.

Damages—Sale of goods—String contract—Failure to provide letter of credit—Loss of profit.

Contract—Repudiation—Waiver—Letter calling on other party for "immediate performance"—Acceptance later of repudiation.

In a contract for the sale of goods f.o.b. which provides for shipment over a period within which the buyer is entitled to call for the shipment of the goods at any time, and which is financed by a banker's confirmed irrevocable credit, the prima facie rule is that the credit must be opened by the buyers at the latest by the first day of the shipment period.

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A contract for the sale of ship plates to be delivered f.o.b. Benelux port for shipment to Canada "August–September, 1956" provided for payment by confirmed irrevocable credit. The buyers were responsible for shipping arrangements and for choosing the exact shipment date. They failed to open the credit either by the time the shipment period started or by August 8 when the sellers called for it to be opened immediately; and on August 14 the sellers informed them that they would be held responsible for the consequences. The buyers never in fact opened the credit and towards the end of the shipment period the sellers, after consultation with the buyers, sold the goods elsewhere but at a price lower than the contract price. In an action by the sellers for damages for breach of contract:—

Held, that it was the duty of the buyers to establish the credit by August 1, 1956, at the latest, and that although the sellers had waived their right to treat the contract as repudiated by reason of their failure to do so until such time had elapsed after August 8 as could be regarded as "immediately," on August 14 the sellers had accepted the buyers' breach as repudiation of the contract as they were entitled to do and were entitled to damages.

Pavia & Co., S.P.A. v. *Thurmann-Nielsen* [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492 applied.

Sinason-Teicher Inter-American Grain Corporation v. *Oilcakes and Oilseeds Trading Co. Ltd.* [1954] 1 W.L.R. 1394; [1954] 3 All E.R. 468 considered.

Action.

In July, 1956, the plaintiffs, Ian Stach Ltd., steel merchants, contracted with the defendants, Baker Bosley Ltd., for the sale to them of 500 metric tons of ship plates of West German origin at the price of 205 dollars per metric ton. Both parties were middlemen under a string of contracts. The plaintiffs, while negotiating the contract with the defendants, at the same time entered into a contract with their suppliers, Amalgamated Exporters (Steel and Machinery) Ltd., for the purchase of 600 metric tons of ship plates at 190 dollars per metric ton, of which the 500 tons to be sold to the defendants was to form a part. The contract between the plaintiffs and the defendants was signed on July 10, 1956, and provided for the goods to be delivered f.o.b. Benelux port (probably Amsterdam/Rotterdam), destination Canada. Delivery was to be August/September, 1956, and payment by confirmed irrevocable letter of credit divisible and transferable and assignable to the plaintiffs' nominees in Western Germany. The plaintiffs undertook to establish a 2 per cent. performance bond immediately they received a pre-advice from the defendants' bank that the letter of credit was being established. In a letter of July 12, 1956, the plaintiffs informed the defendants that delivery would be made by their suppliers to Rotterdam or Amsterdam as the defendants required; that it was the defendants' responsibility to obtain shipping space; that calling forward instructions should be sent as soon as possible; and that they were urgently awaiting either a pre-advice from the defendants' bank that the credit was being established or else the actual credit itself. The defendants, however, who were

experiencing difficulty in obtaining a letter of credit from their own buyers, failed to establish the credit. In a letter of August 8, 1956, the plaintiffs requested the defendants "to open immediately your letter of credit covering this order, as the mills are pressing us for this most energetically." As the defendants still failed to do so, the plaintiffs informed them on August 14 that as they had failed to adhere to the conditions of the contract they would be held responsible for the consequences. In the events which happened the defendants never in fact opened the letter of credit in favour of the plaintiffs.

Early in September consultations took place between the plaintiffs and the defendants with a view to finding an alternative market for the goods, and on September 14 the plaintiffs found a purchaser, a Swiss company, for goods of a similar character but at the lower price of 194 dollars per metric ton. They informed the defendants accordingly. At the time the defendants made no inquiries about the price obtained for the goods, but on September 24 they informed the plaintiffs that as they had not been communicated with before the goods were disposed of they assumed that the price obtained by the plaintiffs was such as to absolve the defendants from liability. The plaintiffs replied that they reserved their rights against the defendants.

In this action the plaintiffs sued the defendants for damages for £1,964 for breach of contract. They claimed that it was a term to be implied in the contract that the defendants would establish the letter of credit not later than August 1, 1956, or, alternatively, forthwith upon being thereafter called on to do so; and that the defendants had committed a breach of that term by failing to establish the credit either by August 1, 1956, or by August 8, when they were called upon to do so, or at all. Further, or alternatively, they contended that the defendants evinced an intention no longer to be bound by the contract; that they were at all material times unable to open the letter of credit, and that they accepted the defendants' conduct and/or their inability as a wrongful repudiation of the contract.

The defendants denied any implied term that the letter of credit would be opened by them by August 1, or when called upon to do so by the plaintiffs. They contended that it was an implied term that they would establish the letter of credit in such time as to allow the plaintiffs to make delivery on or before September 30, 1956, to the ship or ships selected by the defendants and that the defendants were entitled to establish the letter of credit on September 23 and certainly after September 14. They contended that if there were such an implied term as contended for by the plaintiffs it was waived. They admitted that the letter of credit was not opened but denied that they were unable to do so or that they evinced an intention not to be bound by the contract. They also contended that by contracting to sell the goods elsewhere during the subsistence of the contract the plaintiffs had evinced an intention not to perform the contract.

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Michael Kerr for the plaintiffs.
Neil Lawson Q.C. and *John Lloyd-Eley* for the defendants.

In addition to the cases referred to in the judgment, the following cases were cited in argument: *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[1]; *A. V. Pound & Co. Ltd.* v. *M. W. Hardy & Co. Inc.*[2]

Diplock J. This case raises the question: at what time under an f.o.b. contract, where payment is by confirmed credit, must the buyer open the credit? International trade has to an increasing extent over the last 30 or 40 years been financed by bankers' confirmed credits. So much so that the classic f.o.b. and c.i.f. contracts of the textbooks providing for cash or acceptance against documents without the intervention of the banker are now probably the exception rather than the rule; and it is a little surprising that the question which I have to answer in this case is not already the subject of authoritative decision, but it appears that it is not.

The relevant facts are fairly short. Both the plaintiffs and the defendants are merchants dealing in steel, among other metals. As each knew, neither of them was a manufacturer or stockist or a user of steel: they were both middlemen. The sums involved in contracts which they had on hand at any particular time were large, and, as is usual in the trade, beyond their own financial resources. Their method of carrying on business, again usual in the trade, was to enter into practically simultaneous contracts of purchase and sale, and to rely upon the banker's credits opened by the buyers to enable them to pay the purchase price to the person from whom they had in turn bought.

Where, as in the present case, there is a string of merchants' contracts between the manufacturer or stockist and the ultimate user, the normal mechanism for carrying out the various contracts is the familiar one which was intended to be used in this case: the ultimate user, under the terms of his contract of sale, opens a transferable, divisible credit in favour of his seller for his purchase price: his seller in turn transfers so much of the credit as corresponds to his own purchase price to his seller or, more probably, if his own contract with another merchant also calls for a transferable, divisible credit, procures his own banker to issue a back-to-back credit—that is to say, he lodges the credit in his favour with his own banker, who in his turn issues a transferable, divisible credit for the amount of his purchase price to his own seller; and so on, through the string of merchants, until the banker of the last merchant in the string issues the credit in favour of the actual manufacturer or stockist. The reason why they issue fresh credits is that in banking practice a

[1] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[2] [1956] A.C. 588; [1956] 2 W.L.R. 683; [1956] 1 All E.R. 639.

transferable credit is regarded as transferable once only, and, also as is obvious in this sort of trade, it is desired, naturally enough, by any merchant in the string to conceal from his buyer and his seller who his own customer is. That is the way, as both parties to the present transactions knew, in which this type of business is normally carried on.

[His Lordship stated the facts and continued:] On the face of the written contract of July 10, 1956, it may be a matter of doubt as to whose was to be the responsibility for finding shipping space and for determining shipping port and shipping date. Prima facie, under an f.o.b. contract that is the duty and responsibility of the buyer; but there are probably as many exceptions to the rule as there are examples of it. It appears from a letter of July 11, 1956, that the defendants took the view that at any rate so far as the selection of port was concerned the option to select the port of shipment within the limits of Benelux ports lay upon the sellers. But a letter of July 12, 1956, does in my view make it clear that the final contract (and this letter is one of the contractual documents) became a classic f.o.b. contract in which the buyer had the right and the responsibility of selecting the port, of making arrangements for shipment and choosing the date of shipment.

[His Lordship read the correspondence and continued:] The first question that I have to decide is: When was it the duty of the defendants to open the letter of credit or to forward the banker's pre-advice?—that alternative having been put forward in the letter of July 12, 1956.

As has been pointed out in numerous cases, the commercial purpose of a banker's confirmed credit is more than a mere method of payment: it creates a direct liability upon the banker independent of the contract of sale, and is an undertaking by the banker that if the seller presents the required document in the required time he will receive payment of the contract price. The commercial importance of this independent undertaking constituted by opening a confirmed credit is illustrated in a recent case in the Court of Appeal—*Hamzeh Malass & Sons* v. *British Imex Industries Ltd.*[1]—where the Court of Appeal refused an injunction to restrain the defendants from making use of the credit. I need merely refer to a passage in the judgment of Jenkins L.J., where he says[2]: "... it seems to be plain enough "that the opening of a confirmed letter of credit constitutes a "bargain between the banker and the vendor of the goods, which "imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to "whether the goods are up to contract or not. An elaborate "commercial system has been built up on the footing that "bankers' confirmed credits are of that character, and, in my

[1] [1958] 2 W.L.R. 100; sub nom. *Malas* v. *British Imex Industries Ltd.* [1958] 1 All E.R. 262.

[2] [1958] 2 W.L.R. 100, 102.

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" judgment, it would be wrong for this court in the present case " to interfere with that established practice. There is this to be " remembered, too. A vendor of goods selling against a con- " firmed letter of credit is selling under the assurance that " nothing will prevent him from receiving the price. That is of " no mean advantage when goods manufactured in one country " are being sold in another. It is, furthermore, to be observed " that vendors are often reselling goods bought from third parties. " When they are doing that, and when they are being paid by a " confirmed letter of credit, their practice is—and I think it was " followed by the defendants in this case—to finance the pay- " ments necessary to be made to their suppliers against the letter " of credit. That system of financing these operations, as I see " it, would break down completely if a dispute as between the " vendor and the purchaser was to have the effect of ' freezing,' " if I may use that expression, the sum in respect of which the " letter of credit was opened."

A letter of confirmed credit constitutes a direct undertaking by the banker that the seller, if he presents the documents as required in the required time, will receive payment; and where there is provision that under a contract a confirmed credit is to be provided, then, as was pointed out by Devlin J. in *Sinason-Teicher Inter-American Grain Corporation* v. *Oilcakes and Oilseeds Trading Co. Ltd.*,[3] that undertaking from the banker should be obtained before the seller embarks upon those operations which lead directly to the performance of his obligations under the contract.

There is clear authority binding upon me that in c.i.f. contracts the confirmed credit must be opened at latest by the beginning of the shipment period. That was decided by the Court of Appeal in *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen*,[4] where Somervell L.J. said[5]: " I think when a seller is given a right to ship over " a period and there is machinery for payment, that machinery " must be available over the whole of that period "; and Denning L.J. put the matter succinctly in the following words[6]: " The " question in this case is this: In a contract which provides for " payment by confirmed credit, when must the buyer open the " credit? In the absence of express stipulation, I think the " credit must be made available to the seller at the beginning of " the shipment period. The reason is because the seller is entitled, " before he ships the goods, to be assured that, on shipment, he " will get paid. The seller is not bound to tell the buyer the " precise date when he is going to ship; and whenever he does " ship the goods, he must be able to draw on the credit. He " may ship on the very first day of the shipment period. If, " therefore, the buyer is to fulfil his obligations he must make

[3] [1954] 1 W.L.R. 935, 939; [1954] 2 All E.R. 497.

[4] [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492.

[5] [1952] 2 Q.B. 84, 88.

[6] Ibid.

"the credit available to the seller at the very first date when "the goods may be lawfully shipped in compliance with the "contract." That, I think, is as far as the binding authorities upon c.i.f. contracts go.

It is, however, to be observed that in the *Sinason-Teicher* case,[7] in the Court of Appeal, Denning L.J. said this[8]: "We "were referred to *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen*.[9] I "agree with what Devlin J. said about that case. It does not "decide that the buyer can delay right up to the first date or "shipment. It only decides that he must provide the letter of "credit at latest by that date. The correct view is that, if "nothing is said about time in the contract, the buyer must "provide the letter of credit within a reasonable time before the "first date for shipment. The same applies to a bank guarantee: "for it stands on a similar footing."

I think that those observations, although entitled to great respect, are obiter, and they were not necessary for the decision in that case—as indeed appears from the judgment of Devlin J.[10] in the lower court, where he refers to the matter and says it is unnecessary to decide it. Neither of the other Lords Justices appears to me to express any view on the matter.

Those being the cases upon c.i.f. contracts, Mr. Kerr, to whom for his researches among the case law I am much indebted, has drawn my attention to five cases which concern f.o.b. contracts. They are: *Plasticmoda S.P.A.* v. *Davidsons (Manchester) Ltd.*[11]; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[12]; *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster Ltd.*[13]; a cryptic judgment by Bailhache J. in *Dix* v. *Grainger*[14]; and, finally, *N. V. Handel My. J. Smits Import-Export* v. *English Exporters (London) Ltd.*[15] In each of these cases it was either held or assumed that the confirmed credit had to be opened at latest by the shipment date. It does not, however, seem to me that any of them is an authority for Mr. Kerr's proposition. In the *Plasticmoda* case[16] there was a date of shipment fixed—not a period of shipment, as in this case. In the *Trans Trust* case[17] the provision was that the letter of credit should be opened forthwith. In the *Smits* case[18] it was not a classic f.o.b. contract in that the seller had the duty and responsibility of fixing the shipping; and in the *Etablissements Chainbaux* case[19] it was rather an exceptional contract, and a manufacturer's contract at that.

The distinction between those cases and the present case is that this is a classic f.o.b. contract in that the buyer is entitled

[7] [1954] 1 W.L.R. 1394.
[8] Ibid. 1400.
[9] [1952] 2 Q.B. 84.
[10] [1954] 1 W.L.R. 935, 939.
[11] [1952] 1 Lloyd's Rep. 527.
[12] [1951] 2 Lloyd's Rep. 644; [1952] 1 K.B. 285; [1952] 1 T.L.R. 13; [1952] 1 All E.R. 89.
[13] [1955] 1 Lloyd's Rep. 303.
[14] (1922) 10 Ll.L.R. 496.
[15] [1957] 1 Lloyd's Rep. 517.
[16] [1952] 1 Lloyd's Rep. 527.
[17] [1951] 2 Lloyd's Rep. 645.
[18] [1957] 1 Lloyd's Rep. 517.
[19] [1955] 1 Lloyd's Rep. 303.

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to call for shipment at any time within the shipping period and up to the end of the shipping period. The authority for that (if any be wanted) is to be found in *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co. Ltd.*[20] So it is said that there is a distinction to be drawn between a c.i.f. contract and a classic f.o.b. contract, and a distinction to be drawn between a classic f.o.b. contract and those f.o.b. contracts which were the subjects of the cases to which Mr. Kerr referred, namely, that in the classic f.o.b. contract, where the buyer can dictate the date of shipment, the seller is not obliged to commence any of the operations directed to performing his obligations under the contract until he has had shipping instructions or calling forward instructions from the buyer. It is urged by Mr. Lawson that, applying the ratio decidendi in the c.i.f. contract cases—the *Pavia*[21] line of cases—the time at which the confirmed credit must be opened is a reasonable time before the shipping instructions take effect. The rival contention by Mr. Kerr is that the credit must be opened a reasonable time (as he put it) before the earliest shipping date; but in his reply he was prepared to put it as at latest by the earliest shipping date. Mr. Lawson, on the other hand, says that it must be a reasonable time before the actual shipping date.

There is no authority which guides me in this matter. It seems to me, however, that the contention for which Mr. Kerr argues is the sensible one, and, since it is the sensible one, and since there is no authority to the contrary, the one which I am inclined to hold, and do hold, is good law.

I am fortified in this view by the fact that it is quite apparent from the correspondence and from the conduct of the parties in this case (and, so far as one can see, from that of the parties to the other contracts) that it is their view that that was the requirement of the contract. It seems to me that, particularly in a trade of this kind, where, as is known to all parties participating, there may well be a string of contracts all of which are financed by, and can only be financed by, the credit opened by the ultimate user which goes down the string getting less and less until it comes to the ultimate supplier, the business sense of the arrangement requires that by the time the shipping period starts each of the sellers should receive the assurance from the banker that if he performs his part of the contract he will receive payment. That seems to me at least to have the advantage of providing a definite date by which the parties know they have to fulfil the obligation of opening a credit.

The alternative view put forward by Mr. Lawson, namely, that the credit has to be opened a reasonable time before the actual shipping date, seems to me to lead to an uncertainty on the part of buyer and seller which I should be reluctant to import into any commercial contract. I asked Mr. Lawson, when the court came to consider what was a reasonable time, which must

[20] (1922) 28 Com.Cas. 42. [21] [1952] 2 Q.B. 84.

depend upon the circumstances, whether it depended upon the circumstances known to the parties at the time of the contract, or the circumstances as ascertained later before the shipping instructions were given—or, as a third alternative, the circumstances as they actually were, whether known to the parties or not. It seems to me that that sort of uncertainty is open to the same criticism which Somervell L.J. directed to the argument put forward to him in *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen*.[22] What was argued in that case was that the buyer need not open the credit until the seller was ready to deliver and had got bills of lading; and Somervell L.J. said then[23]: "My view is that "the contract would be unworkable if, as suggested by Mr. "Widgery, the buyer under it was under no obligation until a "date, which he could not possibly know, and which there is no "machinery for his finding out, namely, when the seller actually "has the goods down at the port ready to be put onto the ship."

It seems to me that on Mr. Lawson's argument the obligation that arises on the buyer does not arise until a date which he could not possibly know, because it is a date which must depend on circumstances which would not normally be known to him: he does not know, and would not normally know, how long a chain there was between him and the actual manufacturer or stockist to whom the credit or some subsequent back-to-back credit founded upon it has to be transferred: he would not know how long it would take to bring the goods from the place where they were and transport them to the port: he would not know in a case of this kind, and did not know, whether or not the goods had to be rolled to order or whether they were in stock or whether they were partly rolled. It seems to me that in a case of this kind, and in the case of an ordinary f.o.b. contract financed by a confirmed banker's credit, the prima facie rule is that the credit must be opened at latest (and that is as far as I need go for the purposes of this case) by the earliest shipping date. In that way one gets certainty into what is a very common commercial contract. In any other way one can, I think, only get a position in which neither buyer nor seller knows what his rights are until all the facts have been ascertained, and one, and possibly two or three, courts have directed their minds to the question whether in all the circumstances that was a reasonable time for the credit to be opened.

I therefore hold that it was the duty of the defendants under this contract to open their letter of credit or to get a banker's pre-advice of it by August 1, 1956, at the latest. That makes it necessary for me to consider the second line of defence, namely, that the plaintiffs waived their right to treat the contract as repudiated by the defendants when they failed to open their letter of credit within the appropriate time. The defendants rely for that waiver first on the letter of August 8, 1956, which calls upon the defendants to open the letter of

[22] [1952] 2 Q.B. 84. [23] Ibid. 88.

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credit immediately. I think there is no doubt that that letter did amount to a waiver of their right to treat the contract as repudiated by breach of condition until such time had elapsed after receipt of that letter by the defendants as could reasonably be called "immediately." Certainly that time had elapsed by August 14 on which date a letter was sent which said: "In "view of your failure to adhere to the conditions of the above-"mentioned contract we must hold you responsible for all "consequences arising out of this and have no option but to "place the matter into the hands of our legal advisers." It is, in my view, perfectly plain that at that date the plaintiffs accepted the breach of condition by the defendants in failing to open a credit as a repudiation of the contract. It was obviously a term which went to the root of the contract, and they were entitled so to do in law.

[His Lordship having referred to the correspondence then said he could find no sign in the subsequent correspondence or in the actions of the parties of any waiver by the plaintiffs of their rights, and that he would be reluctant to find that by taking the course which they had at the request of the defendants, the plaintiffs were to discover that they had waived their rights without any intention to do so. His Lordship continued:]

There remains one final matter, namely, the question of damages. In accordance with the judgment in *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*,[24] in a case of this kind, where there is a string of contracts which it is known (as it was in this case) can only be financed by a letter of credit from the ultimate buyer, prima facie the measure of damages is the loss of profit on the transaction, since the defendants must have known that their failure to provide the letter of credit would make it impossible for the plaintiffs to carry out the transaction, just as failure on their own buyer's part to provide a letter of credit made it impossible for the defendants themselves to carry out the transaction. I think, therefore, that probably the right basis is loss of profit. The matter was pleaded in that way in the alternative by amendment, which I allowed at a late stage upon terms that it did not increase the amount of damages recoverable. Mr. Kerr has sought damages on the difference between the contract price, namely, 205 dollars per metric ton, and the market price at the time. He says that the market price at the time was 194 dollars, being the price at which the Swiss company were prepared to buy from his clients on August 14, 1956. Mr. Lawson has sought to argue that some higher price represented the market price. I observe that when the defendants themselves were trying to sell these goods the asking price was 195 dollars per ton. The asking price in this business, as in other businesses, does not represent a price less than the market price, and I find

[24] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1006; [1952] 1 All E.R. 970; reversing in part [1951] 2 Lloyd's Rep. 644.

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that the market price here at the relevant time is fairly represented by the figure of 194 dollars, which the plaintiffs received. They are, therefore, in my view, entitled to damages in the sum claimed.

[For the purposes of an appeal, his Lordship found that a reasonable time before the last possible shipping date for opening the letter of credit would have expired three weeks before September 30, 1956, the last day of the shipment period.]

Judgment for plaintiffs for £1,886 15s. 8d.

Solicitors: *Matthew Trackman, Lifton & Cunnington; Rising & Ravenscroft.*

E. M. W.

[CHANCERY DIVISION.]

PUBLIC TRUSTEE *v.* INLAND REVENUE COMMISSIONERS.

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Feb. 4, 13.

Danckwerts J.

[1957 P. No. 2057.]

Revenue — Estate duty — Property chargeable — Property passing on death—Bequest to trustee for life of income from share of residue— "... so long as he shall act as ... trustee ... by way of "remuneration"—Duty claimed on death of trustee on capital of share—Whether exempted as income received "only ... as holder "of an office"—Scope of exempting provisions—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (2) (3), *as amended.*

Trust and Trustee—Remuneration—Annuity—Life interest in share of residue by way of remuneration—Estate duty claimed on death of trustee.

A testator gave to one of the trustees of his will the income from certain shares of his residuary estate "during his life so long "as he shall act as executor and trustee of this my will by way of "remuneration for so doing ..." On the death of the trustee, the Inland Revenue Commissioners claimed estate duty under section 1 of the Finance Act, 1894,[1] as property passing on the

[1] Finance Act, 1894 (as amended by the Finance Act, 1946), s. 1: "In "the case of every person dying after "the commencement of this Part of "this Act, there shall, save as herein- "after expressly provided, be levied "and paid, upon the principal value "ascertained as hereinafter provided "of all property, real or personal, "settled or not settled, which passes "on the death of such person a duty, "called 'estate duty,' at the gradu- "ated rates hereinafter mentioned, "and the existing duties mentioned "in the First Schedule to this Act "shall not be levied in respect of pro- "perty chargeable with such estate "duty."

S. 2: "(1) Property passing on the "death of the deceased shall be "deemed to include the property fol- "lowing, that is to say:—(*a*) Pro- "perty of which the deceased was at "the time of his death competent to "dispose; (*b*) Property in which the "deceased or any other person had "an interest ceasing on the death of "the deceased, to the extent to which "a benefit accrues or arises by the "cesser of such interest; but exclu- "sive of property the interest in "which of the deceased or other per- "son was only an interest as holder "of an office, or recipient of the "benefits of a charity, or as a cor- "poration sole; ... (2) Property

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death, on the share of capital corresponding to the share of income to which the trustee had been entitled immediately before his death. The claim was resisted on the ground that the interest was enjoyed by the trustee "only . . . as holder of an office," and that it therefore came within the exemption from duty in section 2 (1)(*b*) of the Act:—

Held, allowing the claim to estate duty, (1) that the exemption in section 2 (1) (*b*) only applied in respect of property within the extended meaning given to property passing on the death in section 2, and had no application to duty payable under section 1.

Attorney-General v. *Milne* [1914] A.C. 765; 30 T.L.R. 476; *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198; 15 T.L.R. 270; and *Sanderson* v. *Inland Revenue Commissioners* [1956] A.C. 491; [1956] 2 W.L.R. 98; [1956] 1 All E.R. 14 considered.

Per curiam. From the cases the following propositions are deducible: (1) Section 1 of the Finance Act, 1894, is the charging section, and if a case falls within the terms of that section, it is unnecessary to refer to the including or extending provisions of section 2. (2) None the less the restricting or excluding provisions to be found in subsections (2) and (3) of section 2 *do* affect cases which would fall within section 1.

(2) That although the testator's appreciation of the qualities of the trustee was no doubt why he was selected as trustee, as he was only to receive this income so long as he acted as trustee and by way of remuneration for so doing, it could not be claimed that he had not received the income from these shares "only . . . as "holder of an office." The position of a trustee was an "office" within the meaning of section 2 (1) (*b*) of the Act.

Attorney-General v. *Eyres* [1909] 1 K.B. 273; 25 T.L.R. 298 and *Dale* v. *Inland Revenue Commissioners* [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671 applied.

Adjourned summons.

The following statement of facts is taken from the judgment. This summons arose out of the provisions of the will of the late Viscount Northcliffe, and the question asked was whether on the death of Henry Preuss Arnholz (who was an executor and trustee of the will) estate duty became payable on a share of the capital of the testator's residuary estate corresponding to the share of the income thereof to which Arnholz was entitled immediately before his death under the terms of the will.

Lord Northcliffe made his will on March 22, 1919; he also made three codicils, but the provisions of them were not relevant on the present question. Lord Northcliffe died on August 14,

"passing on the death of the deceased "when situate out of the United "Kingdom shall be included only, if, "under the law in force before the "passing of this Act, legacy or suc- "cession duty is payable in respect "thereof, or would be so payable but "for the relationship of the person to "whom it passes. (3) Property pass- "ing on the death of the deceased "shall not be deemed to include pro- "perty held by the deceased as "trustee for another person, under a "disposition not made by the "deceased, or under a disposition "made by the deceased more than "five years before his death where "possession and enjoyment of the "property was bona fide assumed by "the beneficiary immediately upon "the creation of the trust and thence- "forward retained to the entire exclu- "sion of the deceased or of any "benefit to him by contract or "otherwise."

1922, and his will and codicils were duly proved on February 23, 1923, by the executors therein named.

By his will Lord Northcliffe appointed Arnholz (who was a solicitor) and Sir George Augustus Sutton to be the executors and trustees. By clause 6 of his will he devised and bequeathed his real and personal estate upon the usual trusts for conversion and the resulting residuary trust fund was directed to be held upon trust to pay the net income arising therefrom in each year in the shares and manner directed in the following paragraphs of clause 6. The direction in paragraph (26) was "As to three "equal one-hundredth parts of the said income to the said Henry "Preuss Arnholz during his life so long as he shall act as executor "and trustee of this my will by way of remuneration for so doing "and in addition to any professional charges which he may be "entitled to make in accordance with clause (23) of this my "will."

Paragraph (27) directed the payment of seven equal one-hundredth parts of the said income to Sir George Augustus Sutton during his life so long as he should act as executor and trustee of the will by way of remuneration for so doing and in addition to the specific legacy given him under clause 1 of the will.

By paragraph (28) Lord Northcliffe declared that on the failure (whether in his lifetime or afterwards) of each of the trusts declared respectively by sub-clauses (1) to (27) of that clause of the will the shares or share of income which were the subject of the trust which should have failed (including all additions thereto under the present provision) should be added to the income of such of the said trusts created by such sub-clauses (1) to (27) of clause 6 of the will as should not have failed and to the last one of such trusts when all but one should have failed and in every case except the last such addition to each trust should be in the proportion which the income then subject to that trust (including income accrued under this present provision) should at that date bear to the income then subject to the others or other of the said trusts which should not have failed (including income accrued under this present provision).

The division of the income into 100 shares was in fact upset by the addition of provisions for the payment of three more one-hundredth shares in the second codicil dated June 23, 1920. This difficulty was resolved by the decision of Russell J. on July 28, 1924, that the additional three shares be shared equally with the gifts in clause 6 of the will so that everyone took so many 1/103 shares instead of 1/100 shares.

By clause 10 of the will the capital of the residuary estate was dealt with by certain charitable gifts.

By clause 19 of the will the testator conferred very wide discretionary powers on his trustees, stating that it was his intention that the said Henry Preuss Arnholz, whom he had known since he was 10 years old, and the said George Augustus Sutton, whom he had known since the year 1890, both of whom

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were well acquainted with his wishes and intentions with regard to his estate, and in whose business capacity and fairness and integrity he had the fullest confidence, and other the trustees or trustee for the time being of his will should have the fullest freedom of action and the widest and most absolute and uncontrolled discretion in all matters whatsoever relating to the administration of his estate and the carrying out of the purposes of his will.

Sir George Augustus Sutton died on December 7, 1947. No claim to estate duty on the shares of the capital of the estate in respect of which he was receiving the income on the occasion of his death was made by the Inland Revenue Commissioners.

Arnholz died on August 31, 1955. Immediately before his death he was receiving the income of 3/49½ shares of capital of the residuary estate. On the occasion of his death a claim had been made by the Inland Revenue Commissioners that estate duty was payable on those shares of capital under the provisions of section 1 of the Finance Act, 1894. This claim was resisted by the Public Trustee on the ground that Arnholz' interest in the income received by him under the will was "only an interest "as holder of an office" within the terms of section 2 (1) (*b*) of the Finance Act, 1894.

The Public Trustee took out the present summons to have determined whether the claim by the commissioners to estate duty on Arnholz' death was correct.

John Pennycuick Q.C. and *J. A. Wolfe* for the Public Trustee.

Sir Lynn Ungoed-Thomas Q.C. and *E. Blanshard Stamp* for the Crown.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

February 13. Danckwerts J. read the following judgment, in which he stated the facts as set out above.

The claim to estate duty by the Inland Revenue Commissioners is substantial, as duty at the rate of 55 per cent., amounting to some £80,000, is claimed, and if the claim is well founded, duty at the same rate will be payable on Arnholz' comparatively small free estate of some £25,000.

[His Lordship read sections 1 and 2 (1) (*a*) and (*b*) of the Finance Act, 1894.]

Subsections (2) and (3) of section 2 are, however, limiting provisions, which appear to be of general application under the scheme of the Act. Subsection (2) excludes in effect from liability to duty property situate outside the United Kingdom unless legacy or succession duty would previously have been payable; and subsection (3) excludes generally property held by the deceased as trustee unless it falls within the provisions as to gifts.

It is contended on behalf of the Inland Revenue Commissioners that: (1) in any case the position of Arnholz does not come within the words of exclusion in section 2 (1) (*b*), and (2) the excluding provision in that subsection has no application to cases falling within section 1 of the Act.

It is not contested, as I understand, that the shares of the property passed on the death of Arnholz within the meaning of section 1.

The relationship of sections 1 and 2 of the Finance Act, 1894, has been the subject of discussions in a number of cases in the Court of Appeal and the House of Lords.

The view that sections 1 and 2 are mutually exclusive has been based on the remarks of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners*.[1] The short facts of the case were that a father and a son, after disentailing, had mortgaged certain estates to an assurance company to secure £230,000, and had then resettled the estate so that, subject to a charge of annuity for the son during his father's life, the estates were held in trust for the father for life, and after his death for the son, with remainders over. The House of Lords held that the case fell under section 1 of the Act, and that the property which passed on the father's death was the equity of redemption, without any deduction for the annuity. The view taken in the Court of Appeal seems to have been that section 2 applied because the father's life interest ceased on his death. Lord Macnaghten pointed out[2] that in every case in which property comprised in a settlement passes on death the estate or other limited interest of the preceding owner must have ceased for good and all, and that the passing of settled property was specifically mentioned in section 1. Lord Macnaghten then proceeded to say (in an often quoted passage)[3]: "Now, if the case falls within section 1 "it cannot also come within section 2. The two sections are "mutually exclusive. Section 1 might properly, I think, be "headed, 'With regard to property passing on death, be it "'enacted as follows.' Section 2 might with equal propriety be "headed, 'And with regard to property not passing on death, "'be it enacted as follows.' I cannot, therefore, agree with "Rigby L.J. when he says that section 2 is a provision "'explanatory' of section 1. In my opinion the two sections "are quite distinct, and section 2 throws no light on section 1. "But, then, no doubt section 2 speaks of 'property in which "'the deceased . . . had an interest ceasing on the death of "'the deceased.' And that, it may be said, was just the position "of the second earl with regard to the Mornington settled "estates. So it was. But section 2 does not apply to an "interest in property which passes on the death of the deceased. "That is already dealt with in the earlier section."

The House, as a whole, were satisfied that the case fell within

[1] [1899] A.C. 198; 15 T.L.R. 270.
[2] [1899] A.C. 198, 212.
[3] Ibid.

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section 1 of the Act, though Lord Davey expressed an opinion that the same result was arrived at, whether the case fell within the first or the second section.

Attorney-General v. *Milne*[4] related to a gift of property, which was caught by the provisions of section 2 (1) of the Finance Act, 1894, as amended by section 59 of the Finance (1909–10) Act, 1910. The question was whether the further settlement estate duty imposed by section 5 applied to property made subject to estate duty by the provisions of section 2. The decision of the House of Lords was that section 5 did not apply. Lord Haldane described section 2 as not a definition section but an independent section operating outside the field of section 1. Lord Dunedin, though he differed from the other members of the House as to the application of section 5, and, therefore, dissented, had some interesting remarks to make as to the relation of sections 1 and 2. He said[5]: "The paramount enacting section "of the Act is undoubtedly to be found in section 1. I need not "quote it. The duty which it is the object of the Act to levy is "imposed on property real and personal, settled or not settled, "which 'passes' on the death of any person dying after the "commencement of the Act. Now, although the word 'passes' "is what I may call a neutral or vague word, it is so naturally "associated with the idea of 'from' and 'to,' and 'on the "'death,' so directs attention to the death of a person who "leaves property behind him, that had that section stood alone "it is reasonably clear that much property would have escaped "which the framers of the Act wished to tax. Accordingly we "have section 2. That section was authoritatively discussed in "your Lordships' House in the case of *Earl Cowley*.[6] Whether "Lord Macnaghten was strictly correct or not in saying that the "two sections were mutually exclusive seems to me to matter "little. At any rate—and that is all that is material—section 2 "sweeps into the net various things which section 1 would have "failed to secure, or, as Lord Watson put it in the case of "*Attorney-General* v. *Beech*,[7] 'it extends it to all cases where "'a survivor of the deceased takes a succession, or I should "'say rather, derives a benefit by reason of the death of the "'deceased dependent upon and emerging upon the death of the "'deceased.'

"How does section 2 do this? It does not do it by being "conceived in the words of a taxing section imposing the duty "on certain specified kinds of property. It does it by saying "that property passing on the death of the deceased—which is "already taxed by virtue of section 1—shall be deemed to include "the property following, that is to say—and then follow the "various subsections.

"It seems to me that that is as much as to say that the "words, 'property passing on the death,' in the first section,

[4] [1914] A.C. 765; 30 T.L.R. 476.
[5] [1914] A.C. 765, 774, 775.
[6] [1899] A.C. 198.
[7] [1899] A.C. 53; 15 T.L.R. 85.

" are to be read as if the words ' including the property following, " ' that is to say '—(and then all the subsections)—had been " there inserted. In other words, I do not think that any one " can criticize Lord Macnaghten because in *Cowley's* case [8] he " talks of property being ' deemed to pass,' although that expres- " sion is not actually used. The net result is that the expression " ' property which passes,' in the first section, must include " property which is deemed to pass by virtue of the second " section—for section 1 is the only taxing section."

Lord Parker observes [9]: " The second section of the Act, by " providing that property passing at the death shall be deemed " to include certain kinds of property which do not in fact pass " at the death, artificially enlarges the ambit of the expression " ' property passing at the death.' It also artificially limits such " ambit by expressly excluding certain kinds of property which " do in fact pass at the death. It is in no sense a definition " section."

By that, of course, Lord Parker means that section 2 has the effect of removing from liability to tax certain kinds of property on which otherwise the tax would be imposed by section 1. Accordingly the provisions, at any rate of subsections (2) and (3) of section 2 (limiting the property subject to tax), do relate back to section 1 and affect the incidence of that section. It is, indeed, not disputed that the limiting provisions in regard to foreign property and property held by the deceased as trustee in these subsections have the effect of cutting down the charging provisions of section 1.

Further comments on these two sections are to be found in *In re Duke of Norfolk*,[10] which was a case of a continuing annuity for more than one life given to persons in succession, held to pass under section 1, so that duty could not be claimed as on the cesser of an interest, under section 2 (1) (*b*), on a slice of the property charged with the annuity. The Court of Appeal considered that they were bound by Lord Macnaghten's construction of sections 1 and 2 in *Earl Cowley* v. *Inland Revenue Commissioners* [11] that, if the case fell within section 1, a claim to tax could not be made under section 2 (see *per* Evershed M.R. and *per* Jenkins L.J.[12]). But this case does not appear to me to bear very directly on the question I have to decide.

In *Sanderson* v. *Inland Revenue Commissioners* [13] the cases of *Earl Cowley* v. *Inland Revenue Commissioners* [14] and *Attorney-General* v. *Milne* [15] were considered by the House of Lords. A settlor, who died in 1943, had voluntarily settled on trusts for his son and daughter in 1942 shares in a private company. There was no doubt that estate duty had become payable on the shares under section 2 (1) (*c*) of the Finance Act, 1894. The question

[8] [1899] A.C. 198.
[9] [1914] A.C. 765, 779.
[10] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.
[11] [1899] A.C. 198.
[12] [1950] Ch. 467, 473, 484.
[13] [1956] A.C. 491; [1956] 2 W.L.R. 98; [1956] 1 All E.R. 14.
[14] [1899] A.C. 198.
[15] [1914] A.C. 765.

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was whether the method of valuation, substituted by section 55 (1) of the Finance Act, 1940, for the provisions of section 7 (5) of the Act of 1894, applied. The House of Lords held that the section was simply a valuation section and applied equally to property passing on death under section 1 and to property deemed to be included by the provisions of section 2. The relationship of sections 1 and 2 of the Act of 1894 is discussed in some detail by Lord Radcliffe, and I must read some passages from his speech. He said [16]: "Estate duty is not charged by the Act "upon two different kinds or classes of property, property which "passes in the natural sense and property which is deemed to "pass by virtue of special statutory provision. Strictly speaking, "as has often been pointed out, no property at all is 'deemed to "'pass' under the Act. What section 1 provides is that estate "duty is to be charged upon all property passing on death, "whether real or personal, settled or not settled. It offers no "other clue as to the meaning to be attached to those words. "What section 2 provides is that property passing on death is "to be deemed to include certain kinds of property or, perhaps "more accurately, certain property in certain situations, and is "not to be deemed to include certain property in other situa-"tions. I have never known it disputed that the exclusion "provision which is contained in section 2 (3) applies to all "property passing, whether it passes under section 1 simpliciter "or under section 1 so enlarged or interpreted by section 2 (1). "But the result of this is that it is section 1 and no other section "that imposes the charge of estate duty, that the charge so "imposed is imposed upon property that passes on death and "no other property, and that the effect of section 2 (1) is to give "to the word 'passes' in section 1 a meaning wider and, if you "please, less natural than it would have had if section 2 (1) had "not been enacted. Personally, I find this approach to the "general purport of the Act a more satisfactory method than that "of dividing the property charged by the Act into two categories "consisting in the one case of property actually passing and in "the other of property notionally passing, categories which the "Act itself does not employ."

Then, after distinguishing *Attorney-General* v. *Milne* [17] as being a special case, relating to the provisions as to settlement estate duty, Lord Radcliffe says [18]: "I do not see that our "decision can be said in any way to conflict with those earlier "cases. The most that can be said in that connexion is that it "will leave unexplained what exactly Lord Macnaghten meant "in *Cowley* [19] when he said of sections 1 and 2 'the two sections "'are mutually exclusive,' or what Lord Haldane meant in "*Milne* [20] by the words 'Section 2 is thus not a definition section, "'but an independent section operating outside the field of

[16] [1956] A.C. 491, 498.
[17] [1914] A.C. 765.
[18] [1956] A.C. 491, 500.
[19] [1899] A.C. 198.
[20] [1914] A.C. 765.

" ' section 1.' But, as Lord Macnaghten's words have been a " matter of inquiry since the year 1900 (see *Attorney-General* v. " *Dobree*,[21] *per* Channell J.), and since Lord Haldane himself " gave a substantially different explanation of the relation of the " two sections in *Nevill* v. *Inland Revenue Commissioners*[22] " when he said: ' The principle is contained in section 1. Sec- " ' tion 2 combines definitions of such property with the extension " ' of the application of the principle laid down in section 1 to " ' certain cases which are not in reality cases of changing hands " ' on death at all . . .', I think that we may safely resign these " passages to the list of the many minor mysteries of the law."

I was also referred to *De Trafford* v. *Attorney-General*,[23] but that case does not seem to me to advance the matter in any way.

From the cases which I have mentioned the following propositions are deducible, it appears: (1) Section 1 of the Finance Act, 1894, is the charging section, and if a case falls within the terms of that section, it is unnecessary to refer to the including or extending provisions of section 2. (2) None the less the restricting or excluding provisions to be found in subsections (2) and (3) of section 2 *do* affect cases which would fall within section 1. So that foreign property in appropriate cases, and trust property (unless chargeable as a gift), which do pass on a death are excluded from the charge of section 1.

The question still remains whether the excluding provision which is contained in section 2 (1) (*b*) is capable of application to the case of property which passes within the unextended or natural meaning of section 1 of the Act. For this purpose, it appears to me to be necessary to refer again to the precise words of section 2 (1) (*b*). These are: " Property in which the deceased " or any other person had an interest ceasing on the death of " the deceased, to the extent to which a benefit accrues or arises " by the cesser of such interest; but exclusive of property the " interest in which of the deceased or other person was only an " interest as holder of an office, or recipient of the benefits of a " charity, or as a corporation sole." It seems to me that grammatically the second or excluding portion of this provision must refer to the preceding or including part of the provision. The provision is saying that the situation mentioned shall be included in the ambit of the tax, but not so as to bring in cases which are then mentioned. It is not a general provision excluding from liability these cases from the ambit of the Act; it is an exclusion from the extended and artificially included case of certain things to which that artificial provision would otherwise be applicable. Mr. Pennycuick has called my attention to some illogical results which this reading of the provisions will cause. But I do not feel that considerations of that kind justify a

[21] [1900] 1 Q.B. 442, 450; 16 T.L.R. 80.

[22] [1924] A.C. 385, 389; 40 T.L.R. 341.

[23] [1935] A.C. 280; 51 T.L.R. 298.

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departure from the plain grammatical arrangement of the words used.

Accordingly, it appears that the excluding words in section 2 (1) (*b*) do not apply to the present case.

There is also another point which was taken on behalf of the Inland Revenue Commissioners and with which I think I ought to deal. It is said that the interest which Arnholz had in the present case under the provisions of Lord Northcliffe's will was not "only an interest as holder of an office"—in the words of the provision in section 2 (1) (*b*)—with an emphasis on the word "only."

In *Attorney-General* v. *Eyres* [24] the testator had provided for the payment of "an annual sum of £200 each to the trustees or "trustee while acting in the trusts by way of remuneration for "their services, and in addition to any payments for professional "services." Channell J. held that on the death of an original trustee the annual sum of £200 did not attract estate duty or settlement estate duty because the interest which the deceased trustee had in the property was an interest only as holder of an office, namely, the office of trustee, within the exception in section 2 (1) (*b*). It was sought to distinguish this case on the basis of an argument that in the present case, as the remuneration was not given to all the trustees from time to time and in view of the testator's reference to the personal qualities of Arnholz and Sir George Augustus Sutton, the benefit received by them was of a personal and beneficial nature and not annexed to their offices as trustees. This argument seems to me quite untenable. No doubt the appreciation of the qualities of Arnholz and Sir George Sutton by the testator was the reason of his selection of them to be trustees, but the shares of income are given to them by clause 6 of the will only so long as they act as executor and trustee respectively and by way of remuneration for so doing. I understand that Sir Lynn Ungoed Thomas desired to keep open for argument in a higher court whether the position of trustee is an office within the meaning of section 2 (1) (*b*). But I feel no doubt that it is an office and that Arnholz and Sir George Sutton received their remuneration in the form of shares of income only as holders of that office. This view is also supported by the decision of the House of Lords in *Dale* v. *Inland Revenue Commissioners* [25] that the remuneration of a trustee was "earned income"—arising in respect of any remuneration from any office or employment of profit—in regard to the "special contribution" imposed by the Finance Act, 1948.

On this point, therefore, the arguments on behalf of the Inland Revenue Commissioners fail.

In my opinion, therefore, the question raised by the summons

[24] [1909] 1 K.B. 723; 25 T.L.R. 298.

[25] [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671.

should be answered in the affirmative, and I will make a declaration accordingly.

Declaration accordingly.

Solicitors: *Russell & Arnholz; Solicitor, Inland Revenue.*

I. G. R. M.

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[PROBATE, ETC., DIVISION.]

PONTICELLI *v.* PONTICELLI (ORSE. GIGLIO) (BY HER GUARDIAN).

1958 *Jan.* 13, 14, 15.

Sachs J.

Husband and Wife—Marriage—Validity—Proxy marriage—Husband domiciled in England—Home to be in England—Recognition of marriage ceremony in Italy.

Husband and Wife—Nullity—Conflict of jurisdiction—Wilful refusal—Marriage abroad—Law applicable.

Conflict of Laws.

An Italian domiciled and resident in England married by proxy in accordance with Italian law while he personally was in England a girl at that time resident and domiciled in Italy. The country of the intended matrimonial home was England. The husband presented a petition for nullity of marriage on the ground that the wife had wilfully refused to consummate it. The question accordingly arose which law was applicable upon the husband's plea if the proxy marriage itself were recognized in this country as a valid ceremony:—

Held, (1) that the court would recognize the proxy marriage.

Apt v. *Apt* [1948] P. 83; 63 T.L.R. 618; [1947] 2 All E.R. 677 applied.

(2) That the appropriate law to apply was not the lex loci celebrationis but English law, which was the lex domicilii and the lex fori (and, also, the law of intended matrimonial home).

Way v. *Way* [1950] P. 71; 65 T.L.R. 707; [1949] 2 All E.R. 959 followed.

Robert (*orse. de la Mare*) v. *Robert* [1947] P. 164; 63 T.L.R. 343; [1947] 2 All E.R. 22 not followed.

Per curiam: If it were necessary to decide between the lex domicilii and the lex fori, it is to be urged in support of the lex domicilii that it would be unfortunate indeed if a marriage were held valid or invalid according to the country in which the matter was adjudicated; the danger is all the more to be feared by reason of the provisions of section 18 of the Matrimonial Causes Act, 1950. It is a matter of some importance that the initial validity of a marriage should in relation to all matters except form and ceremony (to which a uniform general rule applies) be consistently decided according to the law of one country alone.

de Reneville v. *de Reneville* [1948] P. 100; 64 T.L.R. 100; [1948] 1 All E.R. 56 considered.

PETITION by husband for a decree of nullity on the ground that the wife had wilfully refused to consummate the marriage.

Both the husband and the wife were born in Ostuni in the province of Brindisi in Italy. The former was stated to have

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been born in October 1927, and the latter in February 1937. Both remained at all material times Italian nationals. In 1952, however, the husband came to this country where he considered that there were prospects of earning a better livelihood. He settled in this country and it was stated that he intended shortly to apply for naturalization. He had only been back to Italy once since 1952, namely, on a visit to Ostuni at Eastertide, 1955. One of his objectives on that occasion was to seek a wife. During his stay in Italy of a few weeks, the girl who became his wife, then aged 18, was presented to him by her parents, at the instance of his aunt, in case she should be found suitable for matrimony. After a few visits to see her at her parents' home an engagement was effected. Neither of the parties had spoken to each other in the absence of their elders before the betrothal took place, and the true negotiators appeared to have been the respective families. It was arranged that whilst the husband was still in Italy matters should be put in hand with a view to a marriage by proxy taking place, and the preliminary steps were taken accordingly: the husband returned to England where he signed certain documents, including a power of attorney. The ceremony took place in Italy by proxy on July 11, 1955, while the husband was in England, where it was planned that they should make their home.

The wife remained in Italy for the rest of July, for August and September. On October 26, 1955, she arrived in England and appears to have reached Paddington without having given her husband notice of the date or time of her arrival. He had by then secured accommodation in Bedford. She considered that she had been forced by her relatives into the marriage and it seems that by the time her husband met her at Paddington any disposition on her part to carry out further the wishes of her relatives had evaporated. She gave the husband nothing in the form of a greeting, though he tried to embrace her. On the way from Paddington to King's Cross it did not take much to start some minor tiff and by the time they reached the train for Bedford the wife was manifesting a firm intention to go back to Italy. She refused to go to Bedford so it became necessary, as there was no accommodation available readily for her in London, to repair to the police station at King's Cross, where she introduced herself to the police sergeant by her maiden name and made clear her intention not to stay in this country. No doubt both spouses by then were irritated and excited. In the next few days, first at the Italian Consulate and next at the convent to which she was taken, the husband on his side made it clear that he wanted her to come to Bedford and the wife, on her side, made clear her determination on three points: first, she did not want him as a husband; secondly, she considered she had been forced into the marriage by her relatives and, thirdly, she was going back to Italy.

By his petition dated November 12, 1956, the husband sought

a decree of nullity on the ground of the wife's wilful refusal to consummate the marriage. The wife, as an infant, was represented by the Official Solicitor as guardian, and by her answer, put in issue the validity of the marriage, admitted that there had been no cohabitation between her and the husband, and that there was no consummation of the marriage, but laid the blame for those last two facts at the door of the husband.

George Dobry for the husband.

Roger Ormrod and *Holroyd Pearce* for the Official Solicitor as guardian ad litem to the wife.

The cases cited in argument are those in the judgment.

SACHS J. referred to the facts leading up to the proxy ceremony substantially as set out above, and of the marriage itself and said: It appears that the proxy marriage between these two took place in Italy whilst the husband was in England. I say "appears" to have taken place, because nobody who was there has been called to give evidence before me, and the only evidence that a marriage took place is that the certificate, to which I will refer later, was produced. [His Lordship referred to the contentions on the pleadings and continued:] The issues raised for decision in the course of the trial before this court were as follows: first, was there a valid marriage in Italy between this husband and wife on July 11, 1955; secondly, if the parties were thus validly married, then by the law of what country does the husband's plea fall to be decided, the lex loci contractus, the lex domicilii or the lex fori; thirdly, if the law in question is that of this country, has wilful refusal as alleged been established. A decision on these points has been rendered, if anything, a little more difficult by the absence of the wife. She being still an infant has, however, had the good fortune to be represented by the Official Solicitor and by Mr. Ormrod and Mr. Holroyd Pearce of counsel. She was given every opportunity to come to this country and attend this trial and it is unfortunate that she did not come, especially as she was offered the expenses of attendance.

Turning now to the validity of the marriage, the position is that by 1955 the husband had, in my view, become domiciled in this country. He was so domiciled when in 1955 in Ostuni the betrothal took place, and it was the basis of the arrangement between the parties that the matrimonial home should be in this country. By the evidence of Dr. Terni, an expert on Italian law, it appears that marriages by proxy as between parties resident in Italy are recognized as valid. It further appears that by article 111, subsection 2, of the Italian Civil Code, Book 1, a marriage by proxy can also take place when one of the spouses resides abroad and there are "serious reasons to be evalued by "the General Attorney of the Italian court of the place where

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"the other spouse resides." It is to be noted that, wisely, the proxy must mention the name of the other spouse. It follows that the husband could, in 1955 in Italy, have executed a power of attorney validly authorizing a proxy marriage. It is also clear that providing the appropriate formalities take place, such a proxy executed in this country would be valid for the purpose of a marriage in Italy.

The correct approach by the courts of this country to the issue whether a proxy marriage, such as the present, is valid, was clearly laid down by the Court of Appeal in *Apt* v. *Apt*,[1] the case of a proxy marriage in Argentina. Cohen L.J. delivered the judgment of the court and, after holding that it was not contrary to public policy here to recognize a marriage by proxy which has taken place outside this country, went on to say[2]: "we are unable to see any reason in public policy which would "require the English courts, if they recognize the validity of "proxy marriages celebrated outside the United Kingdom, to "deny to a person domiciled in this country the right of so "celebrating a marriage, provided, of course, that he or she has "in other respects capacity to marry and does not infringe any "provision of English law," and then "We think it impossible "to hold that, in the absence of some statutory prohibition, it "is contrary to public policy to execute in England a power of "attorney which the same person could validly execute in the "Argentine, the power of attorney being intended to authorize "an act in the Argentine which is lawful by the law of that "country."

Those passages plainly cover the present proxy marriage in Italy, despite the fact that the husband was domiciled here. There are here no facts which suggest that a power of attorney was used to effect a marriage which was not at the material moment voluntary on the part of the giver of the power.

The only point which caused me some concern was the paucity of the evidence as to the marriage itself. Neither the power of attorney nor any copy of it was put in evidence. No testimony was given as to the contents or the effect of any document signed or executed by the husband, or as to any "evaluation of serious reasons." The marriage certificate does not even reveal that the marriage was a proxy one, nor does it disclose whether the ceremony was religious, civil or of that mixed variety called a Concordat marriage. The totality of the evidence is that a marriage by proxy was arranged; that the husband signed a document for that purpose when he was in England on July 11, 1955; that the wife admits a proxy marriage took place; and that the marriage certificate in question is produced.

It seems to me, however, that in the above state of affairs the court should in relation to that marriage certificate, which Dr.

[1] [1948] P. 83; 63 T.L.R. 618; [1947] 2 All E.R. 677.

[2] [1948] P. 83, 88.

Terni said was acceptable by the courts of Italy when issued in regard to a proxy marriage, apply the presumption of omnia rite esse acta, and I hold there was a valid marriage shown to have taken place.

The next issue is, what law is applicable to the plea of nullity by reason of wilful refusal to consummate the marriage? The importance of that issue in the present case derives from the fact that such a refusal, if established, (a) is a ground on which a decree of nullity may be granted, according to the law of this country, under section 8 (1) of the Matrimonial Causes Act, 1950; (b) is not a ground for such a decree of nullity before a civil court in Italy; and (c) is not a ground for such a decree before a consistory court there, unless the intention to refuse to consummate the marriage existed at the moment of the ceremony itself.

I pause to note that on the evidence before me it is not clear whether in Italy it would be a civil or a consistory court which has jurisdiction over this particular marriage—but most probably it would be the latter.

As regards the authorities on the question of which law applies, I first refer to *Robert* (*orse. de la Mare*) v. *Robert*.[3] In that case Barnard J. said[4]: "I have come to the conclusion "that I ought to apply the lex loci celebrationis, for the following "reasons. Wilful refusal to consummate a marriage, in order to "be justified on principle as a ground for annulment and not "dissolution, must be considered as a defect in marriage, an "error in the quality of the respondent," and then he goes on to explain that he considered that this wilful refusal did not relate to the personal capacity of the respondent spouse and so he decided that it could not be the lex domicilii which applied.

In Rayden, 1958, 7th ed., p. 93, the law is stated as follows: "Wilful refusal to consummate a marriage has been "held in one case to be a defect in the marriage, so as to make "the lex loci contractus applicable, rather than as something "affecting capacity to contract."

In *Way* v. *Way*,[5] however, Hodson J. took a contrary view. That was the case which concerned the validity of four marriages by British members of military missions and other organizations concerned with the prosecution of the war when they were on duty in Russia during the period 1941 to 1945. In all four cases the main point put forward by the petitioners was that the marriages were void for want of form according to the law of the U.S.S.R., a plea rejected by Hodson J. Brigadier Way, however, succeeded at trial on his alternative plea of wilful refusal to consummate and Hodson J. said[6]: "In the case of Way, "however, on the facts stated, accepting as I do his evidence,

[3] [1947] P. 164; 63 T.L.R. 343; [1947] 2 All E.R. 22.

[4] [1947] P. 164, 167.

[5] [1950] P. 71; 65 T.L.R. 707; [1949] 2 All E.R. 959.

[6] [1950] P. 71, 80.

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" the respondent has wilfully refused to consummate the mar-
" riage and the marriage is accordingly voidable by English law,
" which is the law of the matrimonial domicile. The petitioner
" is accordingly entitled to a decree."

It is true there seems to have been little or no argument in that case as to whether it was lex loci or lex domicilii which was applicable, and there is no trace of the judgment of Barnard J. having been cited. It is also true that on appeal by another of the above four petitioners, the Court of Appeal held that the marriages were void for want of form (*Kenward* v. *Kenward*),[7] and thus the point as to wilful refusal to consummate should perhaps strictly not have been decided in the *Way* case. None the less, the judgment of Hodson J. retains considerable persuasive force and moreover it is reinforced by the fact that later when he wrote the introduction to Mr. Jackson's work on the Formation and Annulment of Marriage (1951 edition) he stated: " Wilful refusal being a post-nuptial fact, it is difficult to " see how, for example, the lex loci celebrationis could have any " application thereto."

Next I should refer to the judgments of the Court of Appeal in *de Reneville* v. *de Reneville*.[8] That well-known case concerned the jurisdiction of the court where the marriage had taken place in Paris—the petitioner being an Englishwoman, who, previous to the marriage, was domiciled in England, the husband being a French national who was domiciled in Paris both at the date of the marriage and at the date of the petition, and France being the place of the matrimonial home. The wife there alleged incapacity on the part of the husband or, alternatively, wilful refusal to consummate the marriage. Lord Greene M.R., whose judgment was supported in toto by Somervell L.J., stated that the wife's allegations went to the essential validity of the marriage and then proceeded to say[9]: " In my opinion, the " question whether the marriage is void or merely voidable is " for French law to answer. My reasons are as follows: The " validity of a marriage so far as regards the observance of " formalities is a matter for the lex loci celebrationis. But this " is not a case of forms. It is a case of essential validity. By " what law is that to be decided? In my opinion by the law " of France, either because that is the law of the husband's " domicile at the date of the marriage or (preferably, in my " view) because at that date it was the law of the matrimonial " domicile in reference to which the parties may have been " supposed to enter into the bonds of marriage." And the following passage is to be found in the judgment of Bucknill L.J.[10]: " The wife consented to marry her husband in France " and intended to live with him there and also impliedly intended

[7] [1951] P. 124; 66 T.L.R. (Pt. 2) 157; [1950] 2 All E.R. 297.

[8] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[9] [1948] P. 100, 114.

[10] Ibid. 121.

" to take her husband's French domicile on the assumption that " the marriage was valid. Under these circumstances it seems " to me that the question as to the validity of the marriage " should be decided by French law." The phrasing of those judgments and the reference to the place where the marriage took place may, of course, be argued to leave open the question, which did not arise in *de Reneville* v. *de Reneville*,[8] as to which law should prevail if there was a conflict between the lex loci and lex domicilii—they simply tend against lex fori.

Turning from authority to general principles, the position is that matters touching the validity of a marriage have, at any rate since *Sottomayor* v. *de Barros*,[11] been generally regarded as divided into two broad categories. The first related to matters of form and ceremony, to be determined by lex loci. The second related to matters " affecting the personal capacity of the " parties " at the moment of marriage. Indeed, earlier, Lord Campbell in his much quoted speech in *Brook* v. *Brook and Attorney-General*, said [12]: " But while the forms of entering into " the contract of marriage are to be regulated by the lex loci " contractus, the law of the country in which it is celebrated, " the essentials of the contract depend upon the lex domicilii, the " law of the country in which the parties are domiciled at the " time of the marriage, and in which the matrimonial residence " is contemplated."

Wilful refusal to consummate a marriage, clearly, cannot be said to fall within the categories of matters of form and ceremony. To my mind the true question is as to whether it should be treated as falling within the category of matters affecting the personal capacity of the spouse, in which case lex domicilii (which normally coincides with the law pertaining to the country of the husband's domicile at the time of marriage) applies, or whether it should be treated as something akin to matters for which the true remedy is divorce, in which case lex fori (e.g. the law pertaining to the domicile of the husband at the date of presentation of the petition, or the law pertaining to the residence of a wife who may bring herself within the provisions of section 18 (1) of the Matrimonial Causes Act, 1950, applies).

It is first to be noted that no direct decision has been cited to me on the question of whether sexual incapacity should be regarded as a matter of " personal capacity " within the meaning of the words used by Cotton L.J. in *Sottomayor's* case [13] when delivering the judgment of the court. Mr. Ormrod submitted that it should be so regarded, but that any claim for a decree of nullity where a marriage was voidable, as opposed to void, should be decided according to lex fori. Dicey on Conflict of Laws, 6th ed., p. 267, treats the point as being open and submits the choice lies between lex domicilii or lex fori. It is there suggested, on the one hand: " it would be logically and historically correct to hold

[8] [1948] P. 100.
[11] (1877) 3 P.D. 1.
[12] (1861) 9 H.L.C. 193, 207.
[13] 3 P.D. 1.

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" that, even if the court has jurisdiction in the case of a voidable " marriage, it can only pronounce a decree if the ground upon " which it is sought is recognized by the law of the husband's " domicile at the date of the marriage." The opposing view is then put as follows: " In answer it may be urged, however, that, " as the practice of ' looking behind the form and regarding the " ' substance of the matter ' has been approved by the Court of " Appeal when the question is one of jurisdiction in the case of " a voidable marriage, it must be adopted when the question is " one of choice of law. The substance of the matter is that " someone is claiming to terminate an existing status, and his " right to do so should be referred to the law of his domicile " at the date the claim is made."

It is next to be observed that upon the authority of the judgment of Denning L.J. in *Ramsay-Fairfax* v. *Ramsay-Fairfax*,[14] I feel bound to take the view that there is no distinction in regard to the present issue to be drawn because the proceedings are for wilful refusal to consummate the marriage, rather than for sexual incapacity. The words of the judgment, albeit in a jurisdiction case, were [15]: " No one can call " a marriage a real marriage when it has not been consummated; " and this is the same, no matter whether the want of consum- " mation is due to incapacity or to wilful refusal. Let the " theologians dispute as they will, so far as the lawyers are " concerned, Parliament has made it quite plain that wilful " refusal and incapacity stand together as grounds of nullity " and not for dissolution." Mr. Dobry put the opposite and logical view in a persuasive manner, but I am unable to accede to his argument, supported though it may be by other judicial dicta. I would add that the reasoning in *de Reneville* v. *de Reneville* [16] also implicitly rules out any attempt to distinguish between the two in relation to the point now under consideration.

In the light of the matters mentioned above, I find myself unable to agree with Barnard J. that lex loci is the proper law applicable to the husband's plea. The choice, in my view, is between lex domicilii and lex fori. As between those, lex domicilii is favoured by Hodson J., by the fact that it was chosen as being the proper alternative by Barnard J. in *Robert* (*orse. de la Mare*) v. *Robert* [17] if he was wrong as to lex loci, and by the fact that the judgments in *de Reneville* v. *de Reneville* [18] clearly tend against the applicability of lex fori. For myself, I would, in support of applying the lex domicilii, urge that it would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue: and the danger of differences of that type arising is now all the more to be feared by reason of the provisions of section 18 (1) of the Matrimonial Causes Act, 1950.

[14] [1956] P. 115; [1956] 3 W.L.R. 849.
[15] [1956] P. 133.
[16] [1948] P. 100.
[17] [1947] P. 164.
[18] [1948] P. 100.

It is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony (to which a uniform general rule already applies), be consistently decided according to the law of one country alone—a point of view which seems to be supported by the judgment of Bucknill L.J. in *de Reneville* v. *de Reneville*,[19] and that consistency cannot be attained if the test is lex fori.

Being of the opinion that the relevant proper law is either lex domicilii or lex fori, it is not, however, in the present case essential to come to a final conclusion as between the two. The husband having been domiciled in England, both at the date of the marriage and when he presented his petition, it is the law of this country that applies in each case. Further, if, and in so far as there may be, according to Mr. Dobry's submission, a third alternative as to the law to be applied in the present case, viz., the law of the intended matrimonial domicile, should that be distinguishable from lex domicilii, again, no difference would be involved, for both spouses originally intended to live and settle here after the marriage.

The law of this country being thus the proper law by which to test the validity of the marriage in relation to the allegations made by the husband, I now turn to the facts to see whether the husband is entitled to relief by virtue of section 8 (1) of the Matrimonial Causes Act, 1950. That, in turn, depends on the view taken of the evidence of what occurred on the wife's arrival in England and during the short period she remained there.

[His Lordship then considered the evidence and found the facts set out above, and continued:] It is clear that the wife had a firm and decisive objection to the petitioner qua husband, that she had made up her mind never to live with him and she was determined in no way to be a wife to him.

In those circumstances, it seems that she was unswerving in denying the opportunity to the husband to consummate the marriage and Mr. Ormrod, very rightly, did not feel able to submit that such conduct, if proved, did not amount to a wilful refusal to consummate within the meaning of section 8 (1). The husband is accordingly entitled to his decree of nullity.

Decree nisi.

Solicitors: *Leader, Henderson & Leader; the Official Solicitor.*

J. B. G.

[19] [1948] P. 100, 122.

[COURT OF APPEAL.]

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Feb. 13, 14, 17.

Hodson and Pearce L.JJ., and Upjohn J.

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Landlord and Tenant — Rent restriction — Premises within the Acts— Rateable value—Ascertainment of rateable value—London unfurnished flat and garage—Flat alone occupied by tenant—Property assessed in valuation list as one hereditament rated at £76—On tenant's proposal property reassessed separately, flat being valued at £40 — Application by landlord for reassessment — Meaning of "hereditament" — Value "shown in" valuation list — Rent Act, 1957 (5 *& 6 Eliz.* 2, *c.* 25), *s.* 11 (1), *Sch.* 5, *paras.* 1 (*b*), 2 (1).

Property in London consisting of an unfurnished flat and a garage had formerly been assessed for rating as one hereditament at £76. The tenant, who occupied only the flat, made a proposal for separate valuations of the flat and garage, and pursuant to section 40 of the Local Government Act, 1948, the local valuation court altered the valuation list by assessing the flat and garage as separate hereditaments, the flat being valued at £55 gross and £40 net, which would keep the flat within the control of the Rent Act, 1957.

The landlord applied to the county court for an apportionment of the rateable value of the flat under paragraph 1 (*b*) of Schedule 5 to the Act of 1957.[1] The tenant opposed the application, and the judge dismissed it, holding that the apportionment by the local valuation court, on the proposal by the tenant, was an alteration "so as to vary" the rateable value of a hereditament within paragraph 2 (1) of Schedule 5,[1] and that there was therefore no jurisdiction to apportion. On appeal by the landlord:—

Held, that the flat fulfilled the definition of "hereditament" in section 68 of the Rating and Valuation Act, 1925; that, although it had been formerly assessed as part of a composite hereditament and no separate assessment had then been made upon it, it was then a "hereditament shown in the valuation list" within the meaning of paragraph 2 (1) of Schedule 5 to the Act of 1957; that the

[1] Rent Act, 1957, Sch. 5: "1. In "relation to any premises in England "or Wales, any reference in this Act "to the rateable value on a particular "date (hereinafter referred to as the "'date of ascertainment') shall sub- "ject to the following provisions of "this Part of this Schedule be con- "strued—(*a*) if the premises are a "hereditament for which a rateable "value is then shown in the valua- "tion list, as a reference to the rate- "able value of the hereditament, or "where that value differs from the "net annual value, the net annual "value thereof, as shown in the "valuation list on that date; (*b*) if "the premises form part only of such "a hereditament, as a reference to "such proportion of the said rateable "value or net annual value as may "be agreed in writing between the "landlord and tenant or determined "by the county court. . . . 2. (1) The "following provision shall have effect "for the purposes of subsection (1) of "section eleven of this Act or an order "made under subsection (3) thereof, "that is to say, where after the date "of ascertainment the valuation list "is altered so as to vary the rateable "value of a hereditament, and the "alteration has effect from a date not "later than the date of ascertainment "and is made in pursuance of a "proposal to which this paragraph "applies, the rateable value on the "date of ascertainment of any "dwelling-house consisting of or "wholly or partly comprised in that "hereditament shall be ascertained "as if the amount of the rateable, or "as the case may be net annual, "value of that hereditament shown "in the valuation list on the date of "ascertainment had been the amount "of that value shown in the list as "altered. . . ."

valuation list had been altered "so as to vary" the rateable value of the hereditament; and that paragraph 2 (1) accordingly applied, and the appeal must be dismissed.

APPEAL from Judge Howard, sitting at West London County Court.

On November 25, 1957, Judge Howard upheld a decision by Mr. Registrar Freeman Coutts, and dismissed an application by Stephen Holland, the landlord of premises at 19, Ennismore Mews, for an apportionment of their rateable value under Schedule 5, paragraph 1 (*b*) to the Rent Act, 1957.[1]

The premises consisted of a flat (of which Sidney Frank Ong was the tenant) and a garage, which had been jointly rated as one hereditament at £76 and so appeared in the valuation list. On the application of the tenant the list was altered by the valuation court prior to November 7, 1956, and appeared in the valuation list as first floor flat, gross £55, net £40; garage £60 gross and £44 net. The tenant resisted the apportionment under paragraph 1 (*b*) of Schedule 5 on the ground that the valuation list had at the relevant date been altered so as to vary the rateable value of the property, and therefore paragraph 2 of Schedule 5 [1] applied. The judge held that there was no jurisdiction to apportion the £76 since the effect of the alteration had been to vary the assessment with retrospective effect.

The landlord appealed.

R. E. Megarry Q.C. and *A. P. Graham-Dixon* for the landlord.

Roy Wilson Q.C. and *Maurice Ahern* for the tenant.

Cases referred to: *Temple* v. *National Mutual Life Association of Australasia Ltd.*[2]; *North Eastern Railway Co.* v. *York Union*[3]; *The Queen* v. *St. George's Union.*[4]

HODSON L.J. This is an appeal from a judgment of Judge Howard, given on November 25, 1957, upholding the decision of Mr. Registrar Freeman Coutts, who had dismissed the application of the landlord for an apportionment of the rateable value of 19, Ennismore Mews. The property consists of a flat and garage which were formerly rated as one hereditament at £76. The tenant of the flat resisted the apportionment on the ground that the valuation list had at the relevant date been altered, so as to vary the rateable value of the property and divide the assessment between the first floor flat and the garage. The county court judge held that there was no jurisdiction to apportion the £76, since the effect of the alteration had been to assess the flat at £40 and the garage at £44 with retrospective effect. The Rent Act, 1957, by section 11, released from control dwelling-houses in London of which, on November 7, 1956, the rateable

[1] See p. 448.
[2] [1955] 2 Q.B. 461; [1955] 3 W.L.R. 264; [1955] 2 All E.R. 758.
[3] [1900] 1 Q.B. 733.
[4] (1871) L.R. 7 Q.B. 90.

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value exceeded £40. The tenant had obtained the alteration by making a proposal to that end pursuant to section 40 of the Local Government Act, 1948, and on September 24, 1957, the local valuation court gave notice of its decision. This notice shows the facts upon which the case was argued.

It had been agreed between the parties to the application in the court below that no evidence should be tendered and that the court should be asked to give its decision on the point of law which emerged from these facts which appeared on the face of the document, it being further agreed (as it had been pleaded) that the tenant had made his application in time for any alteration to have effect prior to the material date, November 7, 1956. The decision of the valuation court described the property as formerly assessed at 19, Ennismore Mews as " first floor flat and " garage (south) "; gross value of the hereditament, £100; rateable value £76; description and value proposed: " first floor flat, " gross £55; net £40; garage (south)," shown separately, £60 gross and £44 net.

The question to be determined on this appeal depends on the terms of paragraphs 1 and 2 of the Fifth Schedule to the Act of 1957. [His Lordship read the material parts of the paragraphs and continued:] If paragraph 2 (1) is applicable to this case, the tenant is right in his application that the rateable value of the flat is £40 and does not fall to be ascertained by apportionment of the £76. No doubt paragraph 2 (1) is primarily directed to a straightforward case of the variation of the value originally appearing in the valuation list attached to the description of a particular hereditament. In this case it would be primarily directed to a variation of the original figure of £76 to some other figure.

The question to be determined is whether the language of the sub-paragraph is apt to embrace the splitting operation which has here occurred. The flat in question fulfils the definition of " hereditament " in section 68 of the Rating and Valuation Act, 1925, to which the Local Government Act, 1948, s. 144, directs attention for definition purposes: " ' Hereditament ' means any " lands, tenements, hereditaments or property which are or may " become liable to any rate in respect of which the valuation list is " by this Act made conclusive." " Hereditament " is a very wide word, and there seems to be no difficulty, on the language of the definition section by itself, in applying that to this flat. I should refer back to section 20 of the Act of 1925, because of the reference in the definition to the operation of the valuation list which is by this Act made conclusive. Section 20 (1) provides: " For the purpose of every rate as defined by this Act, " and for the purpose of determining the annual value of " premises under the Licensing (Consolidation) Act, 1910, . . . " the valuation list as in force at the time when the rate is " made or the value of the premises is to be determined, shall

"be conclusive evidence of the values of the several hereditaments included in the list."

To fulfil the definition is not enough, however, for, in order that the paragraph may operate, the flat must be a hereditament shown in the valuation list. What was shown in the valuation list before alteration was the flat plus garage, according to the description which I read from the notice of the decision, and it was not until after alteration that the flat was separately shown. The question is: Can the flat be said to be shown in the valuation list when it is shown, not as a separate entity, but as part of a composite hereditament? It was part of a larger hereditament, and although its rateable value was not actually shown and would therefore only be ascertained by apportionment, it can, I think, properly be said to be shown without unduly straining the language of the section.

Some assistance is to be obtained from the decision of the Court of Appeal in *Temple* v. *National Mutual Life Association of Australasia Ltd.*[1] That was a decision on section 7 (2) and (3) of the Rent Act of 1939. Subsection (2) reads: "In relation to any dwelling-house of which the rateable value on the appropriate date" [April 6, 1939] "was not on that day separately assessed, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to such proportion of the rateable value on that day of the property in which the dwelling-house is comprised as may be apportioned to the dwelling-house by the county court in accordance with the provisions of subsection (3) of section twelve of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920."

Subsection (3) reads: "In relation to any dwelling-house first assessed after the appropriate day, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to the rateable value on the day on which the dwelling-house was first assessed."

In deciding when the dwelling-house was first assessed the court came to the conclusion that it was so assessed when the assessment was made upon the composite whole of which the particular item formed part although no separate assessment was made upon it until a later date. Mr. Megarry pointed out on behalf of the landlord that "shown" is not the same as "assessed," and contended that though it may be quite right to say that a part may be said to be assessed when the complex of which it forms part is assessed, yet you cannot produce the result that this flat was ever shown on the valuation list before the list was altered. While recognising the force of this submission, I reject it. The flat was certainly shown in the list even though not separately included, and the whole of which it formed part was shown by description with a rateable value which covered

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both component parts. So that, so far as that part of the submission on behalf of the landlord is concerned, I agree with the registrar and with the county court judge that the landlord's submission fails.

There is a further submission on behalf of the landlord that, even if the flat is shown in the valuation list, the list had not been altered so as to vary its rateable value. It seems to me that he would have to argue, so as effectively to exclude the operation of the section, that it could not be altered so as to vary the rateable value; but it is unnecessary to determine that, because it is sufficient for the purpose of this case to say that I agree with the court below that there can be said here to have been a variation from the original assessment of £76, and although I concede that there is difficulty in regarding the known figure of £40 as an alteration from an unknown figure, part of the £76, notionally to be attributed to the flat, yet the alteration of the assessment of the premises as a whole from £76 to two separate assessments of £40 for the flat and £44 for the garage may, in my opinion, fairly be regarded as by itself an alteration varying the rateable value of the hereditament, that is to say, of the flat.

I would accordingly dismiss the appeal.

PEARCE L.J. I agree, and for the reasons that my Lord has given.

UPJOHN J. I also agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Bircham & Co.; Ouvry & Co.*

A. W. G.

[1] [1955] 2 Q.B. 461; [1955] 3 W.L.R. 264; [1955] 2 All E.R. 758.

[QUEEN'S BENCH DIVISION.]

KUCHENMEISTER *v.* HOME OFFICE AND ANOTHER.

1958
Jan. 27, 28, 29.

[1955 K. No. 1272.]

Barry J.

Alien—Landing or embarkation—Airport—Alien landing from aircraft at approved port for purpose only of embarking in another aircraft—Power of immigration officers to restrict limits or premises within which alien required to remain — Aliens Restriction Act, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1—*Aliens Restriction (Amendment) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 92), *s.* 1 (1)—*Aliens Order*, 1953 (*S.I.* 1953, *No.* 1671), *arts.* 2 (1) (*b*) (2).

By article 1 of the Aliens Order, 1953,[1] an alien shall not land from an aircraft in the United Kingdom except with the leave of an immigration officer, but by article 2 (1) (*b*) leave to land shall not be required "in the case of an alien who lands from an aircraft "at an approved port for the purpose only of embarking in an "aircraft at the same port, and remains, throughout the period "between his landing and embarkation, within such premises or

[1] Aliens Order, 1953, art. 1: "(1) Subject to the provisions of this "Order, an alien shall not land or "embark in the United Kingdom "except with the leave of an immi- "gration officer, and shall not so "land or embark elsewhere than at "an approved port or at such other "place as an immigation officer may "in any particular case allow."

Art. 2: "(1) Subject to para- "graph (2) of this article, leave to "land shall not be required under "article 1 of this Order—. . . . "(*b*) in the case of an alien who "lands from an aircraft at an "approved port for the purpose only "of embarking in an aircraft at the "same port, and remains, through- "out the period between his landing "and embarkation, within such pre- "mises or limits as may be "approved for the purpose by an "immigration officer.

"(2) Notwithstanding anything in "paragraph (1) of this article, an "immigration officer may at any time ". . . (*b*) grant or refuse leave to "land to an alien who is within the "United Kingdom after landing "without leave thereunder; and "thereupon . . . paragraph (1) shall "cease to apply to the alien."

Art. 7: "(2) . . . an immigration "officer may examine any person "seeking to land or embark in the "United Kingdom for the purpose of "ascertaining whether that person is "or is not an alien and, in the case "of an alien, for the purpose of "determining whether leave to land "or embark should be granted to "him under this Order; and it shall "be the duty of every such person to "furnish to an immigration officer "such information as that officer "may require for the purpose of his "functions under this paragraph.

"(3) Notwithstanding anything in "article 1 of this Order, an alien "may land, without the previous "grant of leave to land, for the pur- "pose of examination under this "article in accordance with arrange- "ments in that behalf approved by "an immigration officer, and if he "submits himself forthwith to such "examination shall be deemed for "the purposes of this Order not to "have landed unless and until such "leave is granted to him; and an "alien who lands as aforesaid may "be detained, pending and during "examination, under the authority of "an immigration officer."

Art. 8: "(1) Where leave to land "is refused to an alien, an immi- "gration officer may . . . give direc- "tions—(*a*) to the . . . commander "of the aircraft in which the alien "arrived in the United Kingdom, "requiring him to remove the alien "from the United Kingdom in that "ship or aircraft; . . .

"(4) An alien to whom leave to "land is refused may be detained, "under the authority of an immigra- "tion officer, pending the giving of "directions in his case under para- "graph (1) of this article and pend- "ing his removal in pursuance of "directions so given; . . ."

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"limits as may be approved for the purpose by an immigration "officer."

At 6 p.m. on a day in April, 1955, the plaintiff, a German national resident in the Republic of Ireland, who held a through ticket from Amsterdam to Dublin, landed from an aircraft at London Airport (an approved port for the purposes of the Aliens Order, 1953) for the purpose only of transferring to another aircraft in which he intended to fly on to Dublin. That aircraft was scheduled to leave London Airport at 8.40 p.m. on the same day, but its departure point was some distance away from the place where the plaintiff had landed, access thereto being along a road which, though within the confines of the airport, was virtually a public road. At the material time the immigration authorities had instructions that the plaintiff was to be prohibited from landing in the United Kingdom. They did not in fact refuse him permission to land, but caused inquiries to be made about him, detaining him meanwhile in the immigration hall adjacent to the place where he had landed and from which it was impossible for him to embark on the aircraft for Dublin. Authority for him to cross the airport to the departure point for the Dublin aircraft was not obtained by the immigration officers until two and a half hours later, by which time it was too late for him to board the aircraft, which left without him. The plaintiff spent the night at the airport, there being no other aircraft for Dublin until early the following morning.

In an action for damages for false imprisonment against the Home Office and the senior immigration officer at the airport, the plaintiff alleged that he had been wrongfully detained from the time that he landed until he left the following morning, and that his liberty had been restricted:—

Held, that the immigration authorities were not entitled to exercise the discretion conferred on them by article 2 (1) (*b*) of the Order to limit the premises or limits within which an alien landing lawfully for the sole purpose of embarking in another aircraft might remain during the period between his landing and subsequent embarkation in such a way as to render his embarkation in the other aircraft impossible, as so to act would be to frustrate the purpose for which article 2 (1) (*b*) was included in the Order; accordingly, as the immigration officers had restricted his liberty to a greater degree than they were entitled to do under article 2 (1) (*b*), the plaintiff was entitled to regard that restriction as false imprisonment and was entitled to damages.

Semble that the immigration authorities were entitled to a reasonable time in which to decide whether to refuse an alien leave to land under article 2 (2) of the Order.

ACTION.

The following statement of facts is summarized from the judgment.

The plaintiff, Carl Walther Kuchenmeister, was a German national who, after being interned for some years in England, had been required to leave the country in 1948, and since that date had not been allowed to reside in or visit the United Kingdom. In April, 1955, he was resident in Dublin, where he had lived since 1948, and where he carried on business. On April 27, 1955, the plaintiff, who three days previously had flown from Dublin on a direct flight to Amsterdam, boarded an aircraft at Amsterdam to return to Dublin. Although he had a through

ticket to Dublin he was informed that the aircraft on which he would be travelling went no further than London, so that he would have to transfer at London Airport to an aircraft operated by Aer Lingus in order to complete his journey to Dublin. At the time the plaintiff was a person to whom the immigration authorities in the United Kingdom were instructed to refuse leave to land, but he had undertaken many journeys to the Continent via Manchester previously without encountering any difficulties with the immigration authorities, as the normal procedure was for passengers on a transit journey involving a call at the airport not to be subjected to any examination by the immigration authorities, but to be kept segregated while awaiting re-embarkation, rejoining the aircraft when it was ready to continue its journey. In those circumstances, the operating company certified that all transit passengers who had disembarked had in fact re-embarked.

On April 27, 1955, Aer Lingus aircraft were using a new section of London Airport, namely, the central section, which had only recently come into operation, whereas K.L.M., who operated the aircraft in which the plaintiff travelled from Amsterdam to London, used the north section of the airport, some distance from the central section. Access between the two sections was by means of a road a mile long which ran across the airport but within its perimeter. The north section was close to a main road and there was nothing to prevent anyone who wished from walking out of the airport onto the road, thereby obtaining access to any part of the country. In order to board the Aer Lingus aircraft and to continue his journey to Dublin the plaintiff had to go to the central section and in consequence travel along the road linking the two sections.

Having disembarked from the aircraft from Amsterdam soon after 6 p.m. on April 27, 1955, the plaintiff was escorted, with other passengers, to the immigration hall where he presented his passport and certificate of registration under the Aliens Order, 1920, to an immigration officer. He stated that he was going direct to Dublin and had been told that he needed no landing card. He was, however, requested to fill one in and he did so, stating therein that he was "in direct transit to Dublin only." On presenting the card to the immigration officer that officer consulted a small book and after consulting the senior immigration officer, on his instructions, told the plaintiff to wait in a corner of the immigration hall. The plaintiff did so, and although from time to time he protested, stating that he had no intention or desire to enter the United Kingdom, and that he was in transit only, he was in fact kept waiting in the immigration hall until approximately 8.20 p.m., when he was told by one of the immigration officers that he would be escorted to the aircraft for Dublin which was due to leave at 8.40 p.m. At 8 o'clock the plaintiff had reminded the immigration officers that he had to report to the aircraft departure point 40 minutes before it was

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due to leave. At 8.20 p.m. the plaintiff was driven over to the central section passenger buildings but although every effort was then made by the immigration officers to obtain permission for him to board the aircraft it proved to be impossible owing to a rule of the operating company then in force that the passenger list should be closed half-an-hour before the departure time of the aircraft. As a result, the aircraft left without the plaintiff, who spent the night in the transit lounge at the airport. In the morning he was conducted to an aircraft which left for Dublin at 7.45 a.m., his passport and registration certificate being returned to him when he went aboard.

It appeared from the evidence of the immigration officers that during the time that the plaintiff was kept waiting in the immigration hall inquiries were being made to decide the course which ought to be taken in view of the existing instructions that the plaintiff should not be given leave to land, and the fact that, in order to embark on the aircraft for Dublin, he would have to travel from the north to the central section of the airport and thus travel along the road through the airport which was virtually a public road. It was not until after a telephone call had been made to Dublin and an assurance received from an official of the Department of Justice in the Republic of Ireland that the plaintiff would be allowed to land in Dublin that the senior immigration officer telephoned his superior at the Home Office for permission for the plaintiff to proceed across the airport to the central section. That permission was only given at 8.20 p.m. when it was immediately acted upon.

In this action the plaintiff claimed damages for false imprisonment against the Home Office and the senior immigration officer at the airport. He claimed that on April 27, 1955, he was lawfully travelling by air from Hanover to Dublin via Amsterdam and London, and that on landing at London Airport in the course of that journey he was wrongfully imprisoned by being detained by the senior immigration officer and others employed in the immigration office from 6 p.m. on April 27, 1955, until 7 a.m. the following morning in the immigration office and a lounge at the airport; that he had been deprived of his liberty; missed his connexion from London Airport to Dublin and suffered humiliation, discomfort and inconvenience.

The defendants contended that as the plaintiff was an alien, by reason of article 1 (1) of the Aliens Order, 1953, he was not entitled, nor at liberty, to land in the United Kingdom except with the leave of an immigration officer; that he was not entitled to proceed from the north to the central section of the airport which involved travel along a road open to the public without the leave of an immigration officer; that no leave to land was given. Alternatively, they contended that permission was given at approximately 8.15 or 8.20 p.m. by the senior immigration officer, who thereupon made all reasonable efforts to secure the

plaintiff's departure by the intended aircraft, but that the plaintiff was prevented from so departing by circumstances not reasonably foreseeable by or within the control of the defendants. They denied each and every allegation of wrongful imprisonment or detention and relied on articles 7 (2) and (3) and 8 (4) of the Order of 1953 as justifying any detention complained of. They denied that the plaintiff had been deprived of any liberty to which he was in law entitled.

Leslie Scarman Q.C. and *W. A. Forbes* for the plaintiff.

Sir Harry Hylton-Foster Q.C., S.-G., and *Rodger Winn* for the defendants.

The following cases were cited in argument: *Johnstone* v. *Pedlar* [2]; *Liversedge* v. *Anderson* [3]; *John Lewis & Co.* v. *Tims*.[4]

BARRY J. This is a claim for damages for wrongful imprisonment. Despite the fact that the plaintiff sustained no pecuniary damage, this case should certainly not be regarded, in my judgment, as anything in the nature of a storm in a teacup. Apart from the inconvenience, annoyance and humiliation which the planitiff must undoubtedly have suffered, the right of individual liberty is here in issue. Anyone lawfully on British soil is entitled to the protection of the law, and if he is illegally deprived of his freedom, he has every right to seek the protection of the courts. The defendants do not otherwise contend. Their case is that the immigration officers who caused his detention were properly performing the duties imposed upon them by the Aliens Order, 1953, and they, too, regret the inconvenience (which they say was unavoidable) which the plaintiff suffered as a result.

The situation on April 27, 1955, was this: The plaintiff had left Ireland a few days before, he was returning to Dublin at the time of his detention, he was a person acceptable to the Irish authorities, but he was one to whom the immigration authorities in this country were instructed to refuse leave to land.

A claim for privilege has been put before the court by the Secretary of State for Home Affairs and objection has been taken, and, in my judgment, rightly taken, to the disclosure of certain documents. It is common ground that the plaintiff was a man to whom the immigration officers had been instructed to refuse leave to land in this country.

[His Lordship stated the facts, referred to the evidence, and continued:] I am satisfied that throughout the senior immigration officer and the other officials concerned regarded themselves as being in a somewhat difficult position. On their view of their

[2] [1921] 2 A.C. 262; 31 T.L.R. 870.

[3] [1942] A.C. 206; 58 T.L.R. 35; [1941] 3 All E.R. 338.

[4] [1952] A.C. 676; [1952] 1 T.L.R. 1132; [1952] 1 All E.R. 1203.

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duties under the Aliens Order, 1953, they were under the impression that, in strict law, the plaintiff was not entitled to travel from the north buildings to the central buildings and so to embark on the Aer Lingus flight. I am satisfied that they did their best to secure that the plaintiff was put to as little inconvenience as possible and tried, to the best of their ability, to ensure that he did in fact catch the aircraft which took off at 8.40 p.m.

The question which I have to consider is whether the senior immigration officer and his officials correctly interpreted their powers and duties under the Aliens Order, 1953. If, in fact, they incorrectly interpreted them, it would not be surprising as the exact effect of the Order upon circumstances of the kind now under consideration is by no means free from doubt. I have had the benefit of a full and elaborate argument as to the correct interpretation of the Order, but even with that advantage I do not pretend that I have complete confidence in the interpretation which I propose to adopt. In these circumstances, I think no possible blame can attach to the senior immigration officer for any misapprehension which he may have had as to the real meaning of the Order.

The Aliens Order, 1953, was made pursuant to powers conferred on the Crown to make regulations by Order in Council imposing restrictions on aliens under section 1 of the Aliens Restriction Act, 1914, as amended by the Aliens Restriction (Amendment) Act, 1919. [His Lordship read articles 1 (1) and 2 (1) (*b*), of the Order, and continued:] It is on article 2 (1) (*b*) that the plaintiff founds his case. Article 2 (2) reads: "Notwithstanding anything in paragraph (1) of this article, an immigration officer may at any time—(*a*) give notice to an alien who is for the time being on board a ship or aircraft prohibiting him from landing without leave thereunder; or (*b*) grant or refuse leave to land to an alien who is within the United Kingdom after landing without leave thereunder; and thereupon [paragraph (1) of article 2] shall cease to apply to the alien." It is conceded that by virtue of the provisions of article 3, which deals with the common travel area, that the plaintiff did not require leave to embark from the United Kingdom. The only requirement, if any, was that of leave to land.

The next material article is 7, which requires every person over 16 to produce certain documents, including a passport, to an immigration officer if so required, and to give information asked for by the immigration authorities. Paragraph (3) of that article gives an express power of detention to immigration officers in the case of aliens who land without previous grant of leave for the purpose of examination under the article. At one time the provisions of article 7 (3) were relied upon by the defendants as a justification for the plaintiff's detention, but, in my judgment, it is clear that the provisions relate solely to aliens who

land for the purpose of being examined under the provisions of article 7 (1), and I am quite satisfied that the plaintiff did not land for that purpose but for the sole purpose of embarking in an aircraft at the same port as that in which he had arrived.

Certain other express powers of detention are given to immigration authorities under the Aliens Order, 1953. Article 8 refers to the removal from the country of aliens who have been refused leave to land. By paragraph (4): "An alien to whom leave to "land is refused may be detained, under the authority of an "immigration officer, pending the giving of directions in his case "under paragraph (1) of this article and pending his removal "in pursuance of directions so given; and where any such alien "is on board a ship or aircraft he may, under the like authority, "be removed therefrom for detention under this paragraph." It is quite clear that at no time during the course of this ill-fated visit to London Airport was the plaintiff refused leave to land, and in those circumstances, in my judgment, article 8 (4) has no application to the facts of the present case.

Article 9 relates to aliens who have landed unlawfully in this country, and again confers certain powers upon immigration authorities and others. In the present case it cannot be suggested that, in the first instance at least, the plaintiff landed unlawfully in this country. He landed, it is true, without having obtained leave to do so, but he landed, as I find—and as, indeed, very soon became apparent to the immigration authorities—from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port. In those circumstances, under the provisions of article 2 (1) (*b*), his landing was lawful, as no leave to land in those circumstances, under article 1 of the Order, is required.

Further than that, there is no evidence that during any part of his enforced sojourn at the London Airport he failed to remain within such premises or limits as were approved for the purpose by an immigration officer. Therefore, it cannot be suggested that at any period the plaintiff was in the position of an alien who had landed unlawfully or of an alien to whom leave to land had been refused. Similarly, it is right to say that the plaintiff was never in the position of an alien to whom leave to land had been granted. It is quite clear that leave to land was at no time either given or refused.

The gist of the problem is this: The defendants' contention is that it is within the sole discretion of the immigration authorities to lay down the prescribed limits or premises in which an alien landing under the provisions of article 2 (1) (*b*) may remain. For various reasons, some of which are obvious, the senior immigration officer considered that aliens landing at the north section of the airport should be confined to the transit hall and certain other buildings in that section of the airport. His view was, and both the defendants' view is today, that if aliens were allowed to stray beyond those very narrow limits and

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wander off unescorted towards the central buildings, all effective control over their movements would be lost, because, unless a policeman was sent to accompany them, it was perfectly open to them never to proceed to the central buildings at all but to walk out of the airport and so travel to any part of England.

In those circumstances the defendants contend that they were entitled to say that, having landed lawfully under article 2 (1) (*b*), the plaintiff was bound to remain in the transit lounge, or in some part of the buildings of the north section of the airport. All they did was to confine him within that perimeter, and in the circumstances it cannot possibly be alleged that they were guilty of any unlawful or enforced imprisonment. The plaintiff's rights were limited. He could only pray in aid article 2 (1) (*b*) of the Order so long as he remained for the whole period between his landing and embarkation within such premises or limits as may be approved for the purpose by an immigration officer, and the fact that remaining within those limits caused him to lose his flight to Dublin is an unfortunate fact but one which was quite unavoidable, and about which the plaintiff has no legal ground for complaint. According to the defendants' view, if the plaintiff was to proceed outside the narrow confines of the north buildings, or such parts of the north buildings as were approved by the immigration authorities, he required leave to land. He never obtained leave to land, and in those circumstances no wrong has been done to him by insisting that he remain in the north buildings until about 8.20 in the evening.

On the plaintiff's behalf Mr. Scarman puts the case in this way: The plaintiff was undoubtedly detained in the north buildings at the airport, and detained for so long a period that he was unable to catch the aeroplane on which his passage from London to Dublin had been booked. He argues that the defendants must justify that detention. Certain grounds on which they sought to justify it have been shown to be unsound. Article 8 (4), one of the articles which provides an express power of detention, only applies to aliens refused leave to land; and article 7 (3), which again provides an express power of detention relates only, as I have found, to aliens who have landed for the purpose of examination under that article.

Mr. Scarman concedes that the defendants could have provided themselves with a justification for the plaintiffs' detention, because the powers conferred upon the immigration authorities by article 2 (2) could have been utilized at any period during the evening with which we are concerned. It would have been open to the second defendant and the officials under him at any time during that evening to refuse the plaintiff leave to land, even though he had in fact landed lawfully under the provisions of article 2 (1) (*b*). Further, they could have prevented him from leaving the aircraft at all by acting under article 2 (2) (*a*). Mr. Scarman's case is, however, that unless the immigration

authorities elected to proceed under article 2 (2) (*b*), they cannot, by indirect means, secure the detention of an alien by a quite arbitrary exercise of their discretion under article 2 (1) (*b*); and here I come to the one vital question in this case: Assume that the immigration authorities do not put into operation their powers to grant or refuse leave to land, can they, by an exercise of their discretion as to the premises or limits within which an alien landed under article 2 (1) (*b*) may remain, effectually defeat the purpose for which the alien in fact landed under that paragraph, namely, for the purpose of embarking in an aircraft at the same port? If they can do so, then the plaintiff has no possible ground for complaint in law, however much he may feel that this was an unreasonable exercise of the powers conferred upon the immigration officials. If they cannot do so, then what are the justifications for the plaintiff's detention during this very considerable period—more than two-and-a-half hours—in the buildings in the north section of the airport?

I have come to the conclusion that, subject to all the other powers vested in them, the immigration authorities cannot so exercise the discretion conferred upon them by the latter limb of article 2 (1) (*b*) as to frustrate the purpose for which that sub-paragraph was included in the Order. (I do not say "enacted," because it is an Order and not an Act of Parliament.) As I see it, the policy of the Order is that an alien should be allowed to land without leave under certain limited conditions, all but one of which the plaintiff has admittedly fulfilled. He landed from an aircraft, at an approved port, and, as was very soon apparent to the immigration officials, he landed for the purpose only of embarking in an aircraft at the same port. Having fulfilled those conditions, were the defendants entitled to prevent him from carrying out his purpose by limiting the premises or limits within which he might remain between his landing and embarkation in such a way as to render his embarkation impossible? In my judgment they were not. As I see it, the provision contained in article 2 (1) (*b*) was inserted in the Order to confer the privilege of landing without leave on a certain limited class of aliens who were entering the approved airport not for the purposes of visiting the United Kingdom but merely in transit to some other area outside it.

It is true that article 2 (1) (*b*) confers a discretion upon the immigration authorities as to the premises or limits in which the alien may remain while he is upon British soil, but I accept Mr. Scarman's argument that that discretion in effect relates to the geographical situation of the premises or limits in which that alien may be. I do not think that the word "may" confers so wide a discretion upon the immigration officials that they may purely capriciously say that they are going to limit the area in which the alien may remain in such a drastic way that he is faced with the alternative of either returning from whence he came or remaining permanently detained in a small area of the airport

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from which access to the aircraft in which he wishes to continue his journey cannot be obtained.

The conditions imposed upon the alien, if he is to take advantage of this enabling order, are conditions which he must fulfil. He must land from an aircraft, he must land at an approved port, and he must land for the limited purpose referred to in sub-paragraph (*b*). He must also remain within the approved premises or limits. All those are obligations imposed upon the alien, and unless he complies with them he cannot rely upon sub-paragraph (*b*) and he becomes a person who has unlawfully landed in this country. It seems to me to be a corollary that if a requirement is placed upon an alien to remain within certain prescribed areas, certain areas will in fact be prescribed, and if the immigration authorities prescribe no area at all in which he may remain, or if they prescribe an area which renders his onward flight impossible, then to my mind they are frustrating the whole purpose of this provision and are acting outside the jurisdiction and discretion which is conferred upon them by sub-paragraph (*b*).

I am not impressed as to the dangers to which this interpretation of sub-paragraph (*b*) may give rise. The immigration authorities are armed with ample powers. If they feel it dangerous to allow either the present plaintiff or any other alien to move from the north section of the airport to the central section, they can refuse him leave to land. Further than that, I am inclined to the view that, as they are entitled to approve the premises or limits, it would be quite open to them to say that the alien must travel from the north buildings to the central buildings in a motor-car provided by them or by the aircraft company concerned in which either an immigration official or a policeman is also travelling. Be that as it may, if any danger, is apprehended the remedy is the refusal of leave to land. Here the immigration authorities did not refuse leave to land, and in those circumstances I think that their purported detention of the plaintiff under the terms of article 2 (1) (*b*)—namely, by confining the approved area to the north building—was outside their powers and was illegal.

The question therefore arises whether or not the plaintiff can maintain an action for wrongful imprisonment. As I have already indicated, if the immigration authorities were entitled to confine the approved area to the narrow limits to which they did in fact confine it, then the plaintiff could not say that he had been wrongfully imprisoned. If, however, they were not entitled so to confine the permitted area as to prevent him from obtaining access to the aeroplane for the purpose of catching which he had landed at the airfield, then I think that he is entitled to regard that as an unlawful imprisonment. His liberty was restricted to a greater degree than the immigration authorities were entitled to restrict it under article 2 (1) (*b*). The fact that they might have restricted his liberty by employing the powers conferred

upon them by other articles of the Order seems to me to be immaterial. It is no answer, when a man says "I have been "unlawfully arrested without a warrant," to say "Well, had I "(the person making the arrest), taken the trouble to go and ask "for a warrant, I would undoubtedly have got it." That would be no answer to a claim for unlawful arrest. Similarly here, although the second defendant and his colleagues could have detained the plaintiff by refusing him leave to land, that does not entitle them to detain him on the grounds on which they did.

No express powers of detention are conferred under article 2 (1) (*b*). Mr. Scarman has rightly conceded that immigration officials would be entitled to a reasonable time in which to satisfy themselves that the alien who arrived at the approved port really did intend to embark in an aircraft at the same port. If the immigration authorities' inquiries had been confined to that question and they had been completed within a reasonable time, the plaintiff would have raised no complaint: certainly Mr. Scarman disclaims any suggestion that he would raise any such complaint on the plaintiff's behalf. Similarly, I think, without deciding the point, that they would be entitled to a reasonable time to consider whether or not to refuse the alien leave to land. Here that point does not appear ever to have been considered at all, and, if it were considered, it would not give rise to the type of inquiry which formed the subject-matter of the various telephone messages and conversations which took place between shortly after 6 o'clock and approximately 8.30 on the night of April 27.

Whatever view one takes of this case, on the interpretation of the law which I now adopt, I cannot see that this delay of nearly two and a half hours could possibly be regarded as reasonable. If I am wrong as to my view of the law, then no question as to reasonable time arises, because the plaintiff has never been unlawfully detained, but on the law as I understand it, the plaintiff is entitled to recover damages.

He does not ask for an extravagant figure, but, on the other hand, it would be quite wrong for the court to award a contemptuous figure. No pecuniary damage has been suffered, but the very precious right of liberty—which is a right available to everyone who can for the time being be regarded as a subject by local allegiance to Her Majesty—is one which must be protected. I think that a fair figure which will vindicate the plaintiff's rights without amounting to a vindictive award would be £150. I should have felt fully entitled to increase that amount to a very great extent if there had been any suggestion here that the plaintiff was being ill treated by any of the immigration officials, but I am quite satisfied that they all genuinely considered that they were doing the best possible thing in difficult circumstances, and in my judgment no blame of any

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kind rests upon them. In these circumstances there must be judgment for the plaintiff for £150.

Judgment for the plaintiff against both defendants.

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; Treasury Solicitor.*

E. M. W.

[CHANCERY DIVISION.]

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Jan. 24.

Wynn-Parry J.

In re WHITE, DECD.
McCANN AND ANOTHER *v.* HULL AND ANOTHER.

[1957 W. 1144.]

Will — Construction — "Business" — Bequest of "business of a house "furnisher"—What assets comprised in and liabilities payable out of bequest.

By his will made in 1952 a testator bequeathed substantial legacies and continued: "7. I give and bequeath the business of "a house furnisher at present carried on by me at 64 Myddleton "Road, Bowes Park, . . . as to two-thirds to my wife M. abso-"lutely and as to the other one-third to H. (in consideration of "her long and faithful service) for their own use and benefit "absolutely and it is my wish that the said H. shall carry on and "manage the business as she shall think fit. 8. Subject to the "payment of my funeral and testamentary expenses I give, devise "and bequeath all the real and personal estate not hereby or by "any codicil hereto otherwise specifically disposed of and which I "can dispose of by will to my said wife M. absolutely." In 1956 the testator died. By this summons, taken out in 1957, the executors asked, inter alia, what the bequest of the testator comprised and whether it was subject to the payment of the testator's trade liabilities at his death and of the income tax payable in respect of the profits of the business down to his death:—

Held, that the bequest of the business did not include the furniture and floor coverings, the book debts and the freehold testator's bank balance but included the stock-in-trade with the property at Bowes Park, and was subject to the payment of the testator's trade liabilities at his death, but not to the payment of the income tax payable in respect of the profits of the business down to his death, as:

(1) The court could conclude, from the expressed wish that H. should carry on the business, that clause 7 of the will ought to be so construed in relation to the available assets as to carry with the gift of the business sufficient to allow that wish to be achieved.

In re Rhagg [1938] Ch. 828; 54 T.L.R. 990; [1938] 3 All E.R. 314 applied.

(2) The same reasoning applied to the trade liabilities as to the trade assets, the business being regarded as an entity.

In re Timberlake (1919) 63 S.J. 286; *In re Harland-Peck* [1941] Ch. 182; 57 T.L.R. 118; [1941] 4 All E.R. 347 considered.

Dictum of Simonds J. in *In re Rhagg* [1938] Ch. 828, 836; 54 T.L.R. 990, 992; [1938] 3 All E.R. 314, 318, that "the substance "of the bequest is the assets of the business subject to its liabilities" followed.

(3) Taking the profits down to the testator's death to be confined to the amount assessed on him under Schedule D in respect of the profits to which he had become entitled through carrying on the business, the tax must be regarded as entirely personal to him and should not be paid out of the business assets.

ADJOURNED SUMMONS.

By his will dated July 18, 1952, a testator, Horace Smith White, provided: "2. I appoint my daughter Phyllis Margaret "McCann and Leslie Vernon Muskett . . . executors of this my "will. 3. I give to each of my above-named executors who shall "prove my will the sum of £50. 4. I give to my wife Margaret all "my personal chattels and household goods and effects free of "duty. 5. I give to each of my grandchildren living at my death "the sum of £10 free of duty. 6. I give and bequeath a legacy of "£250 each free of duty to Ivy Constance Oliver, Horace Samuel "White, Nancy Ellen Price, Molly White and Phyllis Margaret "McCann. 7. I give and bequeath the business of a house "furnisher at present carried on by me at 64 Myddleton Road, "Bowes Park . . . as to two-thirds to my wife Margaret absolutely "and as to the other one-third to Bessie Amy Hull (in considera-"tion of her long and faithful service) for their own use and "benefit absolutely and it is my wish that the said Bessie Amy "Hull shall carry on and manage the business as she shall think "fit. 8. Subject to the payment of my funeral and testamentary "expenses I give, devise and bequeath all the real and personal "estate not hereby or by any codicil hereto otherwise specifically "disposed of and which I can dispose of by will to my said wife "Margaret absolutely." On July 13, 1956, the testator died. Miss Hull and the testator's widow could not agree what assets were comprised in the gift in clause 7 of the will; and on May 3, 1957, Mrs. McCann and Mr. Muskett, the executors, took out this summons to ascertain: 1. Whether the bequest of the business of a house furnisher in clause 7 included (i) all or part of a sum of £6,660 6s. 2d. in the testator's account at Bowes Park branch of Barclays Bank at the date of his death; (ii) stock-in-trade; (iii) book debts amounting to £608 8s. 9½d.; (iv) (following an item, "moneys owing by trade debtors or any part thereof," which was deleted) a sum of £252 10s. 8d. representing part of the proceeds of sale of a business of house furnishing formerly carried on by the testator at Wood Green; (v) the freehold property at Myddleton Road, Bowes Park; 2. whether the bequest of the business at Bowes Park was subject to the payment thereout: (i) of the testator's trade liabilities at his death amounting to £1,247 7s. 6d.; (ii) of the income tax payable in respect of the profits of the business down to the testator's death. Affidavit evidence was given that the testator bought the Bowes Park business in 1922 and bought the freehold in 1943; that he bought

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the Wood Green business (of a general draper) in March, 1954, adding to its original stock a stock of furniture and floor coverings in the hope of developing a business of that character there, and that he sold that business in March, 1956, thereupon transferring the remainder of that stock of furniture and floor coverings to the Bowes Park business.

John Monckton for the executors.
G. B. H. Dillon for Miss Hull.
B. A. Bicknell for the widow.

At the hearing, counsel for Miss Hull gave up, on her behalf, any claim to the amount standing to the testator's credit at Barclays Bank at his death, and to the sum representing part of the proceeds of sale of the Wood Green business.

The cases cited in argument are referred to in the judgment.

WYNN-PARRY J. The first question with which I have to deal on this summons concerns the content of a bequest by the testator of "the business of a house furnisher at present carried "on by me at 64 Myddleton Road, Bowes Park." The items in dispute are conveniently listed in the summons. The first relates to a sum of £6,660 6s. 2d., standing to the credit of the testator's account with Barclays Bank Ltd., Bowes Park branch, at the date of his death. On the evidence, which shows that the testator had only one banking account and used that banking account sometimes for the purpose of the business and sometimes for his private purposes, counsel for the first defendant has (in my view very properly) abandoned any claim to that amount on behalf of the first defendant, who is a co-beneficiary with the second defendant of the gift of the business. Similarly, he has abandoned any claim to an item appearing in the balance sheet as at July 13, 1956, of £252 10s. 8d. opposite the legend "Private loan account." It is with the remaining items that I have to deal.

Before I come to them, it is, I think, necessary to advert shortly to the terms of the will, because both counsel for the first and counsel for the second defendant have asked me to consider the content of this gift having regard to the other provisions in the will. The testator, having appointed his executors, proceeds in clause 3 to give £50 to each of them; he then, by clause 4, gives to his wife (the second defendant) all his personal chattels and household goods and effects free of duty; he gives to each of his grandchildren £10 free of duty, and by clause 6 he gives a number of pecuniary legacies which amount to £1,250. Then, in clause 7, comes the gift of the business: "I give and bequeath the business of a house furnisher "at present carried on by me at 64 Myddleton Road, Bowes "Park . . . as to two-thirds to my wife Margaret absolutely and

" as to the other one-third to Bessie Amy Hull (in consideration " of her long and faithful service) for their own use and benefit " absolutely and it is my wish that the said Bessie Amy Hull " shall carry on and manage the said business as she shall think " fit." Then comes the residuary gift by which everything else is given to the widow, the second defendant.

The question what is the content of the gift of the business is not free from judicial authority. The authorities were exhaustively reviewed by Simonds J. in *In re Rhagg*,[1] and I think that it is not inaccurate to say that a persual of that review and of the authorities comprised in the review shows that over the time which has elapsed from the earlier cases the court is inclined to take a much broader view than used to be taken, although, of course, it remains as true as ever that each case has to be decided by reference to its own particular facts and the particular language of the will in question. It is also true, as counsel for the second defendant in the present case emphasized, that in effect what Simonds J. was dealing with was the interest of the particular testator in a share of the partnership in question. He had been the sole owner of the business and had made his will bequeathing the business to his clerk, whom he later made his partner; but, as I read the judgment, the judge used or referred to the circumstance that before his death he had brought a partner in only so as accurately to define that with which he was dealing. There are certain observations to be found in the judgment which I read as intended to be of general application and as intended to represent the reasons underlying the conclusion to which the judge came. In the course of his judgment, he said[2]: " I have " now reviewed all the decided cases which can throw any light " on the question before me. They leave me, I think, free to " form my own judgment on the words of this will. I must in " the first place reject the contention of the residuary legatees " that nothing more than the testator's share of goodwill passed " under the bequest. It appears to me an arbitrary and unjustifi- " able selection of a particular asset among the several assets of " which a business is made up. The word ' business ' in such a " context as this bears much the same meaning as when it is " said that a man has sold his business. It means the under- " taking or enterprise itself, not the process of carrying it on. " When, therefore, a solicitor bequeaths his business, or as the " bequest must in the present case be read, his share of the " business carried on by him in partnership with another, I see " no reason for saying that goodwill rather than any other asset " passes. If anything passes which is an asset of the business, " why should not everything pass which is an asset of the " business? And equally if a share in one asset passes, why not " a share in all?" Later he said[3]: " I find the same difficulty

[1] [1938] Ch. 828; 54 T.L.R. 990; [1938] 3 All E.R. 314.

[2] [1938] Ch. 828, 835.

[3] Ibid. 837.

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" which Farwell J. found in *In re Barfield* [4] in excluding anything " which was, in fact, treated by the testator as an asset of his " business. While he carried on business by himself alone he " treated as such an asset certain sums which he had advanced " to clients actual or potentional. These sums were, I think, to " him as much the assets of his business as plant and stock would " to a manufacturer be the assets of his business. I see no " reason to attribute any change on his taking Boyd into partner- " ship. They remained assets of the partnership business, with " the result that the testator is, as a matter of account between " himself and his partner, to be regarded as having a sum due " to him on capital account of the necessary amount."

With that guidance, I return to the consideration of the items in dispute. They are the stock-in-trade of the business, book debts amounting to £608 8s. 9d., moneys owing by trade debtors or any part thereof, and, lastly, the freehold property at 64 Myddleton Road.

Counsel for the second defendant urged on me this consideration: she pointed out that the testator, in addition to giving the second defendant, his wife, all his personal chattels, household goods and effects, bequeathed a number of pecuniary legacies which amount to a substantial sum, as I have already pointed out, and gave his residue to his wife, the second defendant. Counsel asked me to draw from that the inference that he intended those gifts to result in the pecuniary legatees' receiving their legacies and the second defendant's receiving something under the residuary bequest. I quite appreciate the purpose of that submission; but I think, from a somewhat lengthy experience, that I am entitled to take into consideration that testators are very often optimistic and in disposing of their property are frequently far more generous than the amount of the property to be disposed of will effectively allow. So far as the residuary estate is concerned, residue is what it implies, namely, that which remains, if anything.

On the other hand, counsel for the first defendant, Miss Hull, pressed on me the closing words of clause 7: " . . . and it is " my wish that the said Bessie Amy Hull shall carry on and " manage the said business as she shall think fit." I think that that direction in the will is a much stronger indication than that which is afforded by reference to the amount of the pecuniary legacies and the existence of a residue. The gift of residue is common form. A will would be sadly lacking if it did not contain a residuary clause; but in this will there is an express statement of wish that Miss Hull should carry on and manage the business. I think that I am entitled to draw from that the conclusion (and I think it is in accordance with the trend of the modern authorities) that a broad rather than a narrow construction should be given to the bequest of " the business of a house furnisher at

[4] (1901) 84 L.T. 28.

" present carried on by me at 64 Myddleton Road "; in other words, that clause 7 should be so construed in relation to the available assets as to carry with the gift of the business sufficient to allow the obvious wish of the testator to be achieved, namely, that the business should be carried on. Were I to accede to the argument put forward on behalf of the widow, there would pass only a motor-van of the value at the testator's death of £193 15s. 0d., a cash register which, taking into account the amounts written off, is of the value of £30, and the goodwill. That appears in the testator's balance sheet at £25, but I will assume for the purpose of my judgment that it is worth considerably more than that.

It is perfectly true, as counsel for the second defendant pointed out and the evidence shows, that the account kept by the testator was really an account for income tax purposes, and that is one of the reasons why counsel for the first defendant was constrained to give up any claim to the item " Cash at Bank "; nevertheless, it is possible in perusing these items in the light of the evidence which has been filed on this summons to say which items the testator treated as part of his business. The second item, stock-in-trade £6,141 14s. 0d., is to be regarded, in my view, as part of the assets of the business. The evidence shows that the great bulk of that item comprised stock which was used in the business at 64 Myddleton Road. There is some dispute about stock which was used in another business, but I think that matter is cleared up by the evidence of Miss Hull and of Mr. White, the testator's son. She says in her affidavit: " There " was only one business, the business of a house furnisher, and " Wood Green "—that was where the other business was carried on—" was for a time a branch of that business. Stock was taken " from 64 Myddleton Road to start the Wood Green branch, " and when the Wood Green premises were sold the balance of " stock then at Wood Green was naturally brought back to " 64 Myddleton Road and mixed with the stock then at " 64 Myddleton Road. Thenceforth all the stock was used inter- " changeably for the purposes of the business then carried on at " 64 Myddleton Road." If that be right, it seems to me that there is no way of separating the stock which came from Wood Green from that which was already at Myddleton Road.

Mr. White disputes that the business at Wood Green was a branch of the business at Myddleton Road, Bowes Park. He says that the business at Wood Green, which the testator purchased as a going concern in March, 1954, was " that of a general " draper selling women's and children's clothes and his purchase " included the stock of a general draper. The testator continued " that business at Wood Green until its sale in March, 1956. " He added to the original stock of the Wood Green business a " stock of furniture and floor coverings, hoping to develop a " business of that character there. When the Wood Green " business was sold, only the remainder of such latter stock was

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"transferred to the Bowes Park business." So be it. Accepting that, the result is that such of the stock at Wood Green as was suitable for the purpose of a furnishing business was brought back by the testator, to whom solely it belonged, and used in his business at Myddleton Road, Bowes Park. That seems to me to come exactly within what Simonds J. said in *In re Rhagg*,[5] namely, that he shared the difficulty which Farwell J. found in *In re Barfield*[6] "in excluding anything "which was, in fact, treated by the testator as an asset of his "business." So far, then, as the content of the stock is concerned, I see no difficulty from the fact of the introduction of the stock from Wood Green which Mr. White agrees was brought back to the business at Myddleton Road. On the question whether or not that composite stock passes under the gift in clause 7, I take the view that the matter is decided by the force of the closing words of the clause because, if the testator intended that the business should be carried on (as, in my view, he clearly did), it must follow that he intended that the stock-in-trade, which was then part of the business, should pass in order that the business could be carried on, because without that stock-in-trade, steps would have to be taken to procure stock and it seems to me that it would produce a most unnatural result if I construed clause 7 as not including the stock-in-trade.

The next item is under the heading "Sundry debtors, trade "accounts." Those simply are book debts owing to the business; and it seems to me by parity of reasoning that, on the assumption the testator intended the business to be carried on, those are items which must be treated as having been regarded by him as part of his business assets. There remains the item "Freehold "property, at valuation, 64 Myddleton Road, Bowes Park." The evidence is that those premises throughout have been used by the testator to carry on his business there and for no other purpose. They are business premises. At the beginning of his interest in them he held them under a lease, but later purchased the freehold, which fact, if anything, underlines the conclusion that he regarded the freehold property as part and parcel of the assets of his business. Some of the old cases proceed on the basis of excluding such an item, but I can see no reason for doing so in this case. The context which I find on the construction which I have given to clause 7 really demands that they be included; and I again rely on the passage from the judgment in *In re Rhagg*[7] to which I have already referred: "If anything "passes which is an asset of the business, why should not "everything pass which is an asset of the business?" I can see no reason, therefore, for excluding from the assets of the business the freehold property in question.

Therefore, on question 1 I answer thus: paragraph (i) in

[5] [1938] Ch. 828, 837.
[6] 84 L.T. 28.
[7] [1938] Ch. 828, 835.

the negative; paragraph (ii) and paragraph (iii) in the affirmative. I do not think that paragraph (iv) carries the matter any further, because moneys owing by trade debtors or any part thereof cannot in their content be different from book debts, and those are dealt with under paragraph (iii). Paragraph (v) I answer in the negative and paragraph (vi) I answer in the affirmative.

[His Lordship heard argument on question 2.]

WYNN-PARRY J. The last question with which I have to deal relates to two items. The first is the trade liabilities of the testator at the date of his death, amounting to £1,247 7s. 6d., and the question is whether the bequest, in clause 7, of the business subjects the assets which, I have held, passed under the clause, to the trade liabilities.

The authorities are not in a satisfactory state. The first case to which I was referred, *In re Timberlake*,[8] concerned, so far as one can discover from the report, an estate that was insolvent, and, as counsel for the second defendant observed and I agree, in those circumstances the question whether the bequest of the business subjected it to debts would appear to have been somewhat academic. The later case to which I was referred, *In re Harland-Peck*,[9] also is unsatisfactory from the point of view of this question, because it is a report of the case in the Court of Appeal from a judgment of Farwell J., who decided two points, the first being one against which no appeal was made, namely, the question whether a gift of the business in that case was subject to the liabilities. I have no indication in the report on what line of reasoning Farwell J. proceeded.

My attention has been drawn to an article in the Law Times newspaper of November 8, 1941, where reference is made to an unreported case of *In re Abbott*,[10] in which Uthwatt J. is stated to have expressed the view that it seemed wrong that the legatee of the business should take it free from the liability to pay debts. He inclined to the view which Farwell J. had rejected, namely, that the gift of a business was the gift of an entity. He, however, did not decide the point, having regard to the unusual circumstances surrounding the gift in *In re Abbott*.[11]

There is a passage which I agree must be treated as obiter in the judgment of Simonds J. in *In re Rhagg*,[12] where he says: "Secondly, I must observe that somewhat different considera- "tions may be involved where the business was that of the "testator alone and where he carried it on in partnership. In "the former case to speak of his 'capital' in the business or "his undrawn profits may be wholly misleading. The substance "of the bequest is the assets of the business subject to its "liabilities."

[8] (1919) 63 S.J. 286.
[9] [1941] Ch. 182; 57 T.L.R. 118; [1940] 4 All E.R. 347.
[10] October 6, 1941, unreported.
[11] Ibid.
[12] [1938] Ch. 828, 836.

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It is true that *In re Timberlake* [13] was not cited in *In re Rhagg*,[14] and that *In re Harland-Peck* [15] had not been decided. I take it that, if there be no special circumstances, I should follow what I can deduce to be the rule, if any, appearing from *In re Timberlake* [16] and apparently applied in *In re Harland-Peck* [17]; but, of course, as Simonds J. said in *In re Rhagg*,[18] having completed an exhaustive review of the authorities: "They "leave me, I think, free to form my own judgment on the words "of this will." I find myself in just the same position.

The key to the whole problem, in my judgment, is again to be found in the latter words of clause 7. In my view, this is a case where the business should be regarded as an entity, and it is a case where the words of Simonds J. apply [19]: "The substance "of the bequest is the assets of the business subject to its "liabilities." I arrive at that conclusion for the short reason that it appears to me that, on its true construction, clause 7 contemplates a continuation of the business, lock, stock and barrel, as it existed at the date of the death of the testator. It is true that the accounts are not confined merely to accounts of the business; but, as I have said earlier, it is easy to extract, on analysis, what he treated as assets of the business and what he did not. In my view, he clearly treated the amount of the trade accounts as charged on what he regarded as his business assets. Therefore, in my view, the answer to the first point raised by question 2 is that the bequest is subject to the payment of the trade liabilities mentioned in sub-paragraph (i).

The second point relates to the income tax payable in respect of the profits of the business down to the testator's death. I take those to be confined to the amount assessed on the testator under Schedule D in respect of the profits to which he had become entitled through carrying on the business. The amount involved is, I think, very small. In my view, on a question so framed, that tax must be regarded as entirely personal to the testator and should not be paid out of the assets of the business.

Declaration accordingly.

Solicitors: *Frank E. C. Forney; Bailey, Breeze & Wyles; Chatterton & Co.*

K. R. A. H.

[13] 63 S.J. 286.
[14] [1938] Ch. 828.
[15] [1941] Ch. 182.
[16] 63 S.J. 286.
[17] [1941] Ch. 182.
[18] [1938] Ch. 828, 835.
[19] Ibid. 836.

[QUEEN'S BENCH DIVISION.]

HARVEY *v.* R. G. O'DELL LTD. AND ANOTHER. GALWAY (THIRD PARTY).

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Jan. 28, 29, 30, 31; *Feb.* 3, 4, 18.

McNair J.

[1954 H. No. 1206.]

Vicarious Liability — Master and servant — Negligence — Course of employment—Injury to servant through negligence of fellow-servant — Motor-cycle belonging to fellow-servant authorized and only practical method of transport—Accident while travelling for meal —Whether journey in course of employment.

Vicarious Liability—Master and servant—Indemnity from servant— Injury to fellow-servant by negligent driving of servant employed as storekeeper—Motor-cycle combination belonging to storekeeper made available for employers' business—Whether implied term to drive with reasonable skill and care in storekeeper's contract of employment.

Joint Tortfeasor—Contribution—Limitation of action—Action against one tortfeasor statute barred—Any tortfeasor "who would if sued "have been liable"—Injury to fellow-servant by negligent driving of servant — Servant killed in accident — No proceedings brought within six months of taking out representation—Whether claim for contribution between tortfeasors "in respect of cause of action in "tort"—Whether claim to contribution survived against estate of deceased tortfeasor—Whether deceased a tortfeasor "who . . . "would, if sued, have been liable"—"if sued"—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 *—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*).

Joint Tortfeasor—Contribution—Death of one tortfeasor.

On February 29, 1952, the plaintiff, a workman employed by the defendants, a firm of builders and repairers in London, and G., a fellow employee, were engaged on repair work on the defendants' behalf at Hurley. G., who was employed as a storekeeper, owned a motor-cycle combination which he used from time to time for the defendants' business; he paid for his petrol, but when out on the defendants' business received a travel allowance based on the cost of public transport. When engaged on outside work the defendants' workmen were paid for travelling time as working time and if they were out all day and had to travel some distance to get a meal, were paid for the time taken in travelling to and from the meal place as working time. When instructed to go to Hurley G. had been told to take the plaintiff with him as his mate in his sidecar. It would not have been possible for G. and the plaintiff to travel to Hurley and back by public transport and to complete the work there in one day. G. had taken some tools from the defendants' yard with him but after he and the plaintiff had been working for some hours they went into Maidenhead, a distance of about five miles, where G. procured further tools and materials and they both had a meal. On the way back to Hurley when the plaintiff was a passenger in the sidecar the motor-cycle combination came into collision with a car and the plaintiff received injuries and G. was killed. The accident was due, in part at least, to the negligence of G. In an action by the plaintiff for damages on the ground that the defendants were vicariously liable for G.'s negligence in which the defendants contended that at the time of

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the accident neither G. nor the plaintiff was acting in the course of their employment:—

Held, that G. was acting in the course of his employment in using his motor-cycle combination, the authorized and only practical method of conveyance for himself and the plaintiff, for the journey from London to Hurley, and that, in the circumstances, the journey from Hurley to Maidenhead and back, even if no question of tools had arisen and its main purpose had been to get a meal, was fairly incidental to the work which they had been instructed to do, and was within the scope of their employment; accordingly, the defendants were vicariously liable for G.'s negligent method of performing that journey.

Canadian Pacific Railway Co. Ltd. v. *Lockhart* [1942] A.C. 591; [1942] 2 All E.R. 462; and *McKean* v. *Raynor Brothers Ltd.* [1942] 2 All E.R. 650 applied.

On May 24, 1952, letters of administration of the estate of G. were granted to his widow. In third party proceedings against the widow as administratrix instituted by the defendants on March 14, 1955, claiming damages for breach by G. of his contract of employment and contribution under section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935,[1] in which the widow contended, inter alia, that the defendants' rights were barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934[2]:—

Held, (1) that G. had been engaged and employed by the defendants as a storekeeper and not as a driver, and that the fact that he had made his motor-cycle combination available for his employers and was acting in the course of his employment did not mean that there must be implied into his contract of employment a term that he would use reasonable skill and care in driving, or that he had impliedly agreed to indemnify his employers against liability arising from his negligent driving; the defendants, therefore, were not entitled to claim against his estate for damages for breach of contract.

Lister v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555; [1957] 2 W.L.R. 158; [1957] 1 All E.R. 125 distinguished.

(2) That since the right to contribution between tortfeasors was a right sui generis conferred by statute, proceedings for

[1] Law Reform (Married Women) and Tortfeasors) Act, 1935, s. 6 (1): "Where damage is suffered by any "person as a result of a tort . . . "(*c*) any tortfeasor liable in respect "of that damage may recover con- "tribution from any other tortfeasor "who is, or would if sued have "been, liable in respect of the same "damage, whether as a joint tort- "feasor or otherwise. . . ."

[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1: "(1) "Subject to the provisions of this "section, on the death of any person ". . . all causes of action subsisting "against or vested in him shall sur- "vive against, or, as the case may "be, for the benefit of, his estate. ". . . (3) No proceedings shall be "maintainable in respect of a cause "of action in tort which by virtue "of this section has survived against "the estate of a deceased person, "unless either . . . (*b*) the cause of "action arose not earlier than six "months before his death and pro- "ceedings are taken in respect there- "of not later than six months after "his personal representative took out "representation. (4) Where damage "has been suffered by reason of any "act or omission in respect of which "a cause of action would have sub- "sisted against any person if that "person had not died before or at "the same time as the damage was "suffered, there shall be deemed, for "the purposes of this Act, to have "been subsisting against him before "his death such cause of action in "respect of that act or omission as "would have subsisted if he had died "after the damage was suffered."

contribution under section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, were not "proceedings . . . "in respect of a cause of action in tort" within the meaning of section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934; that, although the cause of action for contribution under the Act of 1935 did not arise until the time of judgment in the action, by virtue of section 1 (4) of the Act of 1934, it was to be deemed to have been a cause of action subsisting against G. before his death; and that, therefore, the defendants' claim under the Act of 1935 was not barred by section 1 (3) of the Act of 1934.

Littlewood v. *George Wimpey & Co. Ltd. and B.O.A.C.* [1953] 2 Q.B. 501; [1953] 3 W.L.R. 553; [1953] 2 All E.R. 915; *George Wimpey & Co. Ltd.* v. *B.O.A.C.* [1955] A.C. 169; [1954] 3 W.L.R. 932; [1954] 3 All E.R. 661 and *Post Office* v. *Official Solicitor* [1951] 1 All E.R. 522; [1951] 1 T.L.R. 333 applied.

Alternatively that section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, was not by its terms comprehensive and the present claim for contribution survived against the administratrix like any other claim not expressly dealt with by the section.

(3) That on the construction of section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the phrase "who . . . would if sued have been liable" contained no temporal connotation, other than that the hypothetical action contemplated had been instituted at some time before the claim for contribution arose, and meant "who, if sued at any time, would "have been liable." G., therefore, was a "tortfeasor who . . . "would if sued have been liable" within the meaning of section 6 (1) (*c*) and, accordingly, his administratrix was liable to indemnify the defendants in respect of their liability to the plaintiff.

Morgan v. *Ashmore, Benson, Pease & Co. Ltd. and Samuel Fox & Co. Ltd.* [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328 applied.

George Wimpey & Co. Ltd. v. *B.O.A.C.* [1955] A.C. 169 considered.

ACTION.

The plaintiff, Leonard Harvey, was at all material times employed at their Battersea yard by the first defendants, R. G. O'Dell Ltd., a company carrying on business as barge builders and repairers who also undertook general repair work. On February 28, 1952, the second defendant, William George Hudson, the manager of the defendant company, asked one Galway, a storekeeper employed by the company, to go to Hurley on the following morning to repair a fence round a caravan belonging to his (Hudson's) sister. Galway owned a motor-cycle and sidecar which he used for the journey between his home and the yard and which he also used from time to time for collecting stores for the company and on occasion for travelling to and from outside repairing jobs; when out on the company's business he paid for his own petrol but was entitled to a travelling allowance based on the cost of public transport. It would not have been possible to go to Hurley and back by public transport and complete the work there in one day and Galway was chosen to go

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because he was the most suitable man available and because he had a motor-cycle and sidecar. Hudson told Galway that he could take the plaintiff in his sidecar as his mate. Galway agreed to go to Hurley and arranged to meet the plaintiff at the yard early next morning, telling him that they would be out all day and would get dinner out.

On the following morning, February 29, 1952, Galway and the plaintiff went to Hurley in Galway's motor-cycle combination, taking some tools with them. After they had worked on the fence for some hours they went into Maidenhead, a distance of about five miles, where Galway procured further tools and materials and they both had coffee and sandwiches. They finished their meal and were returning to Hurley when the motor-cycle combination came into collision with a motor-car and the plaintiff received injuries and Galway was killed.

The plaintiff took no proceedings against the estate of Galway, but he sued both defendants for damages for the injuries and loss he had suffered as a result of the accident, which he alleged occurred in the course of his employment and was due to the negligence of Galway, their servant or agent, in the driving, management and control of the motor-cycle combination, alleging also, against the second defendant, breach of warranty of authority. The defendants, inter alia, denied that at the time of the accident either Galway or the plaintiff was acting in the course of his employment.

On May 24, 1954, letters of administration of the estate of Galway were granted to his widow (now Mrs. Doye). On March 14, 1955, the first defendants issued a third party notice against the widow, as administratrix of the estate of Galway, claiming that if they should be held liable to the plaintiff they were entitled to recover from her contribution under section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935,[1] on the ground that Galway was a tortfeasor who would if sued have been liable in respect of the damage alleged to have been suffered by the plaintiff; alternatively they alleged that it was a term of Galway's contract of employment, or a duty owed by him as a servant to them as masters, that he would so conduct himself as not by negligence on his part, to impose liability on them, and they claimed damages for breach of contract, alternatively, an indemnity. Similar third party proceedings were subsequently instituted by the second defendant.

The third party denied liability and contended, inter alia, that the defendants' alleged rights of action, in that they were not pending against Galway at the time of his death, nor taken within six months of representation being taken out, were barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934.

The facts are more fully stated in the judgment.

Gerald Gardiner Q.C. and *J. R. Elson Rees* for the plaintiff.

Stephen Chapman Q.C. and *Gordon Friend* for the defendants.
Harold Marnham for the third party.

The following cases were cited in argument in the action: *Edwards* v. *Wingham Agricultural Implement Co. Ltd.*[3]; *Martin* v. *J. Lovibond & Sons Ltd.*[4]; *John Stewart & Son* (1912) *Ltd.* v. *Longhurst*[5]; *Sir W G. Armstrong, Whitworth & Co. Ltd.* v. *Redford*[6]; *Knight* v. *Howard Wall Ltd.*[7]; *Cook* v. *Gateshead Corporation*[8]; *Higbid* v. *R. C. Hammett Ltd.*[9]; *Canadian Pacific Railway Co.* v. *Lockhart*[10]; *McKean* v. *Raynor Brothers Ltd.*[11] *St. Helens Colliery Co. Ltd.* v. *Hewitson*[12]; *Netherton* v. *Coles*[13]; *Gilbert* v. *Owners of Steam Trawler Nizam*[14]; *Poulton* v. *Kelsall*[15]; *Parker* v. *Owners of Ship Black Rock*[16]; *Charles R. Davidson & Co.* v. *M'Robb or Officer*[17]; *British Transport Commission* v. *Ministry of Supply*[18]; *Weaver* v. *Tredegar Iron and Coal Co. Ltd.*[19]; *Staton* v. *National Coal Board*[20]; *Whatman* v. *Pearson*[21]; *Crook* v. *Derbyshire Stone Ltd.*[22]; *Alderman* v. *Great Western Railway Co.*[23]; *Blee* v. *London and North Eastern Railway Co.*[24]; and *Poland* v. *John Parr & Sons.*[25]

And the following additional cases were referred to in argument in the third party proceedings: *Lister* v. *Romford Ice & Cold Storage Co.*[26]; *Littlewood* v. *George Wimpey & Co. Ltd. and B.O.A.C.*[27]; *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[28]; *Post Office* v. *Official Solicitor*[29]; *Izzard* v. *Universal Insurance Co.*[30]; *Batthyany* v. *Walton*[31]; *Tuckwood* v. *Rotherham Corporation*[32]; *Chant* v. *Read*[33]; *Harmer* v. *Cornelius*[34]; *Mersey Docks and Harbour Board* v. *Coggins and Griffiths (Liverpool)*

[3] [1913] 3 K.B. 596.
[4] [1914] 2 K.B. 227.
[5] [1917] A.C. 249; 33 T.L.R. 285.
[6] [1920] A.C. 757; 36 T.L.R. 451.
[7] (1938) 55 T.L.R. 227; [1938] 4 All E.R. 667.
[8] (1944) 37 B.W.C.C. 106.
[9] (1932) 49 T.L.R. 104.
[10] [1942] A.C. 591; [1942] 2 All E.R. 464.
[11] [1942] 2 All E.R. 650.
[12] [1924] A.C. 59; 40 T.L.R. 125.
[13] [1945] 1 All E.R. 227.
[14] [1910] 2 K.B. 555; 26 T.L.R. 604.
[15] [1912] 2 K.B. 131; 28 T.L.R. 329.
[16] [1914] 2 K.B. 39; 30 T.L.R. 271, C.A.; [1915] A.C. 725, H.L.
[17] [1918] A.C. 304; 34 T.L.R. 213.
[18] June 25, 1956, unreported. Binghams Motor Claims Cases 67 [Supplement to 3rd ed. (1956) A. 7]; The Times, June 26, 1956, page 6.
[19] [1940] A.C. 955; 56 T.L.R. 813; [1940] 3 All E.R. 157.
[20] [1957] 1 W.L.R. 893; [1957] 2 All E.R. 667.
[21] (1868) L.R. 3 C.P. 422.
[22] [1956] 1 W.L.R. 432; [1956] 2 All E.R. 447.
[23] [1937] A.C. 454; 53 T.L.R. 594; [1937] 2 All E.R. 408.
[24] [1938] A.C. 126; 54 T.L.R. 71; [1937] 4 All E.R. 270.
[25] [1927] 1 K.B. 236.
[26] [1956] 2 Q.B. 180; [1955] 3 W.L.R. 631; [1955] 3 All E.R. 460, C.A.; [1957] A.C. 555; [1957] 2 W.L.R. 158; [1957] 1 All E.R. 125, H.L.
[27] [1953] 2 Q.B. 501; [1953] 1 W.L.R. 426; [1953] 1 All E.R. 583; [1953] 3 W.L.R. 553; [1953] 2 All E.R. 915 (C.A.).
[28] [1955] A.C. 169; [1954] 3 W.L.R. 932; [1954] 3 All E.R. 661.
[29] [1951] 1 T.L.R. 333; [1951] 1 All E.R. 522.
[30] [1937] A.C. 773; 53 T.L.R. 299; [1937] 3 All E.R. 79.
[31] (1887) 36 C.D. 269.
[32] [1921] 1 K.B. 526.
[33] [1939] 2 K.B. 346; 55 T.L.R. 624; [1939] 2 All E.R. 286.
[34] (1858) 5 C.B.N.S. 236.

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Ltd.[35]; *Jones* v. *Manchester Corporation*[36]; *Semtex Ltd.* v. *Gladstone*[37]; *Morgan* v. *Ashmore, Benson, Pease & Co. Ltd. and Samuel Fox & Co. Ltd.*[38] and *Merryweather* v. *Nixan.*[39]

Cur. adv. vult.

February 18. McNair J. read the following judgment: On February 29, 1952, the plaintiff, Leonard Harvey, then a lad of 17 in the employment of the first defendants, R. G. O'Dell Ltd., was being driven as a passenger in a sidecar attached to a motor-cycle, of which the driver was one Galway, also in the employment of the first defendants, when the motor-cycle combination came into collision with a motor-car owned and driven by one Bolt on the Maidenhead–Hurley Road, and the plaintiff received injuries and Galway was killed.

In view of the somewhat complicated issues of law which this simple accident has raised between the plaintiff and the first and second defendants and the third party, the personal representative of the deceased Galway, it is convenient that I should first deal with the facts of the accident, since if no negligence is found against Galway, the action fails. I shall then deal with the plaintiff's injuries.

[His Lordship considered the evidence relating to the accident, found as a fact that the accident was due, in part at least, to the negligence of Galway, assessed the plaintiff's general damages at £1,500, and continued:] By his statement of claim delivered on April 9, 1954, the plaintiff alleged that the accident happened whilst, in the course of his employment and by reason of his contract of employment with the defendants, R. G. O'Dell Ltd., he was a passenger in the motor-cycle combination driven by Galway, the servant or agent of the defendants, and that the accident being caused by Galway's negligence, the defendants were vicariously liable. By their defence delivered on May 18, 1954, the defendants, whilst admitting that the plaintiff and Galway were in their employment, denied that either of them was acting in the course of his employment at the time of the collision, and alleged that they were in fact coming back to work after dinner, and that it was no concern of the defendants if Galway chose to use his motor-cycle for this purpose, or if the plaintiff chose to travel as Galway's passenger.

On August 8, 1957, an amended defence was delivered in which it was for the first time alleged that the work which took the plaintiff and Galway down to Maidenhead was no concern of the defendants, but was a private job for Hudson, their manager, undertaken by him on the instructions of his sister, and that Hudson was acting entirely outside the scope of his

[35] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[36] [1952] 2 Q.B. 852; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[37] [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206.

[38] [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328.

[39] (1799) 8 Term.Rep. 186.

employment as manager in sending them down to Maidenhead, and that, accordingly, Galway was not at the material time acting as servant or agent of the defendants.

Accordingly, the plaintiff joined Hudson as a defendant, and by his amended statement of claim delivered on September 30, 1957, alleged in the alternative that he and Galway were in Hudson's employment, and that Hudson was vicariously liable for Galway's negligence, and in the further alternative he claimed against Hudson damages for breach of warranty of authority.

To this statement of claim Hudson on October 16, 1957, delivered a defence, in which he purports to admit that his instructions were not given and the work was not done on behalf of the first defendants, but solely on behalf of himself acting outside the scope of his employment, and that he was not expressly or impliedly authorized by the first defendants to give the instructions; he repeats the allegation made by the first defendants that at the time of the collision the plaintiff and Galway were not acting in the course of their employment, but were on their way back to resume their work at Hurley after having partaken of a meal at Maidenhead, and in answer to the claim for damages for breach of warranty he further alleges that the damages, if any, suffered by the plaintiff were not occasioned by any breach of warranty by him, but by the failure of the plaintiff to sue the personal representative of Galway within the time limited by law. This latter defence was not, however, persisted in at the trial before me.

I should add that by way of further particulars of the allegation the amended statement of claim that Galway was at the time of the collision driving his motor-cycle combination as servant or agent of the defendants, and that it was in the course of the plaintiff's employment by the defendants that the plaintiff was a passenger in the motor-cycle combination at the material time, the plaintiff, by leave given at the trial, added (inter alia) the following particulars: "The said Galway was authorized by "the defendants and directed or requested by one Hudson, "their manager, to go to do a job at Hurley and take with him "the plaintiff in his motor-cycle combination. At all material "times he was being paid by the defendants and was further "entitled to travel expenses. At the time of the accident he "was returning from Maidenhead to Hurley having visited "Maidenhead for the purpose of obtaining tools or materials for "the job and in order to get something to eat for himself and "his assistant, the plaintiff. The conduct and control of the "whole day's operation had been left to the said Galway by the "aforesaid Hudson." At the trial both defendants appeared by the same counsel and solicitors.

I postpone for mention later in this judgment any reference to the third party proceedings launched by both defendants against the legal personal representative of the deceased Galway.

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Upon these pleadings the issues may be summarized as follows: (1) Were the plaintiff's injuries caused or partly caused by the negligence of Galway? This I have already answered in the affirmative. (2) Were the plaintiff and Galway instructed by Hudson to go to Hurley to do work there for and on behalf of the first defendants? (3) If so, had Hudson express or implied authority from the first defendants so to instruct them? (4) If not, did Hudson warrant that he had such authority, or did he employ the plaintiff and Galway himself? (5) Was Galway in proceeding to Maidenhead for materials and food, or for food alone, and returning therefrom towards Hurley, acting within the course of his employment? (6) Was the plaintiff while travelling in Galway's sidecar back from Maidenhead acting within the course of his employment?

The facts as I find them are as follows: O'Dell Ltd., incorporated about 1934, carry on business primarily as builders and repairers of barges, but they also undertake general repair work; for example, if asked, they would accept orders for the repair of a private garage. There are two directors, neither of whom attends the company's works at Battersea regularly, though they both keep in touch by telephone daily. The general running of the business and allocation of the work is left to Hudson as manager; Hudson is a trusted employee with over 30 years' service. At the yard at Battersea at the material time one Kane acted as general foreman; when men were allocated for work away from the yard (as they frequently were) they were, if the work necessitated the use of substantial materials or heavy tools, conveyed by the company's lorry or van, but in other cases they made their own arrangements for travel, being reimbursed the cost of travel by public transport whether they in fact used it or not. The normal working day, whether in the yard or on outside jobs, was an 8-hour day from 8 a.m. to 5 p.m., with one hour off for dinner and with pay at overtime rates outside these hours. When sent on an outside job which involved absence for substantially the whole day, the men were given a subsistence allowance, known as "outdoor money," of 2s. per day; travelling time to and from the work was paid for as working time or overtime, as the case may be, and if they had to travel some distance (even several miles) to get a meal while out on a job, they would normally be paid their fares to and from their meal place, and reasonable travelling time for such purposes would probably be allowed and paid for as working time.

Galway, a man of 32 or 33 years of age, was engaged to act, and did act, as storekeeper at the yard. He owned a motor-cycle combination which he used for the journey between his home and the yard. As storekeeper he had from time to time to use his motor-cycle for the company's purposes, for instance, collecting light stores, and on occasion he used his motor-cycle for travelling to and from an outside repairing job. He paid for his own petrol and maintenance, but when out on the company's

business, he was entitled to a travelling allowance based on the cost of public transport. He was a trusted employee of the defendant company.

Some time before February, 1952, Hudson, as a private venture, had a caravan built for him by the plaintiff's father, which he sold to his sister; this caravan, at the material time, stood on a caravan site at Hurley some five or six miles from Maidenhead.

On Thursday afternoon, February 28, Hudson received a telephone call from his sister at the caravan saying that she was in trouble (some cows having broken down a chain and link fence round her caravan) and asking for help. Without consulting either of his directors, Hudson decided to do what he could to help her. He saw Galway and told him that he would like him to go out on a job the next morning to repair the fence round the caravan, that he could take the plaintiff in his sidecar as his mate, and that he could make his own arrangements for meeting him at his home or at the yard. He chose Galway to do the job because he was the most suitable man available, as he had a motor-cycle and sidecar. Galway was free to decline Hudson's request, but in fact, as Hudson expected, he agreed. The same evening Hudson told the plaintiff that he would be going out with Galway the next morning, and that he was to see Galway to make arrangements. The plaintiff saw Galway and was told by him to meet him at the yard next morning at about 7 a.m.; he was also told by Galway that they would be out all day and that they would get dinner out.

Next morning, shortly before 7 a.m. and after the plaintiff's arrival, Galway put in an appearance at the yard and collected a brace and bit and some tools from the store and, putting them in the sidecar, proceeded with the plaintiff to Hurley, where they worked for four or five hours. Galway then told the plaintiff that they would have to go into Maidenhead to get some further tools and materials.

They went into Maidenhead, Galway dropping the plaintiff at a café, where he joined the plaintiff half an hour later, and they both had coffee and sandwiches. Having finished their meal, they returned to the motor-cycle combination, where the plaintiff found in the sidecar a small parcel at his feet which he described as being hard and about a foot long, but he said that he had no idea of its contents.

I interpose here to say that at one time I was uncertain whether I could safely accept the plaintiff's story as to the tools, as no mention of this feature in the journey into Maidenhead was mentioned in the original particulars given on the plaintiff's behalf; but on reflection I have come to the conclusion that I should accept the plaintiff's evidence in this matter. To find that he had invented this story would be to find him guilty of deliberate perjury and to credit him with an appreciation of the

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legal significance of the tools which I am satisfied he did not possess. The story is not inherently improbable, and I accept it.

The distance from Hurley to Maidenhead is just over five miles, and a journey of that distance was not unreasonable, whether its object was the collection of further tools and materials or to obtain midday refreshments, or either or both; nor was it unreasonable that Galway, the older man who was in charge of the whole operation, should take the plaintiff into Maidenhead with him. It was on the way back from Maidenhead that the accident happened.

It would have been quite impracticable for Galway and the plaintiff to do the journey to Hurley and back by public transport and to complete the work there in the day. According to Hudson, it would have been open to the company to render a charge for the work to his sister, though in fact they did not; if they had raised a charge against her, Hudson would have paid it himself rather than trouble her.

After the accident Hudson himself entered particulars of the plaintiff's accident in the first defendants' accident book, and the plaintiff was credited in the company's wages sheet with wages apparently for 10 hours for his work on that day. After the accident Hudson told the senior director that he had sent the two men down to do a job on his sister's caravan, and no objection was taken by the director.

Neither of the directors was called as a witness, but two answers to interrogatories sworn to by the younger director on May 13, 1955, before the delivery of the amended defence, were put in, in which he states plainly that Galway was instructed by Hudson to do the work on the caravan site, and no suggestion was made in those answers that Hudson was acting outside his authority in giving these instructions.

In my judgment it is fully established: (a) that Hudson was acting within the scope of his authority from the company when he requested Galway to proceed to Hurley, taking the plaintiff with him, to carry out the repairs to the fence, and that this request was, in accordance with his general practice, and that of the company when dealing with its employees, in effect an instruction; and (b) that in using his motor-cycle and sidecar for the purpose of his own conveyance and the conveyance of the plaintiff, Galway was using the authorized and only practical method of transport in order to carry out their work on behalf of the company as so instructed.

There remains for consideration (1) the question whether in using his motor-cycle combination for the purpose of the journey from London to Hurley, Galway was acting within the course of his employment; and (2) the more limited and vital question whether on the journey from Maidenhead to Hurley, in which the accident happened, Galway was so acting.

On behalf of the defendants it was urged that both questions should be answered in the negative, and an elaborate citation of

authorities was made by both counsel on these points. On the first point Mr. Chapman relied upon a series of authorities under the repealed Workmen's Compensation Acts to establish the proposition that a workman's journey from his home or other place to his place of work, or vice versa, is not in the course of his employment, even if the transport is provided by the employer (or even if private transport is used which it is contemplated shall be used) unless there is an obligation upon the workman to use that means of transport.

The cases of *St. Helens Colliery Co. Ltd.* v. *Hewitson* [1] (a case in which the workman was injured in a colliery train provided by his employers for his journey from his work to his home, but which the workman was under no obligation to use) and *Parker* v. *Owners of Ship Black Rock* [2] (a case in which a ship's fireman was injured when going ashore, with leave, to buy provisions for himself, being under no obligation to do so) were cited in support of this proposition. *Weaver* v. *Tredegar Iron and Coal Co. Ltd.*[3] is a case on the other side of the line, which illustrates clearly the very refined distinctions which have been drawn in the cases decided under these particular Acts. Even on these authorities I think it is probable that on the facts of this particular case as I have found them, and in particular the fact that Galway had in the course of his duty to pick up his tools and materials at the yard, any injury suffered on the journey would have been held to have arisen out of and in the course of his employment. But I am by no means satisfied that this line of authority has any relevance, or any strict relevance, to the question which I have to decide, namely, whether in making the journey to Hurley, Galway was acting within the course of his employment so as to make his employers vicariously liable.

On this question the Judicial Committee, in *Canadian Pacific Railway Co.* v. *Lockhart* [4] (a case dealing with the vicarious responsibility of the employer for injuries caused by the servant's negligence in driving a motor-vehicle), accepted as accurate the statement of principle contained in Salmond on Torts, 9th ed. (1936), at p. 95, as follows: " ' It is clear that the master is " ' responsible for acts actually authorised by him: for liability " ' would exist in this case, even if the relation between the " ' parties was merely one of agency, and not one of service at " ' all. But a master, as opposed to the employer of an " ' independent contractor, is liable even for acts which he has " ' not authorised, provided they are so connected with acts " ' which he has authorised that they may rightly be regarded " ' as modes—although improper modes—of doing them. In " ' other words, a master is responsible not merely for what he " ' authorises his servant to do, but also for the way in which

[1] [1924] A.C. 59; 40 T.L.R. 125.
[2] [1915] A.C. 725, H.L.
[3] [1940] A.C. 955; 56 T.L.R. 813; [1940] 3 All E.R. 157.
[4] [1942] A.C. 591, 599; [1942] 2 All E.R. 464.

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" ' he does it. . . . On the other hand, if the unauthorised and " ' wrongful act of the servant is not so connected with the " ' authorised act as to be a mode of doing it, but is an indepen- " ' dent act, the master is not responsible: for in such a case " ' the servant is not acting in the course of his employment, " ' but has gone outside of it.' "

The headnote in *Lockhart's* case,[4] which I think accurately sets out the effect of the decision, is as follows: " Where a " servant of the appellant company, in disregard of written " notices prohibiting employees from using privately owned " motor-cars for the purposes of the company's business unless " adequately protected by insurance, used his uninsured motor- " car on a journey for the purpose of, and as a means of execution " of, work which he was ordinarily employed to do, and by " negligent driving injured the respondent:—*Held*, that the " means of transport was incidental to the execution of that " which he was employed to do, and that the prohibition of the " use of an uninsured motor-car merely limited the way in which, " or by means of which, he was to execute the work, and that " breach of the prohibition did not exclude the liability of the " company to the respondent." So in *Lockhart's* case[5] the employer was held liable for the negligence of the servant in performing a journey on his employers' behalf by a prohibited means, namely, in an uninsured private car—clearly a stronger case than the present.

Similary, in *McKean* v. *Raynor Brothers Ltd. (Nottingham)*,[6] Hilbery J. came to a like conclusion. The headnote of that case reads as follows: " A workman employed by the defendants as " a general utility hand was instructed by the defendants to " take a lorry and meet and give a message to a convoy which " was coming by road. He proceeded on his journey, but instead " of taking the firm's lorry he used his father's car and whilst " driving negligently he collided with and killed the plaintiff's " husband . . . The plaintiff "—that is, the widow—" con- " tended that the workman was acting within the scope of his " authority and in the course of his employment and that the " defendants were liable for damages. The defendants con- " tended that by taking a private car instead of the lorry which " he was instructed to take the workman had changed the journey " from an authorised to an unauthorised journey:—*Held*, the " workman was doing an authorised act within the scope of his " employment and, although it was done in an unauthorised " way it was not done in a prohibited way and the defendants " were liable." Both those cases are stronger cases in favour of the injured person than the case I have to decide.

In my judgment, once it is found that Galway was instructed to take the plaintiff with him to do work on the first defendants' behalf at Hurley, the inevitable conclusion in law is that the

[4] [1942] A.C. 591, 599.
[5] Ibid.
[6] [1942] 2 All E.R. 650.

first defendants would be vicariously liable for his negligent method of performing that journey even if they had not, as they did, expressly authorized the means of transport which was used, unless in the course of the journey Galway had gone outside the scope of his employment by doing something solely for his own purpose.

I now turn to the second and more limited question, namely, whether on the journey from Maidenhead back to Hurley Galway was acting within the scope of his employment. If the primary purpose, or the main purpose, of the trip to Maidenhead was to get further tools necessary for the completion of the work at Hurley, it is clear that the journey into Maidenhead and back to Hurley was as much within the scope of Galway's employment as was the journey to Hurley from London; and accepting as I do the plaintiff's evidence on this point, I am prepared to hold that such was the purpose of the journey. But in my judgment the same result would follow if the primary purpose of the journey into Maidenhead and back was to get a meal, or if that was the main purpose, provided only that the journey to Maidenhead and back could properly be regarded as fairly incidental to the day's work on which Galway and the plaintiff were engaged. It is significant that no evidence was given on behalf of the defendants to the effect that Galway was not entitled to take the plaintiff into Maidenhead for a meal.

In my judgment, while not attempting to lay down any general principle, I am satisfied that, on the particular facts of this case as I have found them, the journey to Maidenhead and back, even if no question of tools had arisen, should be regarded as fairly incidental to the work which Galway and the plaintiff were instructed to do. It was an all-day job; no instructions were given by Hudson that the men should take food with them; Galway told the plaintiff that they would get their dinner out. They were paid subsistence money and the travelling time to and from Maidenhead would have counted, and apparently was counted, as working time.

As stated above, I am satisfied affirmatively that the journey should be so regarded. At the same time it is right that I should say that had the matter been left in doubt I should have accepted Mr. Gardiner's submission on behalf of the plaintiff that the burden of proof that this particular part of the journey was outside the scope of Galway's employment lies upon the first defendants, and that there was no sufficient evidence to discharge that burden.

Accordingly, there will be judgment for the plaintiff against the first defendants for the sum of £1,598 10s., with costs, including any additional costs incurred by the plaintiff in the proceedings against the second defendant; there will be judgment for the second defendant without costs and an order that the first defendants do pay to the second defendant his costs of the action, all such costs to be taxed if not agreed, and to include costs

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incurred by Joseph Henry Harvey, the father of the plaintiff suing as his next friend, up to the date of the adoption of the plaintiff of the proceedings upon his becoming of full age.

I now turn to the third party proceedings brought by the first defendants against Louise Galway, now Doye, the widow and administratrix of the deceased Galway. The following dates are material: February 29, 1952, the date of accident and of Galway's death; May 24, 1952, the date when letters of administration were granted; and March 14, 1955, the date of the third party notice by the first defendants.

By their statement of claim in the third party proceedings the first defendants based their claim on two alternative grounds: (1) that the deceased Galway was a tortfeasor who would, if sued, have been liable to the plaintiff, and that accordingly, there being no personal blame alleged against the first defendants, they are entitled to claim 100 per cent. contribution pursuant to the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6; and (2) that it was a term of the deceased Galway's contract of employment that he would so conduct himself as not by negligence on his part to impose liability upon the defendants. By her re-amended defence the third party raises two defences of substance: (1) that proceedings in respect of the defendants' alleged rights of action and each of them were not pending against the deceased at the date of his death, nor were they taken within six months after the third party, his personal representative, took out representation and were and are therefore barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934; and (2) that the deceased was not a tortfeasor who would, if sued, have been liable to the plaintiff within the meaning of section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, or at all.

It will be convenient if I first deal with the alleged cause of action based upon the implied term in Galway's contract of employment. On this point the issues may be analysed as follows: A (1) If Galway had been alive today, would the first defendants have been entitled to recover against him as damages for breach of the alleged term in his contract of employment the amount which the first defendants have become liable to pay by reason of his negligence? A (2) If so, is that cause of action maintainable against the administratrix (subject to assets being available) or is it barred by section 1 (3) of the Act of 1934?

With regard to A (1), in support of this alleged cause of action reliance was placed upon the decision of the House of Lords in *Lister* v. *Romford Ice & Cold Storage Co. Ltd.*[7] It is, in my judgment, indisputable on the basis of that authority that if Galway had been engaged and employed by the first defendants as a driver of a motor vehicle, the first defendants would have been entitled to recover from Galway, if alive, the amount of the

[7] [1957] A.C. 555; [1957] 2 W.L.R. 158; [1957] 1 All E.R. 125.

judgment together with costs which they had paid or had become liable to pay as damages for breach of the implied term in his contract of employment that he would use reasonable skill and care in driving; see the speech of Viscount Simonds, where he said [8]: "It is, in my opinion, clear that it was an implied term "of the contract that the appellant would perform his duties "with proper care. The proposition of law stated by Willes J. "in *Harmer* v. *Cornelius* [9] has never been questioned: 'When "'a skilled labourer,' he said, 'artizan, or artist is employed, "'there is on his part an implied warranty that he is of skill "'reasonably competent to the task he undertakes—Spondes "'peritiam artis. Thus, if an apothecary, a watch-maker, or an "'attorney be employed for reward, they each impliedly under-"'take to possess and exercise reasonable skill in their several "'arts. . . . An express promise or express representation in "'the particular case is not necessary.'" Viscount Simonds continues [10]: "I see no ground for excluding from, and every "ground for including in, this category a servant who is employed "to drive a lorry which, driven without care, may become an "engine of destruction and involve his master in very grave "liability. Nor can I see any valid reason for saying that a "distinction is to be made between possessing skill and exer-"cising it. No such distinction is made in the cited case: on "the contrary, 'possess' and 'exercise' are there conjoined. "Of what advantage to the employer is his servant's undertaking "that he possesses skill unless he undertakes also to use it? I "have spoken of using skill rather than using care, for 'skill' is "the word used in the cited case, but this embraces care. For "even in so-called unskilled operations an exercise of care is "necessary to the proper performance of duty."

From this it was argued on behalf of the first defendants that once it is established, as it has been by my judgment, that on the occasion in question Galway was acting within the course of his employment, the contractual obligation to drive without negligence is established. On behalf of the third party, however, it was submitted that on the authorities the implied term only extends to the performance of those duties which the servant expressly or impliedly professes to possess at the time when he enters into the contract of service.

It is not without significance that in the famous judgment of Willes J. in *Harmer* v. *Cornelius*,[11] part of which is quoted in, and forms the starting point of, Viscount Simonds' conclusion in *Lister's* case,[12] there appears the following passage by way of qualification or amplification of the passage quoted [13]: "It may be, that, if there is no general and no particular repre-"sentation of ability and skill, the workman undertakes no "responsibility. If a gentleman, for example, should employ a

[8] [1957] A.C. 555, 572.
[9] (1858) 5 C.B.N.S. 236, 246.
[10] [1957] A.C. 555, 573.
[11] 5 C.B.N.S. 236, 246.
[12] [1957] A.C. 555, 572.
[13] 5 C.B.N.S. 236, 246.

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" man who is known to have never done anything but sweep a " crossing, to clean or mend his watch, the employer probably " would be held to have incurred all risks himself."

Furthermore, I think that it is clear that in each of the speeches of the Lords who formed the majority in the House of Lords, there are plain indications that their Lordships were dealing only with the normal engagement of a servant to drive a lorry or other motor-vehicle on the road; see Viscount Simonds [14]: " Nor was it suggested that in the present case " there were any features which distingush the relation of the " appellant and the respondents from that of any other driver " and his employer "; see also Lord Morton of Henryton [15]: " the appellant was under an implied contractual obligation to " take reasonable care in driving the vehicle which he was " employed to drive "; Lord Tucker [16]: " a servant employed to " drive a vehicle in the course of his employment by his master " owes a duty to his master to take reasonable care "; and Lord Somervell of Harrow [17]: " I, therefore, accept the submis- " sion on behalf of the employers that there is normally a con- " tractual duty on a servant to take care." I do not read *Lister's* case [18] as laying down a proposition of general application that whenever an employed person drives a motor-vehicle within the course of his employment he impliedly agrees vis-à-vis his employer to take reasonable care in such driving and to indemnify him for any failure.

Galway was engaged and employed by the first defendants as a storekeeper; as a concession to the first defendants he from time to time used his own motor-cycle on their business and was so using it at the time of the accident. I find it difficult to see on what grounds of justice and reason I should hold that by making his motor-cycle combination available for his employers' business on a particular occasion he should be held in law to have impliedly agreed to indemnify them if he committed a casual act of negligence.

Suppose in a time of labour disturbances in the docks, master stevedores, as sometimes happens, induce their office staff to man the cranes or to do stevedoring; if a third party is injured through the negligence of such staff, no doubt the master stevedores would be vicariously liable, as, indeed, they might be primarily liable, on the basis that they had employed unskilled persons. But it would surely be contrary to all reason and justice to hold that the willing office staff, by abandoning their ledgers and undertaking manual tasks, had impliedly agreed to indemnify their employers against liability arising from their negligence in performing work which they were not employed to do.

I should, therefore, dismiss the claim of the first defendants

[14] [1957] A.C. 555, 576.
[15] Ibid. 555, 580.
[16] Ibid. 592.
[17] Ibid. 598.
[18] Ibid.

against the third party, in so far as it rests upon an allegation of breach of the contract of employment.

This conclusion renders it unnecessary for me to express any final opinion upon the second question, A (2), under this head; it is sufficient for me to say that inasmuch as this cause of action, if maintainable, would be an action in contract and not in tort, it would not be barred by the Act of 1934, but would survive independently of this Act against the administratrix up to the extent of the assets remaining in her hands, like any other claim arising in contract.

I now turn to the defendants' second ground of claim against the third party, based upon section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, which so far as is material provides: "(1) Where damage is suffered by any person as a "result of a tort . . . (*c*) any tortfeasor liable in respect of that "damage may recover contribution from any other tortfeasor "who is, or would if sued have been, liable in respect of the "same damage, whether as a joint tortfeasor or otherwise. . . ."

The first defendants and Galway are in law joint tortfeasors (see *The Koursk*,[19] *per* Scrutton L.J.[20]) and inasmuch as the first defendants' liability on the facts found is purely vicarious, the claim for contribution by Galway, if good in law, should, in my view, be for 100 per cent.

The material questions on this branch of the case may be summarized as follows: B (1) What is the nature of the right of contribution? Are the third party proceedings proceedings "in respect of a cause of action in tort" so as to be barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, as not being pending against Galway at the date of his death, or as not having been taken against the administratrix within six months of the taking out of representation? B (2) Is the cause of action for contribution a cause of action which subsisted against Galway at the date of his death, within the meaning of section 1 (1) of the Act of 1934? If not, is it a cause of action which is maintainable against the administratrix up to the amount of the assets apart from the Act of 1934? B (3) Is there in the expression "who, . . . would, if sued, have "been liable" in section 6 (1) of the Act of 1935 any temporal connotation referring to the time when the hypothetical action must be assumed to have been brought? If it means, as the third party submits, a person who, if sued at the time when the action was brought against the tortfeasor claiming contribution, or at the time when the contribution proceedings were brought, the third party was not such a person, since no action in tort could be brought against her in respect of Galway's tort after November 23, 1952.

B (1): What is the nature of the right of contribution? Are the third party proceedings proceedings in respect of a cause of action in tort? In my judgment it is plainly established on the

[19] [1924] P. 140; 40 T.L.R. 399. [20] [1924] P. 140, 155.

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authorities that the right of contribution between tortfeasors is a right sui generis conferred by statute similar to the right of contribution conferred by section 30 (2) of the Workmen's Compensation Act, 1925; see the cases of *Littlewood* v. *George Wimpey & Co. Ltd. and B.O.A.C. and B.O.A.C. (Third Party)*,[20a] see also the same case under the name of *George Wimpey & Co. Ltd.* v. *B.O.A.C.*,[21] in the House of Lords, and *Post Office* v. *Official Receiver*.[22] Furthermore, if the third party proceedings themselves are not founded in tort, they are not proceedings in respect of a cause of action in tort within the meaning of section 1 (3) of the Act of 1934; the expression plainly means proceedings to enforce a cause of action in tort.

Question B (2) is: Is the cause of action for contribution a cause of action which subsisted against Galway at the date of his death? If not, is it a cause of action which is maintainable against the administratrix up to the amount of the assets apart from the Act of 1934? In my judgment it is also clear that the cause of action for contribution under the Act of 1935 did not arise until judgment in this action. I think this conclusion is implicit, though not a matter of decision, in the speeches in the House of Lords in *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[23] In *Post Office* v. *Official Receiver*[24] Barry J. held[25] (it being common ground that a similar claim for contribution under section 30 (2) of the Workmen's Compensation Act did not arise until payment of compensation was made) that notwithstanding that the payment was not made until after the death of the person from whom contribution was sought, the claim for contribution was subsisting against the deceased person at the date of his death within the meaning of section 1 (1) of the Act of 1934 by reason of the provisions of subsection (4).

The reasoning of Barry J. seems equally applicable to the present claim for contribution under the Act of 1935, and I would respectfully adopt it. But even if this conclusion is wrong, it seems to me that section 1 of the Act of 1934 is not by its terms comprehensive, and that the present claim for contribution would survive against the administratrix like any other claims not expressly dealt with by that section.

Question B (3) is: Is there in the expression "who . . . "would if sued have been liable" in section 6 (1) (*c*) of the Act of 1935 any temporal connotation referring to the time at which the hypothetical action must be assumed to have been brought? In *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[26] this point was much debated but was not, as I think, finally decided either way. Viscount Simonds and Lord Tucker decided the case against the appellant, the party claiming contribution, on the ground

[20a] [1953] 2 Q.B. 501; [1953] 1 W.L.R. 426; [1953] 3 W.L.R. 553 (C.A.); [1953] 1 All E.R. 582; [1953] 2 All E.R. 715, C.A.

[21] [1955] A.C. 169; [1954] 3 W.L.R. 932; [1954] 3 All E.R. 661.

[22] [1951] 1 T.L.R. 333; [1951] 1 All E.R. 522.

[23] [1955] A.C. 169.

[24] [1951] 1 All E.R. 522.

[25] Ibid. 525.

[26] [1955] A.C. 169.

that the third party having, when sued in the action, succeeded on the plea based upon section 21 of the Limitation Act, 1939, could not be said to be a person who, if sued, would have been held liable, a view not shared by the remaining members of the House.

Lord Reid (who, with Viscount Simonds and Lord Tucker, formed the majority in favour of dismissing the appeal) held[27] that "if sued" had a temporal connotation and meant either "if sued at the time when action was being taken against the "other tortfeasor" or "at the time when the former tortfeasor "claims contribution" "and that for the purpose of the appeal "then before the House it was not necessary to decide which." Viscount Simonds, *obiter*, was prepared to accept Lord Reid's conclusion.

On the other hand, Lord Porter and Lord Keith of Avonholm, who dissented, held that the words of the statute were satisfied if the party against whom contribution was sought would have been liable if sued at any time.

In my judgment the phrase "who . . . would, if sued, have "been liable," if construed literally, contains no temporal connotation except that for the institution of the hypothetical action the words "would . . . have been liable" plainly contemplate that the hypothetical action has been instituted at some time before the claim for contribution arose. This, as I have found, is the date of the judgment against the party seeking contribution. Literally construed, the phrase in my judgment means "who "would, if sued at any time, have been liable"—that is, held liable. Is there any reason for not adopting this literal construction?

On behalf of the third party, it is argued that it is unreasonable and unjust that she should be exposed to suit many years after she has by lapse of time become protected as against the original injured party. On the other hand, it is pointed out on behalf of the first defendants that it is unreasonable that their rights against their joint tortfeasor should be determined by the whim of the injured party in not proceeding against the other tortfeasor in due time or at all. And it is said that, if the limitation contended for by the third party is adopted, it would be necessary for every person who is involved in an accident causing injury, for which he may be held liable with a right over against another party to commence declaration proceedings against that other party within that party's limitation period, even though the former party has not yet been sued himself.

These arguments based upon inconvenience seem to me to be very equally balanced. Accordingly, I see no valid reason why the literal construction should not be adopted. This construction does not, as I think, involve reading in any words at all; on the other hand, it does avoid the necessity of reading in words of limitation which are not there.

[27] [1955] A.C. 169, 189, 190.

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I am fortified in this conclusion which I have adopted by the judgment of Donovan J. in *Morgan* v. *Ashmore, Benson, Pease & Co. Ltd. and Samuel Fox & Co. Ltd.*[28] the reasoning of which I respectfully adopt.

There will be judgment accordingly for the first defendants against the third party for an indemnity against their liability under the judgment in the action, together with their costs and the costs of the third party proceedings.

Judgment for the plaintiff against the first defendants.
Judgment for the first defendants against the third party.

Solicitors: *R. I. Lewis & Co.; J. F. Coules & Co.; William Easton & Sons.*

J. F. L.

[28] [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328.

[HOUSE OF LORDS.]

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INLAND REVENUE COMMISSIONERS . APPELLANTS;

AND

SOUTH GEORGIA CO. LTD. . . . . RESPONDENT.

Revenue — Profits tax — Distribution charge — Chargeable accounting period—Trading company—Trading loss exceeding franked investment income — Distributions smaller than franked investment income — "Profits computed without abatement and including "franked investment income" — Meaning of "including" — Whether investment income to be added to nil trading profits— Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 30, 32 (1), 34 (2).

The net relevant distributions for any chargeable accounting period, by reference to which the distribution charge for the purposes of profits tax is ascertained, are defined by section 34 (2) of the Finance Act, 1947, as "... so much of the gross relevant "distributions ... for that period ... as bears to the whole of "the ... gross relevant distributions the same proportion that "the profits for that period bear to the profits therefor computed "without abatement and including franked investment income: "Provided that where the said gross relevant distributions exceed "the profits computed without abatement and including franked "investment income, the net relevant distributions shall be the "sum of—(*a*) the profits for the period computed with due regard "to the provisions for abatement but not including franked investment income; and (*b*) the amount of the excess."

† *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

During the chargeable accounting period ended October 31, 1953, a company incurred a trading loss of £602,000 and received franked investment income to the extent of £272,000. No question of abatement arose. It paid £181,000 in dividends, the gross relevant distributions. A profits tax distribution charge was made on the company in respect of this sum on the footing that it represented net relevant distributions under section 30 (3) and (4) of the Act and that the proviso to section 34 (2) applied. It was common ground that if the proviso was inapplicable no charge could be imposed:—

Held, that for the proviso to apply the gross relevant distributions (£181,000) must exceed not the sum computed in two operations by first ascertaining the trading profit (nil) and then adding the franked investment income (viz., £272,000), but the sum obtained by computing the trading profit and franked investment income together to arrive at the total profits (nil). Accordingly, as "the profits . . . including franked investment income" were nil, the gross relevant distributions exceeded them by £181,000 and nothing had to be brought in under (*a*), because there were no profits, so that there was left "the amount of the excess" under (*b*). It was not a condition precedent to the application of the proviso that there should be a profit when the franked investment income was included in the computation. Unless the contrary was shown, it could only be assumed that the dividends had been paid out of undistributed profits of earlier periods, which was itself the reason for the distribution charge being made.

Decision of the First Division of the Court of Session, 1957 S.L.T. 115; 35 A.T.C. 480 reversed.

APPEAL from the First Division of the Court of Session.

In this appeal from the unanimous decision of the First Division of the Court of Session as the Court of Exchequer in Scotland (Lord President Clyde, Lord Carmont, Lord Russell and Lord Sorn) the appellants, the Commissioners of Inland Revenue, sought to have reversed an interlocutor pronounced affirming the determination of the Commissioners for the Special Purposes of the Income Tax Acts of an appeal by the respondent company, South Georgia Co. Ltd., against an assessment to profits tax for the chargeable accounting period, November 1, 1952, to October 31, 1953, in the sum of £36,363 12s. The Special Commissioners decided that the assessment had been wrongly imposed on the respondent company on an erroneous construction of section 34 (2) of the Finance Act, 1947, and they discharged the assessment. At the request of the appellants the Special Commissioners stated a case for the opinion of the Court of Session, posing the question whether their construction of section 34 (2) was correct. The case was heard on November 29, 1956, and on December 7, 1956, their Lordships delivered judgment and pronounced the interlocutor appealed against, whereby they answered the question in the affirmative, affirmed the determination of the Special Commissioners and refused the appeal. The respondent company submitted that the interlocutor was well founded in law and should be affirmed.

The facts are fully stated in the opinion of Viscount Simonds.

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William Grant Q.C., S.-G. for Scotland, W. R. Grieve Q.C. (of the Scottish Bar) and *Alan Orr* (of the English Bar) for the appellants.

C. J. Shaw Q.C., Dean of the Faculty, and *Alastair Johnston* (of the Scottish Bar) for the respondent company.

Lamson Paragon Supply Co. Ltd. v. *Inland Revenue Commissioners* [1] was referred to in argument.

Their Lordships took time for consideration.

February 27. Viscount Simonds. My Lords, in my opinion the interlocutor against which the Commissioners of Inland Revenue have brought this appeal cannot be sustained. The relevant facts are few and not in dispute nor is the point at issue susceptible of long discussion.

The respondent company have for many years carried on business as whalers. Their accounts for the chargeable accounting period of one year to October 31, 1953, as computed for profits tax and excluding " franked investment income " (an expression which I will presently explain) showed a loss of £602,000. The franked investment income for the same period amounted to £272,000 and the gross relevant distributions, an expression which for the purpose of this case may be regarded as equivalent to dividends, for the same period amounted to £181,818, which has been in the case stated at the round figure of £181,000. They were assessed to profits tax upon the footing that this sum represented a net relevant distribution under the provisions of section 30 (3) and (4) of the Finance Act, 1947. The question is whether they were rightly so assessed and the answer to that question turns on the correct interpretation of the statutory provisions relating to profits tax and particularly of the proviso to section 34 of the Act of 1947. The Commissioners for the Special Purposes of the Income Tax Acts determined that the assessment was wrongly made and in that determination were upheld by the First Division of the Court of Session.

It is necessary to refer briefly to the legislative background to the sections which particularly require your Lordships' consideration.

Profits tax was first imposed by the Finance Act, 1937, under the name of national defence contribution; its name was changed in 1946. It was levied at a flat rate percentage on profits arising in each chargeable accounting period from any trade or business to which the section applied. Such profits were to be computed on income tax principles as adapted in accordance with the provisions of Schedule IV to that Act. I do not pause now to refer to these provisions and their subsequent amendment. Their importance in this case deserves detailed examination at a later stage.

[1] [1951] 2 T.L.R. 723.

The Finance Act, 1947, made considerable changes. In the first place the tax was no longer to be imposed on a class of persons hitherto subject to it. With that change we are not concerned. In the second place the tax was no longer imposed at a flat rate on all profits but a differential was established in order to discourage distribution and encourage retention by granting relief in respect of profits not distributed but retained. In the third place it provided that a tax, called a distribution charge, should be imposed on profits which, having been retained and having therefore enjoyed non-distribution relief, were distributed in a later accounting period. The effect of this legislation as subsequently amended at the relevant date was that the tax in respect of distributed profits was 22½ per cent., and of undistributed profits was 2½ per cent. (a differential of 20 per cent.) and the distribution charge was 20 per cent.

I now turn to the sections which demand closer examination, and, first, to the statutory provision for the computation of profits. I have pointed out that they are to be computed on income tax principles as adapted in accordance with the provisions of Schedule IV to the 1937 Act as subsequently amended. I think it necessary only to refer to paragraph 7 of the Schedule as amended by section 32 of the Act of 1947. The relevant parts of it as thus amended are as follows: " (1) Income received from " investments on other property shall be included in the profits " except—(*a*) income received directly by way of dividend or " distribution of profits from a body corporate carrying on a trade " or business to which section 19 of this Act applies; and " (*b*) income so received from any other body corporate, being " income received indirectly by way of dividend or distribution " of profits from a body corporate carrying on such a trade or " business as aforesaid. . . . (1A) Any reference in any enact- " ment relating to the profits tax to franked investment income " shall be construed as a reference to the income which would be " included in the profits if paragraphs (*a*) and (*b*) of the pre- " ceding sub-paragraph had been omitted, and, in computing " profits for the purposes of so much of any enactment as refers " to profits including franked investment income, the said sub- " paragraph shall have effect as if the said paragraphs (*a*) and (*b*) " were omitted."

My Lords, the meaning of this provision appears to have caused some difficulty, but I think that it is reasonably clear and means (so far as is relevant to our present purpose) no more than this, that when you find the expression " profits including franked " investment income " you disregard for the purpose of your computation paragraphs (*a*) and (*b*) and include in it the income derived from all the investments and property of the company regardless of the fact that in a computation made in another connexion and for another purpose you may have to exclude the income from some, but not all, of its investments. A single ordinary commercial computation of profits has to be made, of

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which the result may be to show some profit, no profit or a loss. I come then to section 34 of the Act and its all-important proviso.

That section provided by subsection (1) that it and the three next succeeding sections should, subject as therein mentioned, determine what was to be taken, for the purposes of the provisions of the Act relating to reliefs for non-distribution and distribution charges, as the net relevant distributions for any chargeable accounting period and by subsection (2) it provided as follows: "The net relevant distributions . . . for any chargeable "accounting period . . . are so much of the gross relevant "distributions . . . for that period as bears to the whole of the "said gross relevant distributions the same proportion that the "profits for that period bear to the profits therefor computed "without abatement and including franked investment income: "Provided that where the said gross relevant distributions exceed "the profits computed without abatement and including franked "investment income, the net relevant distributions shall be the "sum of—(*a*) the profits for the period computed with due regard "to the provisions for abatement but not including franked "investment income; and (*b*) the amount of the excess."

Upon this proviso, interpreted in the light of paragraph 7 of the Schedule as amended, the appellants make a very simple case. Upon the undisputed figures the gross relevant distributions were £181,000, the profits including franked investment income were nil (I may interpolate that the reference to abatement may throughout be disregarded), therefore the net relevant distribution must be the excess of £181,000 over nil, i.e., £181,000; nothing has to be brought in under (*a*) of the proviso, for there were no profits.

To the claim thus formulated the respondents make as simple a reply. They say that the proviso has no application to the present case because it only applies where (1) there is a profit after including franked investment income, and (2) the gross relevant distributions exceed such profit, and here there was no such profit. Therefore, they say, the proviso did not come into operation, and the assessment was wrongly made. I may observe here that it is common ground that, if the proviso is inapplicable, no charge can be imposed, for a calculation made in accordance with the formula contained in the body of subsection (2) would show no net relevant distribution.

Everything, therefore, turns on the meaning of the proviso and whether it is in effect a condition precedent to its application that there should be a profit when the franked investment income is included in the computation. As the learned Lord President said that[1] "the proviso can only apply if there is a profit once "the franked investment income is included," and Lord Sorn expressed a similar opinion.

My Lords, I have already indicated my view upon what a computation of profits in the terms of the proviso involves. I

[1] 1957 S.L.T. 115, 119; 35 A.T.C. 480, 484.

will repeat that it involves, not two operations, first the ascertainment of trading profit or loss and then the addition of franked investment income, but a single operation which takes into one account the trading profit or loss and the investment income, whether franked or not. I cannot, with all respect to the Lord President, accept the view that to interpret "including" as meaning "adding" fits more convincingly into the scheme of section 32 of the Act than does the appellants' contention. On the contrary, I think that the latter contention accords with the primary purpose of section 34 of the Act (the relevant section in this connexion) which I understand to be to determine how much of an actual dividend paid for a particular period is to be regarded as having been paid out of (a) the chargeable profit of the period, (b) the franked investment income of the same period, and (c) the undistributed profits of an earlier period or periods. This result is achieved if a single computation is made which shows that the profits for a period including franked investment income are nil or a minus figure (it matters not which for this purpose) and a dividend for that period is nevertheless paid. For, unless the contrary is shown, it can only be assumed that that dividend has been paid out of undistributed profits of earlier periods, which is itself the reason for a distribution charge being made. The proviso to subsection (3) of section 30 of the Act will safeguard the taxpayer from being charged with an amount of tax in excess of the relief previously granted.

The learned Dean of Faculty on behalf of the respondents urged in support of the construction that he invited your Lordships to adopt that it was really meaningless to speak of a nil profit or of adding something to it, and this plea found favour with the Lord President. As I understood it, this was only relevant if the view was accepted that there were two separate operations and not a single computation. In the view which I take, therefore, it does not arise, but I think it right to say that I see no impropriety of language in speaking of a nil profit, where the question is whether any or what profit has been made. And the answer would be equally valid in the case of an exact balance or of a loss.

It was further urged, in an argument which I find it difficult to distinguish from that which I have already discussed, that, even if the proviso applies, upon its proper application the respondents have been wrongly assessed. I quote from their formal case: "Even if the appellants were entitled to take the profits "including franked investment income at a minus figure of "£330,000 in order to make calculations set forth in the proviso, "the result of the sum was that the excess of the gross relevant "distribution (£181,000) over the profits including franked investment income (minus £602,000 plus £272,000 = minus £330,000) "was £511,000 which, when added to the profits of the period "gave a figure of minus £91,000 for the net relevant distributions." I think that this argument does no more than deny

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the validity of the answer "Profits, nil" to the question "What "profit is shown by a computation made in accordance with the "terms of the proviso?" But, in my opinion, there is no need to go behind that simple answer and inquire whether the computation shows that even with the inclusion of franked investment income there is still a loss. The argument stated in this way does, however, illustrate that the respondents' contention must have a result which defeats the essential purpose of the Act. For year after year a company could continue to pay dividends which could only come out of undistributed profits, but would escape from any payment of distribution charge so long as, even after including franked investment income, it showed no profit. The appellants' contention, on the other hand, appears to me both to be in accord with the natural and primary meaning of the section and to harmonize with the plain purpose of the Act.

I would, therefore, allow the appeal and declare that the respondents were correctly charged to profits tax by way of a distribution charge for the chargeable accounting period November 1, 1952, to October 31, 1953, in respect of the sum of £181,818.

The respondents must pay the appellants' costs in this House and in the Court of Session.

Lord Reid. My Lords, the profits tax assessed in this case is a distribution charge. The general scheme of the Finance Act, 1947, is that if a company does not distribute the whole of its profits for a particular period it gets relief for non-distribution by paying a lower rate of profits tax in respect of that part of its profits which it has retained. But when such retained profits come to be distributed the company pays by way of distribution charges what it had saved by way of relief for non-distribution while it retained the profits undistributed. The provisions of the Act are complicated, partly because profits tax may not be payable in respect of the whole of the company's profits. In particular profits tax is not payable in respect of franked investment income which consists, broadly speaking, of dividends received from its investments in other trading companies; the reason being that those other companies will already have paid profits tax on their profits, so that to subject them to profits tax again when they are received by another company as dividends would involve double taxation. The Act also deals with abatements, but this matter does not arise in the present case.

Allowance is made for these factors in calculating the amount of reliefs for non-distribution and distribution charges. These are calculated, not by reference to the total dividends paid by the company (the "gross relevant distributions"), but by reference to the appropriate proportion of them (the "net relevant "distributions"). Section 34 of the 1947 Act sets out alternative formulae by which net relevant distributions are to be calculated and this case depends on the proper interpretation of that section.

In this case, during the relevant period the respondent company suffered a trading loss of £602,000 (in round figures), it received franked investment income amounting to £272,000, and it distributed dividends of £182,000. It had sufficient reserves which had enjoyed relief for non-distribution to enable it to pay this dividend. Admittedly the leading formula in section 34 (2) cannot be applied. The question is whether the alternative formula set out in the proviso to section 34 (2) can be applied. If it can, this appeal must succeed: if it cannot, then the respondent succeeds and no distribution charge is payable.

The proviso is in these terms: " Provided that where the said " gross relevant distributions exceed the profits computed without " abatement and including franked investment income, the net " relevant distributions shall be the sum of—(*a*) the profits for " the period computed with due regard to the provisions for " abatement but not including franked investment income; and " (*b*) the amount of the excess."

It was argued that before the proviso can apply at all there must be a profit and that here there was a loss: even if the franked investment income is taken into account there was a loss of £330,000. I agree that a loss of £330,000 cannot be regarded as a profit of *minus* £330,000, but in my judgment it can in accordance with ordinary usage be regarded as a profit of nil. There was no profit, and to say that there was no profit appears to me to be the same thing as to say that the profit was nil. Then it was said that a sum cannot properly be said to " exceed " nil: it can only " exceed " another sum. But, again, I think that in ordinary usage one can properly say that ten exceeds nil or nothing.

The difficult question in the case appears to me to be the meaning of the words " the profits computed without abatement " and including franked investment income ": what is it that the gross relevant distribution must exceed in order to bring the proviso into operation?

It is said for the respondent that " profits " in the legislation dealing with profits tax means profits apart from franked investment income (which I shall call trading profits although that is not quite accurate); and that therefore what the proviso directs you to do is first to compute the trading profits and then to include, i.e., to add, the franked investment income. In this case the trading profits are nil, the franked investment income is £272,000, and adding these two together gives £272,000. The gross relevant distributions, £182,000, do not exceed £272,000, and therefore the proviso does not apply. If section 34 could be taken in isolation I might be inclined to accept this argument, but it cannot be so taken.

Schedule IV to the Finance Act, 1937, sets out modifications of the provisions of the Income Tax Acts which were to be applied in computing profits for the purposes of the national defence contribution. In 1946 the national defence contribution was

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renamed the profits tax and in 1947 extensive alterations were made. In particular, section 32 of the 1947 Act substituted new provisions for those of Schedule IV, paragraph 7 (1), to the 1937 Act. The new sub-paragraph 7 (1) appears to me to make it clear that whenever the word " profits " appears by itself in this legislation it means profits excluding franked investment income. But this is followed in section 32 by a new sub-paragraph 7 (1A), which is, I think, of vital importance in this case: the new provisions are in these terms: " (1) Income received from invest- " ments or other property shall be included in the profits except— " (*a*) income received directly by way of dividend or distribution " of profits from a body corporate carrying on a trade or business " to which section nineteen of this Act applies; and (*b*) income so " received from any other body corporate, being income received " indirectly by way of dividend or distribution of profits from a " body corporate carrying on such a trade or business as afore- " said; and (*c*) income to which the persons carrying on the trade " or business are not beneficially entitled: Provided that the " profits of a body corporate which, either alone or in conjunction " with any statutory undertakers carrying on a trade or business " to which subsection (5) of the said section nineteen applies, has " a controlling interest in any other body corporate, being such " statutory undertakers as aforesaid, shall not in any case include " any income received from that other body corporate. (1A) Any " reference in any enactment relating to the profits tax to franked " investment income shall be construed as a reference to the " income which would be included in the profits if paragraphs (*a*) " and (*b*) of the preceding sub-paragraph had been omitted, and, " in computing profits for the purposes of so much of any such " enactment as refers to profits including franked investment " income, the said sub-paragraph shall have effect as if the said " paragraphs (*a*) and (*b*) were omitted."

Sub-paragraph (1) is not obscure. Leaving aside paragraph (*c*) and the proviso which throw no light on the present question, it includes in " profits " for the purposes of profits tax all income from investments except such income as is described in paragraphs (*a*) and (*b*)—chiefly dividends from the company's investments in other trading companies. Put more simply, that means that such dividends are not to be included in " profits " for profits tax purposes.

Sub-paragraph (1A) is more than a little obscure. The first part of it appears to be no more than a verbose way of attaching the name " franked investment income " to the kinds of income described in paragraphs (*a*) and (*b*) of sub-paragraph (1). (I follow the statute in referring to parts of a sub-paragraph as paragraphs.) And at first sight the second part might seem to be no more than an elaborate statement of an obvious consequence of so naming those kinds of income. But on closer examination it appears to me that this second part has an operative effect which is really decisive of the present case.

In the legislation dealing with profits tax the word "profits" frequently occurs. Sometimes it is qualified by the words "including franked investment income": often it is not so qualified. When it is not so qualified sub-paragraph (1A) can have no application, and if in these cases it is necessary to compute the profits, then the computation must be made in the manner provided by sub-paragraph (1). But where the word "profits" is so qualified and the provision requires profits to be computed, then sub-paragraph (1A) applies and the computation must be made in the manner provided by this sub-paragraph and not in the manner provided by sub-paragraph (1). Normally when the same word is used repeatedly in the same section or group of sections one presumes that it is intended to have the same meaning. But it appears to me that sub-paragraph (1A) treats the words "profits including franked investment income" as a composite phrase with a special meaning and effect: it directs that where profits have to be computed for the purposes of a provision in which this phrase is used the computation shall be made in the manner which would be provided by sub-paragraph (1) if paragraphs (*a*) and (*b*) were deleted from that sub-paragraph. Deleting these paragraphs and again leaving aside paragraph (*c*) and the proviso, sub-paragraph (1) would provide: "Income received from investments or other property shall be "included in the profits." In other words, all dividends received by the company are to be taken into account in making the computation of profits whether they are franked investment income or not.

There may have been good reason for adopting this cumbrous and unusual method of drafting—I do not know. I am very conscious of the fact that all the learned judges of the First Division attach another and a simpler meaning to sub-paragraph (1A). The Lord President said [2]: "Throughout these two "sub-paragraphs, therefore, what I have called trading profits "and franked investment income are treated as quite distinct "and separate, and 'profits' per se exclude any part of the "franked investment income"; and later [3]: "If it could have "been said that the statutes had contemplated that the profits "could only be ascertained after franked investment income had "been taken into account, then there might have been plausibility "in the appellants' argument. But this is not the situation." Lord Sorn said [4]: "The scheme consistently shows that profits "are to be calculated separately from franked investment "income." But giving the best consideration I can to the matter I have been forced to a different conclusion. To my mind, the compelling words in sub-paragraph (1A) are "*in computing*

[2] 1957 S.L.T. 115, 118; 35 A.T.C. 480, 483.
[3] 1957 S.L.T. 115, 118; 35 A.T.C. 480, 484.
[4] 1957 S.L.T. 115, 120; 35 A.T.C. 480, 486.

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"*profits* . . . the said sub-paragraph shall have effect as if the "said paragraphs (*a*) and (*b*) were omitted."

I must now turn back to the proviso to section 34 (2) and in particular the words "the profits computed without abatement "and including franked investment income." Here the words "computed without abatement and" are interposed between "profits" and "including franked investment income" but I do not think that that is material. It appears to me that this is an enactment which in the words of sub-paragraph (1A) "refers to "profits including franked investment income." If the view which I have already expressed is right, then these profits must be computed as directed by sub-paragraph (1A) and franked investment income must be taken into account in making that computation. The trading loss being £602,000 and the franked investment income £272,000, the result of taking both into computation is that there were no "profits computed without abate-"ment and including franked investment income." I have already given my opinion that that is equivalent to saying that such profits were nil. If that be so it follows that the assessment in this case was properly made. In my judgment, this appeal should be allowed.

Lord Tucker. My Lords, I also agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friend.

Lord Keith of Avonholm. My Lords, the object of the profits tax legislation is reasonably clear, though the effect of the formulae by which it is sought to achieve that object may not be so immediately apparent. Indeed, the whole point of this appeal is whether one of the formulae is apt to achieve the object of the statute. In imposing a profits tax upon the profits of a company Parliament has allowed a certain relief in respect of profits that are retained by the company and not immediately distributed to the shareholders, called relief for non-distribution, and has imposed a compensating charge upon these profits if they come to be subsequently distributed, called a distribution charge. That at least was Parliament's intention though, if the respondents' contentions and the judgment of the court below, as well as the determination of the commissioners, are right, there is a gap in the legislation which prevents that intention, in present circumstances, from taking effect.

It is important to observe that "profits" of a company are not confined under the relevant statutes to trading profits. While trading profits are to be computed for the chargeable accounting period on income tax principles, as they would be under Case I of Schedule D of the Income Tax Acts, there is to be included, with certain exceptions, in the profits assessable to profits tax, income from investments or other property. This was so in certain cases under section 20 and the original paragraph 7 of

Schedule IV to the Finance Act, 1937, and though the original paragraph 7 has now been replaced by a new paragraph 7 in somewhat different terms, this conception is still retained. As matters now stand, there is to be included in the profits all income received from investments or other property except what is referred to as "franked investment income" and some other categories of income absent from this case. Franked investment income is income received from other bodies corporate on which profits tax has already been paid.

Section 19 of the Finance Act, 1937, is the provision under which the tax is charged. It was levied originally at the rate of 5 per cent., with no provision for relief in respect of non-distribution or compensating charge in respect of distribution. Subsection (2) of section 30 of the Finance Act, 1947, introduced non-distribution relief where "the net relevant distributions to "proprietors . . . for any chargeable accounting period are *less* "than the profits . . . for that period chargeable to the profits "tax." Subsection (3) of the same section prescribed a distribution charge where "the net relevant distributions to "proprietors . . . for any chargeable accounting period are *greater* "than the profits . . . for that period chargeable to the profits "tax."

"Net relevant distribution" is explained in section 34 (2) of the Act of 1947. I quote the subsection in full: "The net "relevant distributions to proprietors for any chargeable account-"ing period of a body corporate, society or other body are so "much of the gross relevant distributions to the proprietors for "that period of that body corporate, society or other body (as "defined by the next succeeding section) as bears to the whole "of the said gross relevant distributions the same proportion "that the profits for that period bear to the profits therefor com-"puted without abatement and including franked investment "income: Provided that where the said gross relevant distribu-"tions exceed the profits computed without abatement and "including franked investment income, the net relevant distribu-"tions shall be the sum of—(*a*) the profits for the period "computed with due regard to the provisions for abatement but "not including franked investment income; and (*b*) the amount "of the excess."

A few calculations will show that where the amount distributed as dividend to the shareholders is less than the profits plus the franked investment income (if any) of a company for the relevant accounting period the "net relevant distribution" calculated according to the first part of the subsection will always be less than the profits. A balance is attained where profits and franked investment income exactly meet the amount distributed as dividend. There is then a net relevant distribution equal to the profits. No occasion arises for non-distribution relief nor for a distribution charge. The profits excluding franked investment income are taxed at the full rate of charge and that is all. But

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where the dividend to the shareholders is greater than the profits including the franked investment income, the formula so far applied breaks down. It takes no account of the sum drawn from reserves to make up the dividend and so the figure brought out as the net relevant distribution will not be appropriate for the purpose of calculating the distribution charge under section 30 (3) of the statute. A new formula, as prescribed by the proviso, is accordingly introduced to be applied where the dividend paid out in any year is greater than the profits including franked investment income. This achieves, at least where there is a profit, that the full profits tax is charged. Tax at 22½ per cent. is charged on the profit for the year, excluding the franked investment income. The franked investment income which has already borne the full tax and is now distributed to help to make up the dividend pays nothing further, and on the balance, which ex hypothesi has been drawn from past profits to meet the dividend and has already borne tax at the rate of 2½ per cent. in respect of non-distribution relief, the company pays the distribution charge of 20 per cent.

So far the scheme of the statute seems plain. But it is said for the respondents and has been held by the Court of Session and the commissioners to break down in the circumstances of this case, because there are no profits to which the proviso can apply. There was in fact a substantial loss, even including franked investment income. Further, it is said that if there are no profits franked investment income cannot be included in the profits. Franked investment income accordingly, if it falls to be brought in at all, falls to be brought in by itself and as, added to nothing, it exceeds the amount of the dividend paid, the proviso does not apply.

My Lords, I have come to the opinion that the contentions of the respondents and the reasoning of the learned judges in the court below are unsound. If the phrase found in the proviso "profits computed without abatement and including franked "investment income" were taken by itself, without any aid from any other part of the statute, I should have thought that it meant that profits and franked investment income were to be computed together to arrive at a total profit. If there is no profit with the inclusion of the franked investment income, then total profit, as I see it, would be nil. It is to be remembered that profit for the purpose of profits tax includes investment income which is not franked and that the exclusion of franked investment income from the profit is to prevent it being taxed a second time. This is, I think, clear from the provisions of subparagraph (1) of paragraph 7 of Schedule IV to the Act of 1937, as amended by the Act of 1947. But what is conclusive, in my opinion, is subparagraph (1A) of the same paragraph which, in effect, enacts that "in computing profits for the purposes of so much of any "such enactment as refers to profits including franked investment "income" franked investment income shall be computed in the profits. In the opening words of the proviso franked investment

income cannot therefore be treated as something standing outside or apart from profits or losses. It must be included in striking a balance of profit or loss.

That leaves the question whether, if there is a loss after bringing in franked investment income the proviso applies. In my view, the profits must then be regarded as nil and the calculation under the proviso must be made from this level. There is nothing in the proviso which excludes such an interpretation and such a reading is consistent with the whole object of the statute. As already indicated the formula of the proviso is designed to secure that any draft from past undistributed income to make up a distribution of dividend should bear its proper share of the distribution charge. This object would be entirely defeated if a company which operated in any year at a loss and paid a dividend out of past profits were to pay no distribution charge. An application of the formula in the proviso to such a case, by taking profits as nil, involves, I think, no straining of the statutory language.

I would allow the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack and have nothing to add to it.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Thomas Cooper & Co. for Beveridge & Co., Edinburgh.*

F. C.

[QUEEN'S BENCH DIVISION.]

PTEROTI COMPANIA NAVIERA S.A. *v.* NATIONAL COAL BOARD.

[1957 P. No. 2038.]

Shipping—Charterparty—Demurrage—Lay time—Commencement—Discharge of cargo begun prior to notice of readiness—Commencement of lay time.

Clause 8 of the Americanized Welsh Coal Charter in making provision for the calculation of lay time provides: "Time to "commence 24 hours . . . after vessel is ready to unload and "written notice given. . . ." The defendants, the charterers, began discharging their cargo from the plaintiffs' ship as soon as the vessel berthed. A few hours later a notice of readiness to unload was served on the charterers which expired 24 hours later. The owners claimed that lay time began to run from the time when the charterers began to discharge the vessel, while the charterers claimed that time did not begin until the expiry of the notice of readiness:—

Held, that on the construction of clause 8, time began to run 24 hours after notice of readiness was served, and on the facts of

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the case there was no waiver of clause 8 by the charterers and no implied term that lay time was to commence earlier than as provided for in clause 8.

James Nelson & Sons Ltd. v. *Nelson Line (Liverpool) Ltd.* [1908] A.C. 108; 24 T.L.R. 315 considered.

Action.

The following facts were agreed between the parties: By a charterparty in the form of the Americanized Welsh Coal Charter dated September 29, 1955, concluded between A. Lusi Ltd., as agents for the shipowners, Pteroti Compania Naviera S.A., and Cory Brothers & Co. Ltd., as agents for the charterers, the National Coal Board, the owners agreed to charter to the charterers vessels to be nominated totalling not exceeding 1,265,000 nor less than 1,035,000 tons net register for the carriage of full and complete cargoes of coal not exceeding 10,450 nor less than 8,550 tons from Baltimore or Hampton Roads to one safe port in the United Kingdom or Continent. Clause 8 of the charterparty provides: "The cargo to be taken from alongside by "consignee at port of discharge, free of expense and risk to the "vessel, at the average rate of 2,500 if Antwerp, Rotterdam or "Amsterdam or 1,500 if U.K. tons per day, weather permit-"ting, Sundays and holidays and after noon on Saturdays "excepted, provided vessel can deliver it at this rate. If longer "detained, consignee to pay vessel demurrage at the rate of "£300 Br. Stg. per running day (or pro rata for part thereof). "If sooner dispatched, vessel to pay charterer or his agents "£150 Br. Stg. per day (or pro rata for part thereof) dispatch "money for working time saved. Time to commence twenty-"four (24) hours, Sundays and holidays excepted, after vessel "is ready to unload and written notice given, whether in berth "or not, and the time allowable for discharging to be calculated "on the basis of the bill of lading quantity. In case of strikes, "lockouts, civil commotions, or any other causes or accidents "beyond the control of the consignee which prevent or delay "the discharging, such time is not to count unless the vessel is "already on demurrage. Consignee to effect the discharge of the "cargo, vessel providing only steam, steam-winches, winchmen, "gins and falls."

The *S.S. Khios Breeze* was nominated on behalf of the owners and accepted on behalf of the charterers to carry out the voyage under the charterparty, and the vessel loaded 9,705 tons 1,000 lb. at Hampton Roads. In accordance with the charterparty the master applied to the charterers by wireless about 96 hours before the vessel arrived off Land's End for orders as to the port of discharge and the charterers thereupon ordered the vessel to discharge at Rotterdam. The master thereupon informed the charterers by wireless of his estimated time of arrival at Rotterdam. On the basis of the cargo of 9,705 tons 1,000 lb., and the daily discharging rate of 2,500 tons as provided in clause 8 of the charterparty, the vessel's lay time

for discharging was 3 days 21 hours 10 minutes. At 0200 hours on Wednesday, July 18, 1956, the vessel berthed at Waalhaven Quay, Rotterdam, which was her discharging berth. The vessel was then in free pratique and in every respect ready to discharge. At 0230 hours on the same day the charterers' agents began to discharge the vessel. The shipowners' servants on board the vessel assisted in the discharge in the usual manner and raised no objection to the discharge commencing at the aforesaid time. At 0900 hours on Wednesday, July 18, the shipowners' Rotterdam agents tendered a notice of readiness to the charterers' Rotterdam agents, which the latter accepted. According to clause 8 of the charterparty the notice of readiness expired at 0900 hours on Thursday, July 19. The vessel's discharge proceeded continuously from 0230 hours on Wednesday, July 18, until 2345 hours on Friday, July 20, when the discharge was completed.

The shipowners contended that on the above facts the vessel's lay time for discharging of 3 days 21 hours 10 minutes began at 0230 hours on Wednesday, July 18, and that the charterers were therefore entitled to dispatch money in respect of 23 hours 55 minutes which was equal to £149 9s. 7d. at the daily rate of £150 provided in clause 8. The charterers contended that on the facts the vessel's lay time commenced at 0900 hours on Thursday, July 19, and that the charterers were therefore entitled to dispatch money in respect of 2 days 6 hours 25 minutes which was equal to £340 2s. 1d. The charterers had deducted £340 2s. 1d. on account of dispatch money from the freight payable in respect of the voyage. The shipowners in the present action claimed £190 12s. 6d. (and interest thereon) being the difference between £340 2s. 1d. and £149 9s. 7d.

Eustace Roskill Q.C. and *Michael Kerr* for the shipowners. This case raises a short point: whether lay time counts from the time when a vessel is actually loaded or discharged if this happens before notice of readiness can be given and before it expires, or whether it only counts from the expiry of the notice.

The obligation on the owners to give notice of readiness is an obligation imposed solely for the charterers' benefit. The owners are not contractually bound to assist in the unloading until notice is given and lay time has begun. They may send their crew on a holiday if they so wish. The charterers by requiring cargo to be delivered earlier are waiving their right to notice of readiness before they start to unload. Had the master given no notice, then if the owners' argument was wrong on this point, the charterers would receive no dispatch money at all. It would be an unreal result if the shipowners could deprive the charterers of money for speedy dispatch. There is authority that charterers can waive a cesser clause (*Rederaktiebolaget Transatlantic* v. *Board of Trade* [1]), and if they can do that, then by parity of

[1] (1924) 30 Com.Cas. 117.

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reasoning they can say: "We are going to conduct ourselves "in such a way that we do not require notice of readiness to "make us aware of the presence of the vessel." [Reference was made to Scrutton on Charterparties, 16th ed., p. 150, in particular footnote (*e*), Carver's Carriage of Goods by Sea, 10th ed., p. 862, in particular footnote 19, *Kawasaki Kisen Kabushiki Kaisha* v. *Bantham S.S. Co. Ltd.*[2] and *Franco-British S.S. Co. Ltd.* v. *Watson & Youell.*[3]]

It may be that the charterers are entitled to delivery up of their cargo the moment that it arrives because, otherwise, the shipowners are liable in detinue. But if they demand delivery, as in the present case, the charterers waive the shipowners' obligation to give notice of readiness. Notice of readiness is only relevant for the purpose of informing the charterers of the vessel's arrival and of enabling them to make preparations for the loading or discharging. At common law, in the absence of an express clause, there is no obligation to give a notice of readiness at the discharging port. The clause is therefore wholly for the benefit of the charterers. It is important to distinguish between the charterers' rights and the shipowners' obligations. The obligation of the charterers to do their part in the loading or discharging is subject to the condition precedent that the owners have given notice but it is always open to a party in whose favour the condition is made to waive the condition precedent.

That is the simplest way to put the case on behalf of the shipowners but it can also be put as an implied term. *The Katy*[4] established that parties can by their conduct in loading or discharging produce the result that time counts as lay time although otherwise it would not have so counted. In *James Nelson & Sons Ltd.* v. *Nelson Line (Liverpool) Ltd.*[5] the House of Lords refused to infer an agreement that certain time should count, where there was an express term in the contract excepting the time in question, but that is not the same as the present case, since the time was not excepted time. *Nelson's* case[5] was not concerned with waiver.

A. A. Mocatta Q.C. and *S. O. Olson* for the charterers. This is a matter of construction, and the words of clause 8 of the charterparty are quite clearly in favour of the charterers' contention. The right approach to this contract must be to look at what the parties have agreed, and there can be no doubt that what appears in clause 8 of this charterparty does cover this case on these facts. Clause 8 enables one to calculate permissible lay time. There are two provisions in that clause, a 24-hour period after (a) the ship is ready and (b) notice of readiness has been given. Notice of readiness was given in the present case. If the charterer waived the notice there would still be the period of 24 hours after the ship was ready. The shipowners are trying

[2] [1938] 1 K.B. 805; 54 T.L.R. 436.
[3] (1921) 9 Ll.L.R. 282.
[4] [1895] P. 56; 11 T.L.R. 116.
[5] [1908] A.C. 108; 24 T.L.R. 315.

to read into clause 8 some extra words like "unless discharge "begins earlier," for which there is no justification; compare "unless used" in clause 3 as regards loading. [Reference was made to *Burnett S.S. Co. Ltd.* v. *Olivier & Co. Ltd.*,[6] and *Horsley Line Ltd.* v. *Roechling Brothers.*[7]]

If the shipowner's argument succeeds on waiver and he is right that the notice is purely for the charterer's benefit, he is still faced with the problem that time does not run until 24 hours after the ship is ready to unload, which point only arises in the alternative and would make a reduction of some £40 in the claim. The shipowners fail unless the court is persuaded that the clause was solely for the charterers' benefit and that it was a reasonable inference on the facts that there was an agreement. If there was such an agreement it does not explain why notice of readiness was in fact given. Scrutton L.J. in *Verren* v. *Anglo-Dutch Brick Co. (1927) Ltd.*[8] said that *Nelson's* case[9] (which is indistinguishable from the present case) overruled *The Katy.*[10]

One cannot say that in the present case it was a necessary and reasonable inference of fact that there was any ground for altering clause 8. The fact that notice of readiness was given at the first moment when it could be given is conclusive. If no notice at all had been given, that would have been a breach of contract.

Roskill Q.C. in reply. A notice of readiness must relate to the ship's present state of readiness, not to a past or future state of readiness.

DIPLOCK J. This is in form a claim for freight under a charterparty, but it raises a question as to the moment from which time is to run for the purpose of calculating demurrage or dispatch money (in this particular case dispatch money) under clause 8 of the Americanized Welsh Coal Charter. It seems to me that prima facie the first thing I have to do is to look at the charter and see what its words say and endeavour to construe it. I will accordingly start by reading clause 8. "The cargo to be "taken from alongside by consignee at port of discharge, free of "expense and risk to the vessel, at the average rate of 2,500 . . . "tons per day . . . weather permitting, Sundays and holidays "and after noon on Saturdays excepted, provided vessel can "deliver it at this rate. If no longer detained, consignee to pay "vessel demurrage at the rate of £300 British sterling per "running day (or pro rata for part thereof). If sooner dispatched, "vessel to pay charterer or his agents £150 British sterling per "day (or pro rata for part thereof) dispatch money for working "time saved. Time to commence twenty-four hours, Sundays "and holidays excepted, after vessel is ready to unload and "written notice given, whether in berth or not, and the time

[6] (1934) 48 Ll.L.R. 238.
[7] 1908 S.C. 866.
[8] (1929) 45 T.L.R. 556.
[9] [1908] A.C. 108.
[10] [1895] P. 56.

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" allowable for discharging to be calculated on the basis of the " bill of lading quantity. In case of strikes, lockouts, civil " commotions, or any other causes or accidents beyond the " control of the consignee which prevent or delay the discharging, " such time is not to count unless the vessel is already on " demurrage. Consignee to effect the discharge of the cargo, " vessel providing only steam, steam-winches, winchmen, gins " and falls."

The circumstances to which that clause in the charterparty has to be applied are set out in an agreed statement of facts, and I think I can summarize them by saying this. The charterparty related to a cargo of coal in the *S.S. Khios Breeze*. The cargo consisted of 9,705 tons 1,000 lb., and at the daily discharge rate of 2,500 tons provided for in clause 8 the laytime for discharge was 3 days 21 hours 10 minutes. The agreed statement of facts vouches for the accuracy of that figure. The vessel arrived at 2 o'clock in the morning of Wednesday, July 18, at Rotterdam, which was her discharging berth; and at 2.30 the defendants' agents started to discharge. At 9 o'clock on Wednesday the same day, which was the earliest moment possible under clause 8, the vessel's agents tendered a notice under clause 8 in the following terms: " Dear Sirs, *S.S. Khios Breeze*. On behalf " of the master we herewith declare that the above named vessel " arrived at her discharging berth at 0130 hours today, July 18, " 1956, being in free pratique and in every respect ready for her " discharging operations as from 0130 hours. Time to count as " per terms, conditions and exceptions of the charterparty " covering this voyage."

Owing to the modern discharging facilities available at Rotterdam, the discharge of the vessel, which started at 2.30 in the morning of Wednesday, July 18, continued until 11.45 at night on Friday, July 20, when the discharge was completed. The issue between the parties is: from what hour and day is time to run (or " to commence," which is the phrase used) for the purposes of clause 8? The contention of the charterers, the National Coal Board, is that it is to commence 24 hours after 9 a.m. on Wednesday, July 18, when notice of readiness was given: that is to say, that it was to start at 9 a.m. on Thursday, July 19. On that basis, having regard to the fact that the lay days extend over the week-end, the dispatch money, at £150 a day, comes to £340 2s. 1d.; and that amount the charterers deducted from the freight. The shipowners, on the other hand, contend that time should commence from the moment at which discharge in fact started, namely, 2.30 a.m. on July 18. Dispatch money on that basis is calculated at £149 9s. 7d.; and this action is brought by the shipowners to recover the difference between those two sums, as the charterers deducted the dispatch money, on their calculation, from the freight.

I am told that this is the first time the question has arisen as to when time is to commence for the purpose of demurrage or

dispatch money where the charterers in fact start unloading before a notice of readiness has expired; and it does appear from the cases which have been cited to me that there is none which is completely on all fours with this. On the other hand, it seems to me that the point is a short one, and I may be wrong but to me it is a simple one. It depends, as points of this kind must depend, on the true construction of the relevant contract and, in particular, clause 8 of that contract. The most relevant sentence of it is: "Time to commence twenty-four hours, Sun- "days and holidays excepted, after vessel is ready to unload and "written notice given, whether in berth or not, and the time "allowable for discharging to be calculated on the basis of the "bill of lading quantity." It seems to me that that sentence means what it says—that in order to find out when time starts one looks to see two things: first, when was the vessel ready to unload (and time must start at least 24 hours after that); and secondly, when was written notice given (and time must start at least 24 hours after that).

Therefore, applying this sentence and clause to the facts of this case, on the face of it it would appear that the charterers' contention is right. On what seems to me to be plainly the prima facie meaning of the clause, why should it not apply to this case? Mr. Roskill, I think, puts the matter in two ways. He says that the clause providing for notice, which includes also the provision about "time to commence 24 hours . . . after "vessel is ready to unload," is put in for the charterers' benefit alone: it is therefore one that can be waived by the charterers, and that when charterers start to unload before the time has commenced to run under that clause they waive their right to delay the starting of lay days until 24 hours from when notice of readiness to unload has expired. Alternatively, Mr. Roskill says that if it is not a case of waiver then there is an agreement to be implied between the charterers and the shipowners that time is to start from the time at which unloading in fact commences. The only evidence that there is either of agreement or of waiver is that in fact the charterers did start to unload at the time that I have stated and that the vessel's servants assisted in the operation in accordance with the provisions of the clause by providing steam, steam-winches, winchmen, gins and falls. I think that quite plainly no agreement can be construed out of those facts.

The case is not wholly similar, but I draw attention to the decision in the House of Lords in *James Nelson & Sons Ltd.* v. *Nelson Line (Liverpool) Ltd.*,[1] and to a dissenting judgment of Fletcher Moulton L.J.[2] in the Court of Appeal in the same case, which points out the principles on which the court should be prepared to infer agreements of that kind between the parties, and contains a warning against an easy inference of such agreements. I can see no ground whatever on which I could infer an

[1] [1908] A.C. 108; 24 T.L.R. 315. [2] [1907] 2 K.B. 705, 712.

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agreement here that because the charterers started to unload, and the shipowners' servants assisted in doing so, at 2.30 in the morning there was an agreement between the parties that laytime should start then instead of at the time provided for (in my view) on the plain construction of clause 8. Equally I can see no grounds on which I should be entitled to hold that it had been waived by the charterers. It does not seem to me that either the clause relating to time commencing or the clause relating to notice is one which is put in solely for the benefit of the charterers; and I do not think that it is a clause to which waiver would apply in any event.

Mr. Roskill has sought to impress on me that the only advantage of starting to unload early accrues to the charterer because he gets his cargo quicker and he gets dispatch money or pays less demurrage. It seems to me that there is also an advantage to the shipowner in getting his vessel discharged as early as possible because he gets the use of his vessel. Whether one advantage outweighs the other in any particular case I do not know, and I do not think it matters. As I say, I think that there are advantages to both sides; and in those circumstances I am not prepared to infer any waiver of what I think are the plain terms of the clause itself.

I have had cited to me, by the industry of counsel, a number of cases on the fringe of the matter; and if I do not mention them in detail I hope it will not be thought that I have not derived benefit from reading them. But it does seem to me that I am engaged here in determining a question of construction. I do not think there is any particular magic about its being a charterparty in this case (except that one would seek to know the meaning of the technical terms involved); and it does not seem to me that the construction which other courts have put on different clauses in other charterparties really could or should constrain me to apply to this charterparty a construction which in my view would be contrary to its plain meaning.

This action accordingly fails.

Judgment for the defendants.

Solicitors: *Stokes & Mitcalfe; Donald H. Haslam.*

C. J. E.

[HOUSE OF LORDS.]

BETTY'S CAFÉS LTD. . . . . APPELLANT;

AND

PHILLIPS FURNISHING STORES LTD. . RESPONDENT.

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Jan. 27, 28, 29; *Feb.* 27.

Landlord and Tenant—Business premises (security of tenure)—Landlord's intention to reconstruct—Time of intention—Meaning of "intention"—Meaning of "proposals"—Landlord's intention to occupy for own purposes—Whether bar to relief—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 26 (6), 30 (1) (*f*) (*g*), 31 (1).

Judicial Precedent — Court of Appeal decision — Two grounds — One obviously wrong—Whether Court of Appeal may overrule it.

By section 26 (6) of the Landlord and Tenant Act, 1954: "Within two months of the making of a tenant's request for a new "tenancy the landlord may give notice to the tenant that he will "oppose an application to the court for the grant of a new tenancy, "and any such notice shall state on which of the grounds men-"tioned in section 30 of this Act the landlord will oppose the "application."

By section 30 (1): "The grounds on which a landlord may "oppose an application under subsection (1) of section 24 of this "Act are such of the following grounds as may be stated in the "landlord's notice under section 25 of this Act or, as the case may "be, under subsection (6) of section 26 thereof, that is to say: ". . . (*f*) that on the termination of the current tenancy the "landlord intends to demolish or reconstruct the premises . . . and "that he could not reasonably do so without obtaining possession "of the holding; (*g*) . . . that on the termination of the current "tenancy the landlord intends to occupy the holding for the "purposes . . . of a business to be carried on by him therein."

Since 1925 the tenants had carried on their business in premises held under a series of leases, none of which granted a term exceeding eight years. In 1954 the landlords, a limited company, had purchased the reversion expectant on the tenants' term with a view to occupying the premises for their own business. Because they had done so less than five years before the termination of the tenancy they were precluded by section 30 (2) from relying on paragraph (*g*) of section 30 (1). On June 28, 1955, the tenants served a notice under section 26 of the Act asking for the grant of a new tenancy for a term of 14 years. On August 15, 1955, the secretary of the landlord company gave notice to the tenants that they would oppose the grant of a new tenancy under section 30 (1) (*f*), stating: "The grounds on which we shall oppose any applica-"tion which you may make to the court . . . are that . . . we intend "to reconstruct the premises . . ." At the time no resolution to that effect had been passed by the board. On April 16, 1955, the hearing of the application began before Danckwerts J. On April 23, before it was completed, the board of the company passed a resolution that, in the event of possession being obtained, a scheme prepared in January, 1955, should be carried out and that expenditure up to £20,000 on the works should be approved and that counsel should be authorized to give an undertaking to that effect. Danckwerts J.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

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held that the intention so expressed had the necessary qualities of fixity and genuineness. It was not disputed that it had not been proved that such an intention existed at the date of the notice of opposition:—

Held, (1) (Lord Keith of Avonholm dissenting), that the intention established by the landlords was sufficient to negative the grant of a new lease; the landlords proved the intention required by section 30 (1) if they proved its existence at the date of the hearing.

Per Lord Denning. The landlord must honestly and truthfully state his ground in his notice and establish it as existing at the time of the hearing.

Definition of "intention" by Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 K.B. 237, 253; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720 approved.

Held, (2) that the fact that the landlords intended to occupy the rebuilt premises themselves did not deprive them of the right to possession under paragraph (*f*), since they could satisfy its conditions; such a deprivation was not implied in it when read with paragraph (*g*).

Fisher v. *Taylors Furnishing Stores Ltd.* [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78 approved.

Atkinson v. *Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340 considered.

Decision of the Court of Appeal [1957] 1 Ch. 67; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1 affirmed.

Appeal from the Court of Appeal (Birkett and Romer L.JJ., Lord Evershed M.R. dissenting).

This was an appeal from an order of the Court of Appeal dated November 28, 1956, after a hearing on October 4, 8, 9, 10 and 11, 1956, setting aside the order of Danckwerts J. in the Chancery Division of the High Court of Justice dated May 7, 1956, after a hearing on April 16, 17, 18, 19, 23 and 24, 1956, whereby it had been ordered, pursuant to the provisions of Part II of the Landlord and Tenant Act, 1954, that a new tenancy of certain business premises, 42–44, Darley Street, Bradford, in the County of York, be granted to the appellant company, Betty's Cafés Ltd., for the period of 14 years from June 24, 1956, at a rent of £3,000 per annum and otherwise on the terms of a lease dated April 29, 1946. The respondent company, Phillips Furnishing Stores Ltd., as landlords of the premises within the meaning of Part II of the Act relied, in opposition to the appellant company's claim for the grant of a new tenancy, on the ground of opposition specified in section 30 (1) (*f*) of the Act.

The facts are fully stated in the opinion of Viscount Simonds.

Charles Russell Q.C., *Lionel Blundell* and *Christopher Priday* for the appellant company.

E. M. Holland Q.C. and *John Widgery* for the respondent company.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *X.L. Fisheries*

Ltd. v. *Leeds Corporation*[1]; *Reohorn* v. *Barry Corporation*[2]; *Fleet Electrics Ltd.* v. *Jacey Investments Ltd.*[3] and *Upson's Ltd.* v. *E. Robins Ltd.*[4]

Lazarus Estates Ltd. v. *Beasley*[5]; *Kimpson* v. *Markham*[6]; *Benninga (Mitcham) Ltd.* v. *Bijstra*[7]; *R. F. Fuggle Ltd.* v. *Gadsden*[8]; *Bolton Engineering Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[9] and *Ancona* v. *Marks*,[10] referred to by Lord Denning, were not cited in argument.

Their Lordships took time for consideration.

February 27. VISCOUNT SIMONDS. My Lords, this appeal raises a short question of construction of certain sections of Part II of the Landlord and Tenant Act, 1954, to which I will refer as "the 1954 Act." Concretely, it is whether Danckwerts J. was right, when the matter first came before him, in ordering the respondents to grant to the appellants a new tenancy of certain business premises known as 42–44, Darley Street in the city of Bradford, for the term of 14 years from June 14, 1956, at a rent of £3,000 per annum and otherwise upon the terms of a lease dated April 29, 1946, to which I will refer later. The Court of Appeal have by a majority (Birkett and Romer L.JJ., dissentiente Lord Evershed M.R.), held that he was wrong in doing so.

It is necessary to state briefly the relevant facts upon which this question arises.

The appellants and their predecessors in title have since 1925 carried on the business of café proprietors and retail confectioners on the greater part, and since June 24, 1955, on the whole of the premises in question under a series of leases, the last of which was dated April 29, 1946, and was for a term of eight years from January 1, 1946, at a rent of £1,400 per annum. On September 23, 1953, the Bradford County Court made an order under the Leasehold Property (Temporary Provisions) Act, 1954, for the grant of a new tenancy of the premises to the appellants' predecessor in title for a term of 12 months from January 1, 1954, at a rent of £2,000 per annum and otherwise on the terms of the said lease. This tenancy was from January 1, 1955, continued by section 24 (1) of the 1954 Act and has since February 17, 1955, been vested in the appellants.

In the meantime, the respondents had acquired the long leasehold reversion of the premises at a price of £38,750, the

[1] [1955] 2 Q.B. 636; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875.
[2] [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742.
[3] [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99.
[4] [1956] 1 Q.B. 131; [1955] 3 W.L.R. 584; [1955] 3 All E.R. 348.
[5] [1956] 1 Q.B. 702; [1956] 2 W.L.R. 502; [1956] 1 All E.R. 341.
[6] [1921] 2 K.B. 157; 37 T.L.R. 342.
[7] [1946] K.B. 58; 61 T.L.R. 519; [1945] 2 All E.R. 433.
[8] [1948] 2 K.B. 236; 64 T.L.R. 364; [1948] 2 All E.R. 160.
[9] [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624; (H.L.) [1957] 1 W.L.R. 454.
[10] (1862) 7 H. & N. 686.

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contract for purchase having been made on August 25, 1953, and the purchase completed on March 1, 1954. It was in the view of the learned judge, which I see no reason to doubt, fairly clear that they hoped to occupy this property for the purposes of their furnishing business. It is also, I think, clear that this idea was never formally given up by the board of directors of the company, though the inconsistent idea of selling the premises to the appellants was favoured by certain of the directors, and was by them carried so far that the appellants felt a legitimate grievance at its abandonment. All this, however, has become of no importance, for your Lordships have to determine this appeal upon two findings of fact, (i) that it was proved that on April 23, 1956, the respondents intended on the termination of the current tenancy to carry out a substantial work of construction on the premises and could not reasonably do so without obtaining possession thereof; and (ii) that it was not proved that they so intended at any earlier date. The relevance of these dates must now be explained.

Part II of the 1954 Act was designed (inter alia) to give a greater degree of protection to the tenants of business premises than they formerly had. To effect this purpose it provided in the first place that a tenancy to which it applied should continue automatically under section 24 until one or other of several events should happen, of which the relevant event for the purpose of this case is that the tenant should, pursuant to section 26, make a request for a new tenancy. That section provided that a tenant's request for a new tenancy might be made in the circumstances therein described (which admittedly covered the present case), and should be for a tenancy beginning with such date not more than 12 or less than 6 months after the making of the request as might be specified therein, with a proviso which I need not state. It further provided that a tenant's request for a new tenancy should not have effect unless it was made by notice in the prescribed form given to the landlord and set out the tenant's proposals as to the property to be comprised in the new tenancy, as to the rent to be payable thereunder and as to the other terms thereof. And by subsection (6) it provided as follows: "Within two months of the "making of a tenant's request for a new tenancy the landlord "may give notice to the tenant that he will oppose an applica- "tion to the court for the grant of a new tenancy, and any such "notice shall state on which of the grounds mentioned in "section 30 of this Act the landlord will oppose the application."

Taking advantage of this section the appellants by notice in the prescribed form to the repondents dated June 28, 1955, requested the grant of a new tenancy of the premises commencing on June 24, 1956, at a rent of £2,500 per annum for a term of 14 years, the other terms being, except as therein mentioned, those of the existing tenancy.

On August 15, the respondents replied that they were not

willing to grant a new tenancy and, following precisely the language of subsection (6) and of section 30 (1) (*f*), said the grounds "on which we shall oppose any application which you "may make to the court for the grant of a new tenancy of the "said property are that on the termination of the current tenancy "we intend to reconstruct the premises comprised in the holding "or a substantial part of those premises or to carry out sub-"stantial work of construction on the holding or part thereof and "that we could not reasonably do so without obtaining possession "of the holding."

On October 27, 1955, the appellants accordingly issued an originating summons in the Chancery Division of the High Court asking that the respondents might be ordered to grant them a new tenancy in the terms of their notice. This summons, having come before the master on certain affidavit evidence, was adjourned to be heard in effect as a witness action by the judge. It was heard with oral evidence before Danckwerts J. on April 16, 1956, and five further days, and on May 7 he gave judgment in favour of the appellants and ordered the respondents to grant them a new lease of the premises for 14 years from June 24, 1956, at a rent of £3,000 per annum.

It is necessary now to remind your Lordships of what proved to be the decisive event of April 23, 1956. On that day at a board meeting of the respondents, the hearing of the case before the learned judge being nearly but not quite concluded, it was resolved: "(1) That in the event of the company obtaining "possession of these premises from Betty's Cafés Ltd. on the "termination of the last-mentioned company's current tenancy "thereof, the works detailed in Mr. Ovenden's specification "dated January, 1955, and plan numbered 45/2 be forthwith "carried out and that expenditure of up to £20,000 upon such "works be approved, and (2) That counsel appearing for the "company in the application by Betty's Cafés Ltd. now proceed-"ing in the Chancery Division be authorized to give an under-"taking either to the court or to Betty's Cafés Ltd. that the "above-mentioned works will be carried out as soon as is prac-"ticable in the event of possession being so obtained."

I have said that the passing of this resolution was a decisive event. But it was not yet to be decisive. For Danckwerts J., while holding that the works in question were a substantial work of construction within the meaning of section 30 (1) of the Act, and that the respondents could not reasonably carry them out without obtaining possession of the premises, held that upon the true construction of the Act the respondents must prove that already at the date when they gave their notice of opposition, namely, on August 15, 1955, they had a firm and settled intention to carry out these works at the end of the current tenancy. He held (and it has not since been disputed) that they had not proved such an intention at that date: he therefore regarded the resolution of April 23, 1956, as irrelevant.

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Here, then, my Lords, was the issue upon which the Court of Appeal, though divided among themselves, overruled the learned judge. Was it necessary to prove that the requisite intention was held at the date of the notice of opposition, or was it sufficient to prove that it was held at the date of the hearing? Taking the latter view, the Court of Appeal, not having had the advantage of the learned judge's opinion whether the resolution of April 23 had the requisite quality of a fixed and settled intention, remitted the case to him for his determination of that question. He decided it in favour of the respondents and, accordingly, dismissed the appellants' application for a new lease. In effect, therefore, this appeal raises the single question whether the Court of Appeal were right in holding that the respondents proved the intention required by section 30 (1) of the Act if they proved its existence at the date of the hearing. If your Lordships thought they were not right, then the further question would arise whether the term of the new lease should, if granted, be, as Danckwerts J. determined, 14 years or, as the Court of Appeal unanimously thought, 5 years only. But this question does not arise.

For the determination of this short question of construction I must refer to certain other sections of the Act. I have already pointed out that under section 26 (6) "the landlord "may give notice to the tenant that he will oppose an applica- "tion to the court for the grant of a new tenancy, and any such "notice shall state on which of the grounds mentioned in "section 30 of this Act the landlord will oppose the application." I have also, with sufficient precision, referred to the ground, namely that contained in section 30 (1) (*f*), upon which the respondents gave notice that they would oppose, and in fact opposed, the appellants' application in this case. But, in deference to the argument addressed to us, I set out the grounds mentioned in section 30 (1), (*a*), (*b*), (*c*), (*d*) and (*g*), ignoring (*e*) which neither side found helpful or wholly intelligible. I shall also refer to section 30 (2) and to section 31 (1) as throwing a mild light on the construction. Section 30 (1) is as follows: "The grounds on which a landlord may oppose an application "under subsection (1) of section 24 of this Act . . . under "subsection (6) of section 26 thereof,—(*a*) where under the "current tenancy the tenant has any obligations as respects the "repair and maintenance of the holding, that the tenant ought "not to be granted a new tenancy in view of the state of repair "of the holding, being a state resulting from the tenant's failure "to comply with the said obligations; (*b*) that the tenant ought "not to be granted a new tenancy in view of his persistent delay "in paying rent which has become due; (*c*) that the tenant "ought not to be granted a new tenancy in view of other "substantial breaches by him of his obligations under the "current tenancy, or for any other reason connected with the

" tenant's use or management of the holding; (*d*) that the land-
" lord has offered and is willing to provide or secure the
" provision of alternative accommodation for the tenant, that
" the terms on which the alternative accommodation is available
" are reasonable having regard to the terms of the current
" tenancy and to all other relevant circumstances, and that the
" accommodation and the time at which it will be available are
" suitable for the tenant's requirements (including the require-
" ment to preserve goodwill) having regard to the nature and class
" of his business and to the situation and extent of, and
" facilities afforded by, the holding; . . . (*g*) subject as herein-
" after provided, that on the termination of the current tenancy
" the landlord intends to occupy the holding for the purposes, or
" partly for the purposes, of a business to be carried on by him
" therein, or as his residence."

Subsection (2) of section 30 precluded the respondents from taking advantage of ground (*g*), for it made that ground available only to a landlord who had acquired the reversion at least five years before the termination of the current tenancy.

Section 31 (1) provided that if a landlord opposes an application under subsection (1) of section 24 on grounds on which he is entitled to oppose under section 30, and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy.

My Lords, as a preliminary to determining the date when the requisite intention must be proved to have been formed, there was much discussion upon the meaning of the word " intends " in section 30 (1) (*f*). It might be regarded as somewhat academic in this case: for it is conceded that, whatever the meaning of the word, an intention had not been formed at the date of notice of opposition but had been formed on April 23, 1956. But the question has this degree of relevance, that the greater the fixity of intention and the less the mental reservation, the greater the difficulty in supposing that the landlord is to form that intention within two months of receiving the tenant's request or for ever hold his peace. In this context your Lordships have the advantage of a judgment delivered by Lord Asquith (then Asquith L.J.), than whom there have been few greater masters of the English language in judicial interpretation or exposition, in *Cunliffe* v. *Goodman*.[1] I will content myself with a single short passage, though much more might be usefully cited[2]: " An ' intention ' " said the learned Lord Justice " to my " mind connotes a state of affairs which the party ' intending '— " I will call him X—does more than merely contemplate: it " connotes a state of affairs which, on the contrary, he decides, " so far as in him lies, to bring about, and which, in point of " possibility, he has a reasonable prospect of being able to bring

[1] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.
[2] [1950] 2 K.B. 237, 253.

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"about, by his own act of volition." I do not think that anything is to be gained by trying to elaborate these words, but I must fairly add that I do not at all dissent from the explanation of them which the learned Master of the Rolls has given in this case. It is a question of fact what intention a man has at a given time, difficult, it may be, to ascertain, but still a question of fact, and I think that a jury directed in such words as these could come to a fair conclusion.

Having said so much, I doubt whether I have got much help on my way to a solution of the question of construction. But perhaps it may be said that it would, in many cases, place an unfair burden on the landlord if within a short space of two months he had to attain the fixity of intention which I have indicated. Content perhaps to await the time when he can resume possession under ground (*g*), he is suddenly faced with an application compelling him to form an intention, which can only be formed after a consideration of a number of factors not easily ponderable. If I felt any real difficulty in construction, I should, I think, find in this consideration an impulse to regard the date of hearing as the relevant and only relevant date for the ascertainment of intention.

Equally from the point of view of the tenant it seems essential that the court should find the intention subsisting at the date of the hearing. As I listened to the argument for the appellants and studied their formal case, it appeared to me that they regarded the date of notice of opposition as the only relevant date. But I have not been able to understand what advantage the tenants could gain from the fact of the landlords' intention at that date or from the proof of it, if at a later stage it had been abandoned. Upon this part of the case I respectfully adopt the reasoning of Romer L.J. upon which I cannot hope to improve.

I return, then, to the short question of construction. Under section 26 (6) a landlord giving notice that he will oppose an application must state in his notice on which of the grounds mentioned in section 30 he will oppose the application. This is the language of futurity. The landlord "will" oppose the application and he "will" oppose it on such and such a ground. If the matter rested there, I should not find it possible to regard the ground of opposition as referring to anything but a state of affairs existing at the date of the hearing when its validity could be tested. It might, no doubt, be relevant for the purpose of testing its validity to know something of the precedent state of affairs: that would depend on the nature of the ground of opposition. But in regard to ground (*f*), which we are immediately considering, nothing more is required of the landlord than that he should state that he will oppose the application on the ground that on the termination of the current tenancy he intends to do certain work and so on. All is still in the future and, except for the purpose of challenging his bona fides, which is not here in question, nothing that has happened in the past has any relevance. At the hearing

he will oppose and prove his avowed intention. This seems to me, with all deference to those who take a different view, to be the plain English of section 26 (6) and section 30 (1) (*f*). I have already pointed out that it appears to accord also with the general purpose of the Act. It harmonizes also with the language of section 31 (1) which contemplates the landlord satisfying the court upon any of the grounds upon which he is entitled to oppose the application.

But it has been urged (and for that reason I have set out grounds (*a*) to (*d*) and (*g*)) that, whatever might be said if ground (*f*) stood alone, a different construction is imposed by a consideration of the other grounds of opposition. From this argument I entirely dissent. In the first place I see no reason why different grounds of opposition should not relate to different periods of time. But, in any case, the argument, if bona fides is assumed, is an unreal one. It is not to be supposed that a landlord will base his opposition under ground (*a*), i.e. the state of repair of the holding resulting from the tenant's failure to comply with his obligations, if in fact the state of repair at that date gives him nothing to complain of. He will state that he will rely on ground (*a*) if and only if at the date of notice it gives him solid support. At the hearing the judge, whose power to grant a new tenancy is discretionary where this ground of opposition is pleaded, will necessarily take into consideration the state of repair or disrepair, not only at the date of notice, but also at the date of hearing. This appears to me to throw no light upon the meaning of section 30 (1) (*f*). I would make the same observations mutatis mutandis upon grounds (*b*) and (*c*). Perhaps a brighter light is thrown by (*d*), which opens with the words "that the landlord has offered "and is willing," etc. Here the perfect and the present tense are used. Leave out the perfect and look only at the present tense. "The landlord is willing." It would be a hardship and worse on the tenant, if the relevant date were any other than that of the hearing: it is to his advantage that the opportunity of accepting an offer of alternative accommodation should be open to the last moment, and it is inconceivable that the landlord should at the hearing be permitted to say that, though no longer willing, he had been willing at an earlier date, and therefore could validly oppose the application. Nor would it be reasonable to reduce the time within which the landlord should have the opportunity of finding and offering alternative accommodation. If the tenant complains that he has had too little time to consider its suitability, his grievance can be met by an appropriate adjournment. In ground (*d*), therefore, I find support, if it be needed, for the view that the word "intends" in ground (*f*) means "intends at "the date of the hearing."

Learned counsel for the appellants argued in the alternative that the relevant intention must be proved to exist at the moment when the landlord states in the proceedings that he opposes the tenant's application on ground (*f*), that is, presumably, when the

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proceedings are commenced by way of originating summons in the High Court, in the affidavit filed by him or on his behalf in opposition. But it did not appear to me that there was any reason to select this moment of time rather than any other in the course of the hearing before judgment except that fortuitously it would in the present case defeat the respondents. They also relied on the analogous provisions of Part I of the Act: so also did counsel for the respondents. I intend no disrespect to their careful arguments if I say that they cannot affect the conclusion that I reach upon a consideration of the relevant sections of Part II.

My Lords, in the courts below it was proper to consider at length the cases in which the quality of the requisite intention had been considered, and also those cases in which there had been obita dicta as to the relevant date. As to the former, I hope I have said enough in accepting the decision of Lord Asquith in *Cunliffe* v. *Goodman* [3] and not dissenting from the elaboration or explanation of it by the present Master of the Rolls. As to the latter, the point having been fully argued in the present case but not in those containing the dicta to which I have referred, your Lordships will not, I believe, think I should be justified in occupying time in discussing them.

It remains to consider an alternative argument on behalf of the appellants which was not, I think, dealt with by the Court of Appeal. It was to the effect that upon the true construction of section 30 a reconstruction or other work such as is specified in paragraph (*f*) is not intended within the meaning of, and does not fall within, the said paragraph, if the landlord's intention to carry out the work is conditional upon his obtaining possession of the premises for his own occupation, and the sole object of the work is to adapt the premises for the purposes of the business which he desires to carry on therein. It is clear that no such limitation of the scope of paragraph (*f*) is to be found in the paragraph itself. But it is said to be implicit in it, when read with paragraph (*g*). But there is, I think, no force in this argument. Paragraph (*g*) is available to the landlord whether or not he intends to carry out a work of demolition or reconstruction. There is no reason to deny to him the use of paragraph (*f*) if he can satisfy its conditions. I do not ignore that reliance was placed on a decision of the Privy Council in *McKenna* v. *Porter Motors Ltd.*,[4] but I am unable to get any help from a construction placed on another statute unless it establishes some principle or that statute is so closely connected with the statute under consideration that the legislature must be deemed to have legislated with a knowledge of that construction. The decision in *McKenna* v. *Porter Motors Ltd.*[4] satisfied neither condition.

In the result, the appeal must be dismissed with costs. That means that the application of the appellants for the grant of a

[3] [1950] 2 K.B. 237.

[4] [1956] A.C. 688; [1956] 3 W.L.R. 658; [1956] 3 All E.R. 262.

new lease fails and must be dismissed. I think it right to mention this because the case has taken a curious course. The order of the Court of Appeal did not directly order that the application should be dismissed but, in effect, made the dismissal conditional upon the learned judge finding on further consideration that the intention of the respondents on April 23, 1956, possessed the necessary qualities of fixity and genuineness. The learned judge did so find and accordingly himself dismissed the application. But no further order was made by the Court of Appeal.

LORD MORTON OF HENRYTON. My Lords, the appellants are tenants of Nos. 42/44, Darley Street, Bradford. They and their predecessors in title (an associated company) have held the premises since 1925 under a series of four leases for terms of eight, eight, five and eight years. The last of these leases expired on December 31, 1953. The tenancy was continued until December 31, 1954, by an order made under the Leasehold Property (Temporary Provisions) Act, 1951, and from January 1, 1955, the tenancy has been continued by section 24 (1) of the Landlord and Tenant Act, 1954.

The respondent company completed a purchase of the leasehold reversion in the premises, expectant on the determination of the appellants' tenancy, on March 1, 1954. On June 28, 1955, the appellants served on the respondent company a request for a new tenancy under sections 24 (1) (*b*) and 26 of the 1954 Act. In reply thereto the appellants received a notice in writing dated August 15, 1955, signed by Mr. Jones, the secretary and a director of the respondent company, purporting to be a notice given pursuant to section 26 (6) of that Act. The notice stated that the respondent company would oppose an application to the court for the grant of a new tenancy on the ground "that on "the termination of the current tenancy we intend to reconstruct "the premises comprised in the holding or a substantial part of "those premises or to carry out substantial work of construction "on the holding or part thereof and that we could not reasonably "do so without obtaining possession of the holding." The words quoted are taken from section 30 (1) (*f*) of the 1954 Act.

The subsequent history of the matter has been fully stated by my noble and learned friend on the Woolsack. As he has stated, it was proved that on April 23, 1956 (the fifth day of the hearing of this case by Danckwerts J.), the respondent company intended to carry out the works mentioned in the notice, but it was not proved that the company so intended at any earlier date.

The question for decision on this appeal is whether this intention was formed too late to enable the respondent company to oppose the application of the appellants for a new tenancy. Danckwerts J. held that this intention must be in existence when the notice of opposition is served, and granted to the appellants a new tenancy for fourteen years at a rent of £3,000; but the Court of Appeal, by a majority (Lord Evershed M.R.

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dissenting), held that the intention need not be formed until the opposition by the landlord is being heard by the court. The result was that the appellants' application for a new lease was dismissed.

My Lords, I have not found it easy to answer the question just stated. The answer to it depends upon the true construction of the relevant provisions of the Landlord and Tenant Act, 1954, and in particular the following provisions:—

Section 26 (6): "Within two months of the making of a "tenant's request for a new tenancy the landlord may give notice "to the tenant that he will oppose an application to the court "for the grant of a new tenancy, and any such notice shall state "on which of the grounds mentioned in section thirty of this "Act the landlord will oppose the application."

Section 30: "(1) The grounds on which a landlord may oppose "an application under subsection (1) of section twenty-four of "this Act are such of the following grounds as may be stated in "the landlord's notice . . . under subsection (6) of section twenty-"six thereof, that is to say:—(*a*) where under the current "tenancy the tenant has any obligations as respects the repair "and maintenance of the holding, that the tenant ought not to "be granted a new tenancy in view of the state of repair of the "holding, being a state resulting from the tenant's failure to "comply with the said obligations; (*b*) that the tenant ought not "to be granted a new tenancy in view of his persistent delay in "paying rent which has become due; (*c*) that the tenant ought "not to be granted a new tenancy in view of other substantial "breaches by him of his obligations under the current tenancy, "or for any other reason connected with the tenant's use or "management of the holding; (*d*) that the landlord has offered "and is willing to provide or secure the provision of alternative "accommodation for the tenant, that the terms on which the "alternative accommodation is available are reasonable having "regard to the terms of the current tenancy and to all other "relevant circumstances, and that the accommodation and the "time at which it will be available are suitable for the tenant's "requirements (including the requirement to preserve goodwill) "having regard to the nature and class of his business and to "the situation and extent of, and facilities afforded by, the "holding; (*e*) . . . (*f*) that on the termination of the current "tenancy the landlord intends to demolish or reconstruct the "premises comprised in the holding or a substantial part of those "premises or to carry out substantial work of construction on the "holding or part thereof and that he could not reasonably do so "without obtaining possession of the holding; (*g*) subject as "hereinafter provided, that on the termination of the current "tenancy the landlord intends to occupy the holding for the "purposes, or partly for the purposes, of a business to be carried "on by him therein, or as his residence.

" (2) The landlord shall not be entitled to oppose an applica-
" tion on the ground specified in paragraph (*g*) of the last fore-
" going subsection if the interest of the landlord . . . was pur-
" chased or created after the beginning of the period of five years
" which ends with the termination of the current tenancy . . ."

I omit paragraph (*e*) because neither party relied upon it in this House.

Section 31 (1): " If the landlord opposes an application under
" subsection (1) of section twenty-four of this Act on grounds
" on which he is entitled to oppose it in accordance with the last
" foregoing section and establishes any of those grounds to the
" satisfaction of the court, the court shall not make an order for
" the grant of a new tenancy."

Counsel for the appellants point out that a landlord can only oppose the tenant's application for a new lease if he brings himself within the terms of section 30 (1), and their argument continues on the following lines. Taking paragraph (*f*) as an example, two requirements are imposed on the landlord by section 30 (1). First he must assert the facts set out in paragraph (*f*) and, secondly, this assertion must be made in his notice of opposition. Having asserted these facts, the landlord must establish, at the hearing of the application, that the assertion was true, i.e. that when he delivered the notice of opposition the landlord intended to carry out the works mentioned in paragraph (*f*) on the termination of the current tenancy. It is now common ground that in the present case the landlord failed to establish that he had such an intention when he delivered the notice of opposition. Therefore the opposition of the landlord failed, and the Court of Appeal wrongly dismissed the tenants' application for a new tenancy.

In support of the argument just stated, counsel for the appellants point to the terms of paragraph (*a*), (*b*), (*c*) and (*d*) of section 30 (1). They submit that the " state of repair " mentioned in (*a*), the " persistent delay " mentioned in (*b*), and the " substantial breaches " mentioned in (*c*) all refer to facts existing at the date of the notice. They further submit that in paragraph (*d*) the words " has offered " must refer to an offer made before the notice has been delivered, and in the same paragraph the words in the present tense " is willing," " is available " and " are suitable " must refer to the state of affairs at the date of the notice. This being so, they say, the words " the landlord " intends," in paragraph (*f*), must also refer to the state of affairs at the date of the notice, since it would be strange indeed if in paragraph (*f*) the legislature intended to refer to any point of time other than the point of time so clearly indicated in the earlier paragraphs.

My Lords, the line of argument which I have tried to summarize undoubtedly has its attractions, but I have reached the conclusion that it cannot prevail, if one considers section 30 in the light of section 26 (6) and section 31 (1) already quoted.

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Section 26 (6) provides that the landlord's notice of opposition "shall state on which of the grounds mentioned in section thirty "of this Act the landlord *will oppose* the application." The words "will oppose" must surely refer to some date *after* the delivery of the notice in which the landlord states the ground on which he "will oppose" the tenant's application. And, in my view, that date can only be the date when the opposition of the landlord is heard by the High Court or the county court, as the case may be.

I now turn to section 30 (1) and I shall first consider a case where the landlord selects paragraph (*f*) as the ground on which he will oppose the tenant's application. That is the present case, and I shall for the moment disregard the other paragraphs in section 30 (1). Looking only at paragraph (*f*), and bearing in mind what the landlord is to state under section 26 (6), it would seem that when the landlord delivers his notice he is not saying: "I give you notice that I intend to reconstruct the premises." He is saying: "I give you notice that I will oppose your "application on the ground that I intend to reconstruct the "premises," which is a very different statement. The former is a statement that an intention to reconstruct exists at the time when the notice is given. The latter is a statement that at a future date the landlord will allege, and endeavour to prove, that an intention to reconstruct is then in existence. Later, when the hearing takes place, the landlord says to the court: "I now "oppose the application of the tenant on the ground that I "intend to reconstruct the premises and that I could not reason-"ably do so without obtaining possession of the holding." If the landlord establishes that his intention exists at that date, and that the work could not reasonably be carried out without obtaining possession of the holding, section 31 (1) forbids the court to make an order for the grant of a new tenancy. There was much discussion in the course of the argument as to the nature of the "intention" which must exist at the relevant date, but ultimately counsel on both sides agreed that the landlord must prove that he has definitely decided to carry out the work, and that this decision has a reasonable prospect of being carried into effect. I would accept this definition, which is entirely in accordance with the words of Lord Asquith already quoted by my noble and learned friend on the Woolsack.

The observations which I have just made on paragraph (*f*) apply equally to the use of the word "intends" in paragraph (*g*), and if these paragraphs had stood alone in section 30 (1), I should have had no doubt that the appeal must fail. But section 30 (1) must be read as a whole, and I now turn to paragraphs (*a*) to (*d*) inclusive. I shall first read paragraph (*a*) in the light of section 26 (6). So read, the effect of paragraph (*a*) is as follows: "I give you notice that I will oppose your application "on the ground that you ought not to be granted a new tenancy

"in view of the state of repair of the holding, being a state "resulting from your failure to comply with your obligations."

I cannot imagine a landlord relying on this ground unless the premises were in disrepair at the date of the notice, and I think that at the hearing, in deciding whether the tenant ought or ought not to be granted a new tenancy, the court would have regard both to the state of repair at the date of the notice and to the state of repair at the date of the hearing. A similar situation arises in cases under paragraphs (*b*) and (*c*) of section 30 (1). The court would consider, at the hearing, whether there has been persistent delay in paying rent, or other substantial breaches of obligation by the tenant, at the date of the notice, and would also consider the state of affairs at the date of the hearing. Again, in a case under paragraph (*d*), the court would consider the state of affairs at each of the dates already mentioned. Thus in each of these four paragraphs I find words which are clearly referable to the date of the notice of opposition.

I feel, my Lords, that this fact lends considerable support to the views expressed by the Master of the Rolls, and Danckwerts J. and I think that the presence of paragraphs (*a*) to (*d*) inclusive in section 30 (1) throws some doubt upon the meaning of the word "intends" in paragraph (*f*). In the end, however, I have come to the conclusion that the decision of the majority of the Court of Appeal is correct. In paragraphs (*f*) and (*g*) there are no words which are plainly referable to the date of the notice of opposition and, for the reasons already given, I think that the more natural interpretation of the word "intends" in paragraph (*f*) is that it is referable only to the time when the opposition of the landlord is heard by the court. If a doubt exists on the point, it is right to have regard to the practical considerations mentioned by Romer L.J. in the passages in his judgment which I shall now quote[5]: "Section 31 (1) shows, in my opinion, "beyond question that the intention must exist at the hearing; "for it would be nihil ad rem for a landlord to establish to the "satisfaction of the court that he had intended some weeks or "months previously to demolish or reconstruct on the termina- "tion of the tenancy if, in fact, he had abandoned that intention "in the interval. But the additional requirement that an earlier "intention, in the strict sense of the word, must also be estab- "lished cannot be clearly derived, in my judgment, from the "statutory language used which, if it imposes the requirement "at all, does so in an equivocal and ambiguous manner. "Accordingly, it is permissible to inquire whether the require- "ment would, on the one hand, be of advantage to the tenant "and, on the other hand, would or might result in hardship or "inconvenience to the landlord; for if it would be a disadvantage "to the landlord without securing any corresponding benefit to "the tenant, it is surely a legitimate inference that the legisla- "ture did not intend to impose it."

[5] [1957] Ch. 67, 91; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1.

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The learned Lord Justice then embarked on the inquiry just mentioned and concluded, for reasons which I accept, that a requirement that the "intention" must exist at the date of the notice of opposition was unnecessary for the protection of a tenant and would or might impose hardship on a landlord. As to the reason for the requirement, in section 26 (6), that the landlord must state, in his notice of opposition, on which of the grounds mentioned in section 30 he intends to rely, Romer L.J. said[6]: "The matter will ultimately come before the court and it is "obviously right that the tenant should know in advance what is "the case that he will have to meet at the hearing. It is, in my "judgment, the object of the counter-notice that the tenant "should be given this information, but, in my opinion, the "counter-notice has no further or other object. It is, I think, "intended to be in the nature of a pleading and its function, as "in the case of all pleadings, is to prevent the other party to the "issue from being taken by surprise when the matter comes "before the judge. Why the interests of justice should further "require that the landlord's intention must be shown to have "been a definite and settled intention at the time when the "counter-notice is served, or why the tenant should be entitled "to a new tenancy unless such an intention can be established, I "find, for my part, difficult to comprehend."

My Lords, I would gratefully adopt these observations, and they confirm me in my view that the word "intends" in paragraph (*f*) should be construed as referable only to the date when the opposition of the landlord is heard, notwithstanding the doubts which are created by the language of paragraphs (*a*) to (*d*) inclusive.

In the course of the argument reference was made to the provisions of Part I of the 1954 Act, but I have been unable to derive any assistance from these provisions. Other dates were suggested as being possible dates on which intention to reconstruct must be formed, but I can find no warrant in the Act for selecting any of these alternative dates. I think that if the intention need not exist at the date when the notice of opposition is served, it need not exist at any other time before the hearing of the opposition by the landlords.

A further argument submitted on behalf of the appellants was stated by Mr. Russell somewhat as follows: Even if the requirements of the Act are satisfied by an "intention" formed just before judgment is given, these requirements are not satisfied if the landlord's *only* intention is to carry out works necessary to enable him to occupy the premises. Counsel referred to certain cases bearing upon this matter, in particular *Atkinson* v. *Bettison*[7] and *Fisher* v. *Taylors Furnishing Stores Ltd.*[8] I need only say that I can find no ground for this submission in

[6] [1957] Ch. 67, 93.
[7] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.
[8] [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

the Act of 1954 and I would adopt the language of Parker L.J. in the latter case.[9] After referring to the relevant sections of the Act of 1954, Parker L.J. continued as follows[9]: "From the "scheme of the Act as there laid down I should have thought "that it was clear, apart from authority, that if any of those "grounds of objection is established, the tenant's application for "a new lease must fail. Each ground is entirely separate and "independent and each, if proved, entitles the landlord to "succeed. Thus, if ground (*f*) is proved to the satisfaction of "the court, it matters not to what use the landlord ultimately "intends to put the holding. He may intend to let it when the "work is done to a third party. He may intend ultimately to "occupy it himself for his own business; or he may not have "made up his mind at all. To suggest that, if his intention is "ultimately to occupy it himself and he cannot by reason of "subsection (2) of section 30 rely on ground (*g*), he is thereby "debarred from relying on ground (*f*), is to apply a proviso to "the operation of ground (*f*) which is not there and for which "there is no warrant. Of course, if he finds himself debarred "from relying on ground (*g*) and is forced to rely on ground (*f*), "his task will not be an easy one; it will at once be suspected "that his alleged intention is not genuine, and that it is merely "put forward to circumvent his inability to rely on ground (*g*). "But assuming that he satisfies the court that the intention is "genuine I can see no reason why he should be debarred from "relying on ground (*f*)."

The result is that, in my view, the appellants are not entitled to the grant of a new tenancy and the question of the length of the term which should be granted does not arise; but as the members of the Court of Appeal were unanimous in thinking that the term should be five years, in place of the term of fourteen years granted by Danckwerts J., I desire to say that I prefer the view of the Court of Appeal. It is true that under section 33, in default of agreement between the parties, the new tenancy is to be "such a tenancy as may be determined by the court to "be reasonable in all the circumstances, being . . . a tenancy "for a term not exceeding 14 years." Thus the learned judge had a discretion; but I cannot help feeling that in granting a term of the maximum length, he may have overlooked one consideration which seems to me of great importance. In all cases, except a case coming within subsection (2) of section 30 (already quoted), if a landlord proves at the hearing the ground of objection set out in paragraph 30 (1) (*g*), namely, that he intends to occupy the holding for the purposes of a business to be carried on by him therein, the court must refuse to grant a new tenancy. In the present case I think it is clear that the landlords could have proved this fact. The only reason why they could not rely on paragraph (*g*) was because they came within subsection (2) of section 30, and it is to be observed that the Act, in these

[9] [1956] 2 Q.B. 78, 91–92.

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circumstances, imposes a bar for a period which cannot exceed five years. In the present case the bar would only have lasted till March 1, 1959. I do not suggest that these facts compel the court to any particular conclusion as to the length of the term to be granted; but I think that section 30 (2) gives an indication of the policy of the Act in cases coming within paragraph (*g*) of section 30 (1).

I agree that this appeal should be dismissed.

Lord Keith of Avonholm. My Lords, in this difficult case, which, before coming to this House, has given rise to an even conflict of judicial opinion, I find myself in general agreement with the judgment of the learned Master of the Rolls. He has expressed his reasons so fully and so clearly that I find it unnecessary to embark on a detailed examination of the Act under consideration and will confine myself to a few general observations.

I should have thought that when Parliament provided for the notices to be given by the landlord under section 25 and section 26 of the Act it contemplated that the grounds on which the landlord has to state that he would or will oppose an application to the court for a new tenancy would be in existence at the time of the notice. This, I should have thought, was clear where the notice was given under section 25, for I cannot understand a landlord, who wishes to terminate a tenancy, being thought to state a ground of opposition to a possible application for a new tenancy that did not exist at the time of his notice. The prescribed form of notice under the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957, No. 1157), carries, I think, the same inference. I am not sure that sufficient attention has been paid to this aspect of the case. When I turn to the grounds themselves, set out in section 30 (1), I find that grounds (*a*) to (*d*) are grounds which have their origin in the past. These must, I think, be assumed to be live grounds at the date of the notice. Without examining various situations that might arise under these heads, because no case under them is now before us, it may be, though it is not necessary to express any opinion on the point, that the court might take account of the fact that the tenant had purged past breaches of his contract of tenancy under heads (*a*) to (*c*) by the time the case came into court. Ground (*d*) raises a somewhat different point, for it speaks both in the past and in the present. Here I would be prepared to read "is willing" as involving an element of continuing willingness. It must mean, I think, is willing at the time of the notice and at the time his opposition commences. What is to happen if the alternative accommodation offered thereafter disappears is a problem that may some day have to be considered, for a tenant may well think that he has good reason for resisting the offer on the ground that the accommodation offered is not reasonably suitable.

Ground (*f*), as also ground (*g*), speaks wholly in the present, "the landlord intends." As under (*d*), I think this means that

he intends at the time of the notice, and that he will intend at the commencement of his opposition. But as this is an intention with regard to something which is to happen in the future, namely, on the termination of the current tenancy, I think he must continue to intend throughout the hearing. If he abandoned his intention while the court was seised of the case, it would be a clear negation of what the statute meant, that he should be given possession because he had an intention when he gave the notice and when proceedings commenced. In effect he must, I think, be taken to say: "I have intended, I do intend and I will "continue to intend," and the court must believe him. It may be said that if continuing intention is required, last-minute intention achieves the same result. Even if it did, that is not, I think, what the statute says. The landlord is entitled to oppose under section 30 (1) only if the factual ground stated in the notice given under section 26 (6) was then true. The tenant is entitled to know betimes the alleged reason for the landlord's opposition, to enable him to judge of its truth and make his arrangements accordingly. A termination of his tenancy because of a last-minute intention of the landlord accepted by the court as genuine may put him to no end of inconvenience and disturbance of his business. On the other hand, if the court thinks the intention, though belated, should receive consideration, it could grant a short tenancy which the landlord could give notice to terminate because of his intention, without any grave hardship to the landlord.

Reference has been made to the hardship that might arise to a landlord if he had to make up his mind within two months of a tenant's request for a new tenancy in a matter of demolition or substantial reconstruction of his premises. But I find it somewhat unreal to imagine a landlord, spurred by the request of a tenant for a new tenancy, suddenly to bethink himself of a scheme of reconstructing or substantially altering his premises, and if he has been contemplating such a project and is unable to make up his mind, for one reason or another, within the statutory period, the statute contemplates, I think, that the tenant should not be faced with this ground of opposition. As I have said, if the landlord has perfected his plans and intentions before a new lease has been granted, but too late to give due notice, he may adduce that as a ground for curtailing the length of the new tenancy. Further, the point has no validity where the landlord gives notice to terminate the tenancy and intimates reliance on an intention under head (*f*) in the event of the tenant applying for a new tenancy.

The learned Master of the Rolls, while he considers the date of the landlord's notice as the relevant date, says that alternatively the relevant date is the date when parties first join issue, here the lodging of the landlord's affidavit. I would not dissent from this as an alternative ground of judgment, though I prefer the view that the intention must exist at both dates.

I would allow the appeal.

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Lord Somervell of Harrow. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack and desire to add only a few observations.

The sections dealing with applications by the tenant and opposition by the landlord have already been cited. The notice under section 26 (6) in all cases, I think, is for the purpose of telling the tenant the case which he will have to meet if the matter comes to court. It is, as Romer L.J. said, analogous to a pleading. The landlord may fail. That would not mean that the notice had been invalid as a document entitling him to appear.

In all the cases under section 30 the court must, in my opinion, consider the points raised as at the conclusion of the cases on each side. Although, for example, a notice based on paragraph 30 (1) (*b*) would not be given unless there had been past delay in paying rent, events between the notice and the hearing would be relevant to the decision whether the court ought to grant the tenancy. The tenant may after the notice has been given have improved or aggravated his position as a payer. The court would have to consider as at the time of the hearing whether he had "persistently delayed in paying his rent."

When one comes to sub-paragraphs (*f*) and (*g*) the intention must be established to the satisfaction of the court when the order falls to be made. The previous history may be relevant in considering whether there is an intention within the statute. If the appellant is right, a landlord is precluded from giving a notice if at the time of the notice demolition or reconstruction is a possibility or probability but not an intention. A landlord may have instructed an architect or surveyor who has not by the end of the two months completed his plans and obtained an estimate. I can find no words in the Act or any principle which would exclude a landlord on that state of facts from giving a valid notice. The estimate may be satisfactory and the court fully satisfied of his intention. If the estimate is higher than he likes, he can withdraw his opposition.

I also agree with Romer L.J. that if the statutory language imposes the requirement for which the appellant contends, it does so in "an equivocal and ambiguous manner." The provisions under consideration are cutting down the contractual rights of the landlord and an equivocal and ambiguous manner is not sufficient on this and it may well be on other grounds.

An argument was based on the different wording of Part I of the Act dealing with residential tenants. An Act must no doubt be construed as a whole but it would be unfortunate if landlords of business premises could only discover their rights and obligations by drawing inferences from complicated provisions dealing with a different subject-matter. The argument was in part based on the use of the word "proposes" in section 4 (3) (*b*), the suggestion being that proposals were less formal than intentions. I doubt this. In the matrimonial field and in

others a proposal is not made until an "intender" has reached the head of the "valley of decision."

The word "intends" is to be found in section 30 (1) (*f*). I doubt whether one assists the tribunal of fact by expanding into a paragraph what Parliament has stated in a word which falls, of course, to be applied in its context. If one starts laying down other words, they may well cause difficulty in the varied circumstances which may arise.

On the second point I agree with what Parker L.J. said in *Fisher* v. *Taylors Furnishing Stores Ltd.*,[10] and would not wish to add to it.

I would dismiss the appeal.

LORD DENNING. My Lords, on August 15, 1955, the landlords, Phillips Furnishing Stores Ltd., gave a notice to the tenants opposing the grant of a new tenancy. The notice was in accordance with the statute and said this: "The grounds on which we shall "oppose any application which you may make to the court for "the grant of a new tenancy are that on the termination of the "current tenancy *we intend to reconstruct the premises.*" It was signed "A. Jones for and on behalf of Phillips Furnishing "Stores Ltd." Mr. Jones was the secretary of the company and a director of it.

I regard that notice as a clear statement that at that time—the time of giving the notice—the company had formed the intention to reconstruct the premises. It meant: "We intend to recon-"struct the premises at the end of your tenancy." It did not mean: "If you make an application to the court, then, by the "time it is heard, we *will* intend to reconstruct." It is a misuse of the English language for a man to say: "I *will* intend to do" so and so. He says, "I intend to do it." Intention is a present state of mind denoting what it is his purpose to do in the future. That is the way in which the Master of the Rolls interpreted this notice and I entirely agree with him about it.

This interpretation is borne out by a reference to the other grounds which under the statute may be stated in a notice of opposition. If a landlord opposes on the ground that: "I have "offered you alternative accommodation and am willing to "provide it," he clearly means that *in the past*, at some time before the notice, he *has offered* alternative accommodation, and "that *in the present*, at the time of giving the notice, he *is willing* to provide it. If he opposes the new lease on the ground of "your persistent delay in paying rent," he means the tenant's delay in the *past*, before the giving of the notice, and not some hypothetical delay in the future.

Such being the true interpretation of these notices, I am of opinion that they must be given honestly and truthfully. They are not to be regarded merely as pleadings preparatory to a trial—in which parties, I regret to say, sometimes deny the truth, or

[10] [1956] 2 Q.B. 78, 91.

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refuse to admit it, if it suits their plan of campaign. These notices are intended to be acted upon before there is a trial at all. On the receipt of such a notice, the tenant has to decide his course of action—for instance, whether to accept the alternative accommodation that is offered, or whether to accept the landlord's word that he intends to occupy the premises himself, or as the case may be. In every case he has to decide whether to apply for a new lease or not. It would be deplorable if a landlord could be allowed to get an advantage by misrepresenting his state of mind or any other fact. Suppose he said in his notice: "I intend to "reconstruct the premises" or "I intend to occupy for the pur- "poses of my own business," when he, in fact, had no such intention at all. On the faith of such a statement, the tenant might be induced to abstain from applying to the court for a new tenancy, because he would think it no use to do so. He would know that he would have to pay the costs if he lost. Just imagine the tenant's consternation if at the end of the tenancy, after he had left, the landlord did not reconstruct the premises or occupy them himself, but straightway let in someone else. Would the tenant have no redress? I should have thought it clear that the notice would be bad—voidable—liable to be set aside for fraudulent misrepresentation; see *Lazarus Estates Ltd.* v. *Beasley*.[11] If it was avoided, the original tenancy would continue. The landlord would get no advantage from his misrepresentation—which is as it ought to be. If it was too late to avoid the notice, the landlord would be liable at common law in damages for fraud: just as he would be under section 55 if the misrepresentation was made to the court.

Provided, however, that the notice is a good and honest notice when it is given, then it is clear to my mind that the ground stated therein must be established to exist at the time of the hearing. Suppose a landlord had been willing on the giving of the notice to provide alternative accommodation, but he was not willing at the time of the hearing; or suppose he had the intention, at the giving of the notice, to reconstruct the premises, but had changed his mind by the time of the hearing. He clearly could not resist a new lease. To succeed he must satisfy the trial judge that, at the time when the court comes to make its order, he is *then* willing to provide alternative accommodation, or *then* intends to reconstruct, or as the case may be. An interesting parallel can be found under the Rent Acts; see *Kimpson* v. *Markham*,[12] *Benninga (Mitcham) Ltd.* v. *Bijstra*,[13] *R. F. Fuggle Ltd.* v. *Gadsden*.[14]

In short, it comes to this: the landlord must *honestly and truthfully* state his ground in his notice and he must establish it as *existing* at the time of the hearing.

[11] [1956] 1 Q.B. 702; [1956] 2 W.L.R. 502; [1956] 1 All E.R. 341.
[12] [1921] 2 K.B. 157; 37 T.L.R. 342.
[13] [1946] K.B. 58; 61 T.L.R. 519; [1945] 2 All E.R. 433.
[14] [1948] 2 K.B. 236, 243; 64 T.L.R. 364; [1948] 2 All E.R. 160.

Apply this to the present case: the landlords did establish to the satisfaction of the judge, before he made his order, that at the time of the hearing they intended to reconstruct the premises at the end of the tenancy. But the tenants assert—and it was the main burden of their complaint before your Lordships—that the landlords had not that intention at the time when they gave their notice. What is the result of this? If the notice had been a dishonest notice in which the landlords had fraudulently misrepresented their intention—or, I would add, if there had been a material misrepresentation in it—I should have thought it would be a bad notice. But no such suggestion was made at any stage of the proceedings, and I think I can see why. Much of the trial was occupied with the question whether the proposed work was "substantial" and whether there was a firm "intention" to do it. In the course of this inquiry, the judge held that "the intention of the company can only be discovered from "the acts of the board of directors as recorded in the minutes "of the company," and, as no resolution was passed until April 23, 1956, he held that the company had not established its intention before that date. This finding was not challenged before your Lordships, but I may perhaps remark that it has since been held that a company can form an intention without necessarily calling a board meeting; see *H. L. Bolton Engineering Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[15] It is the absence of a board meeting that has led to an apparent paradox: The company did not have the intention it professed at the date of the notice, but nevertheless its statement of it in the notice was not dishonest or untrue. The explanation is this: Mr. Jones, the secretary and a director, gave the notice in good faith. At the time the notice was given, there was no resolution of the board of directors giving Mr. Jones authority to sign the notice and he disclaimed any right to bind the company without a directors' meeting. But he, no doubt, assumed—quite rightly as it turned out—that the company would ratify his action. Many an agent has done as much before to protect his principal's interests and no one has ever suggested that there is anything wrong in it. The company ratified Mr. Jones' action when it, by its solicitors, filed in the court an affidavit in answer to the tenants' application. In this affidavit the acting secretary swore on oath that he was authorized by the company to make it on its behalf and stated that the company opposed a new tenancy on the ground stated in its notice of opposition. No one can, in these proceedings, dispute the authority of the company's solicitors to file this answer on the company's behalf. It was a clear ratification of Mr. Jones' action at a time long before the tenants had any idea that it had not be authorized. The notice thereupon became just as good as if it had been previously authorized; see *Ancona* v. *Marks*.[16]

[15] [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624; (H.L.) [1957] 1 W.L.R. 454.

[16] (1862) 7 H. & N. 686.

H. L. (E.)
1958
Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd.
Lord Denning.

It will be seen that I have gone a long way with the Master of the Rolls. His mind recoiled at the thought that a landlord, by making an untrue statement about his intentions, could successfully resist a new lease. The Master of the Rolls would not allow the landlord to get any advantage by an untrue notice. Nor would I. But in this particular case I do not regard the landlords' notice as untrue. Once it was ratified by the company it became true from the beginning.

On the second point, I agree that it is covered by *Fisher* v. *Taylors Furnishing Stores*,[17] which will now have the support of this House. In that case the Court of Appeal virtually overruled one of the grounds of the decision in *Atkinson* v. *Bettison*,[18] leaving that decision to rest on its other ground—a course which I think it was right to take, on being completely satisfied that the first ground was wrong.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co. for Booth, Wade, Lomas-Walker & Co., Leeds; Clifford-Turner & Co.*

F. C.

[17] [1956] 2 Q.B. 78. [18] [1955] 1 W.L.R. 1127.

[PRIVY COUNCIL.]

J. C.*
1958
Feb. 13; *Mar.* 11.

MOHAMED FIAZ BAKSH . . . . . Appellant;

AND

THE QUEEN . . . . . Respondent.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA.

Criminal Law—Appeal—Fresh evidence—Statements by prosecution witnesses to police—Not available at trial—Material discrepancies when compared with oral evidence—Whether trial should have been ordered—Murder—British Guiana.

British Guiana.

The appellant and his co-accused (who had each relied on an alibi) having been convicted of murder, both appealed to the Court of Criminal Appeal of British Guiana, who permitted to be produced and proved on the hearing of the appeal statements, which had not been available at the trial, made to the police by the three main witnesses for the prosecution. The Court of Criminal Appeal found that a comparison of the statements with the oral evidence given by those witnesses at the trial disclosed material discrepancies. They said in respect of the appellant's co-accused that in the interests

* *Present*: Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning and the Rt. Hon. L. M. D. de Silva.

of justice the value and weight of the new evidence should be determined by a jury and not by that court, and they quashed his conviction and ordered a new trial. In the case of the appellant, however, they were of opinion that different considerations applied; they considered that nothing favourable to him could have been obtained from the statements which was not obtained at the trial, and held that the jury's verdict in respect of him could not be disturbed on that ground:—

Held, that if the statements afforded material for serious challenge to the credibility or reliability of the witnesses on matters vital to the case for the prosecution, the defence by cross-examination might have destroyed the whole case against both accused or, at any rate, shown that the evidence of those witnesses could not be relied on as sufficient to displace the evidence in support of the alibis. Their credibility could not be treated as divisible and accepted against one and rejected against the other. A new trial should have been ordered in both cases.

The case would be remitted to the Court of Criminal Appeal with the direction that they should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course they considered proper in the interests of justice in the existing circumstances.

APPEAL (No. 26 of 1957), by special leave, from a judgment of the Court of Criminal Appeal of British Guiana (June 7, 1957), dismissing the appellant's appeal from a judgment of the Supreme Court of British Guiana (Clare J. and a jury) (December 5, 1956), whereby the appellant was convicted of murder and sentenced to death.

The following facts are taken from the judgment of the Judicial Committee: The appellant had been charged jointly with one Nabi Baksh with the murder of Mohamed Saffie on June 12, 1956. Nabi Baksh was also found guilty.

Both prisoners appealed to the Court of Criminal Appeal of British Guiana (Holder C.J., Stoby and Date JJ.), and on June 7, 1957, that court dismissed the appellant's appeal but quashed the conviction of Nabi Baksh and ordered a new trial in his case.

The appellant appealed by special leave to Her Majesty in Council and his appeal was heard by the Board on February 13, 1958.

The case for the prosecution was that the deceased man was killed shortly after 3 a.m. on June 12, 1956, by shots from a gun fired by one or other of the two accused men acting together with the common design of killing or doing grievous bodily harm to the deceased. The case rested largely on the identification of the accused by three prosecution witnesses named Mohamed Haniff, the deceased's brother-in-law, Mohamed Nazir, brother-in-law of Haniff, and Bebe Mariam, who had been living with the deceased. Haniff at the trial swore that on June 12 he was living with the deceased at a house at Clonbrook, East Bank, Demerara. Also living in the house were Nazir and his wife and Bebe Mariam. He woke about 3 a.m. and helped the deceased and Nazir load a boat with vegetable produce, and then returned to the house with the deceased. Nazir and his wife and Bebe Mariam went away

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with the boat. He went to lie on his bed, and before Nazir returned with the boat he heard gun fire from the kitchen direction and went to the window with his torch. He saw two men whom he could identify. He shouted to them: "Alright Fiaz and Jacoob no use "run any more I see you already." Nabi Baksh was known as Jacoob. He saw a gun in the appellant's right hand. He ran downstairs and saw deceased lying at the top of the step leading from the kitchen. Nazir was there, and they lifted the deceased and placed him on his back.

He said that he had been acquainted with both accused for three or four weeks before June 12.

Nazir swore that after he had taken his wife and Bebe Mariam with the vegetable produce to the bus when he reached the spot where he usually tied his boat he heard a shot. He ran underneath his house and from there saw the appellant and Nabi Baksh crossing a trench near the house. He heard Haniff shout to them "Alright Fiaz and Jacoob, don't run I see you." He turned his torch on them and saw the appellant had a gun.

Bebe Mariam swore that she and the deceased were awakened about 2.30 a.m. on June 12 by the barking of dogs and that by a torchlight she saw the appellant and Nabi Baksh about 48 yards away from the house. She said that she had known them for about two years.

Neither of the accused gave evidence, but in statements from the dock denied that they were anywhere near the scene of the murder. They gave an account of their movements and said that the statements they had given to the police were true. They both called a number of witnesses in support of their alibis.

Both prisoners appealed, and on May 13, 1957, counsel who had appeared on behalf of Nabi Baksh at the trial swore an affidavit stating that at his request the Solicitor-General had allowed him to inspect the statements made to the police by the witnesses Haniff, Nazir and Bebe Mariam on the morning of June 12, 1956, which had not been available to him at the trial, and that these statements showed serious discrepancies and contradictions in vital matters when compared with the evidence given by them at the trial. The Court of Criminal Appeal accordingly allowed these statements to be produced and proved. They were found to contain the following discrepancies—Haniff in his statement had said that after he heard the gunshot he looked out of the window and shone his torch and saw the appellant and another man whom he did not know by name on the parapet of the trench dividing the yard and the rice field; that he ran on the bridge and was all the time shouting "all right "Fiaz, all you run, me see all you two."

Nazir had said that neither he nor Haniff had shouted at the men who were escaping because they were afraid of being shot.

Bebe Mariam had said that when she was awakened by the barking of dogs she saw the appellant by the light of her husband's flashlight running away in the rice field south of her home.

After examining the statements and comparing them with the sworn testimony at the trial the Court of Criminal Appeal in their judgment delivered on June 7, 1957, said: "From an examination of the additional evidence it will be seen that Bebe Mariam made no mention of seeing Nabi Baksh on the morning of June 12 shortly before the shooting; Mohamed Haniff did not know the name of the man he saw with Fiaz Baksh and therefore could not have called it out. Had the jury known these facts we are unable to say that inevitably they would have arrived at the same conclusion. They may have done so because they may have accepted Mohamed Nazir's evidence that he saw the two appellants, or the two witnesses already mentioned may have been able to explain or amplify their original statements."

They went on to say that in their view, in respect of Nabi Baksh, in the interests of justice the value and weight of the evidence should be determined by a jury and not by that court. They accordingly quashed the conviction in his case and ordered a new trial.

With regard, however, to the present appellant, they considered entirely different considerations applied. They could find a good deal unfavourable and nothing favourable to him in the statements and considered that nothing favourable to him could have been obtained therefrom which was not obtained at the trial. They accordingly held that the jury's verdict in respect of this appellant could not be disturbed on this ground.

1958. Feb. 13. *Bernard Gillis Q.C.* and *J. Lloyd-Eley* for the appellant.

J. G. Le Quesne for the Crown.

The following cases were cited in argument: *Reg.* v. *Collister* [1] and *Reg.* v. *Puddick*.[2]

Feb. 13. LORD REID said: "The appeal will be allowed and the case remitted to the Court of Criminal Appeal of British Guiana with a direction that they should quash the conviction and either enter a verdict of acquittal or order a new trial, whichever course they may consider proper in the interests of justice in the existing circumstances. Their Lordships will give their reasons for their decision at a later date."

March 11. Their Lordships' reasons for allowing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: Their Lordships are unable to accept the reasoning of the Court of Criminal Appeal on this matter. If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the prosecution it follows that by cross-examination—or

[1] (1955) 39 Cr.App.R. 100. [2] (1865) 4 F. & F. 497.

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by proof of the statements if the witnesses denied making them—the defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis. Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept their verdict against one and re-open it in the case of the other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases.

It remains only to say that their Lordships are in complete agreement with the view expressed by the Court of Criminal Appeal with regard to the criticisms which were made, and which have been repeated before the Board, of the trial judge's summing-up with respect to the onus of proof in connexion with the defence of alibi. Taking the summing-up as a whole, the jury could have been left in no doubt that the onus remained on the prosecution throughout to establish the guilt of the accused.

For the reasons stated above, their Lordships have humbly advised Her Majesty that the appeal should be allowed and the case remitted to the Court of Criminal Appeal of British Guiana with the direction that they should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

C. C.

[CHANCERY DIVISION.]

1958
Feb. 28.

HOLMES and Another *v.* KEYES and Others.

Danckwerts J.

Company—Meeting—Vote—Date of vote—Poll taken on resolution for election and completed—Votes counted and result declared on following day—Whether director elected on day of poll or when result declared—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 182.

On December 23, 1957, at a general meeting of the G. Co. a poll was taken on resolutions for the election of the defendants to be directors. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers informed the company that the defendants had been elected. The company's articles required that the qualification of a director should be the holding of 500 shares in the capital of the company and that, in accordance with section 182 of the Companies

Act, 1948,[1] he should obtain that qualification within two months after his appointment. The articles further provided that a transferor of shares should be deemed to remain the holder of shares until the name of the transferee was enterd in the company's register. The defendants' names were not entered into the company's register as holders of the requisite number of qualification shares until the afternoon of February 24, 1958.

On a motion to restrain the defendants from acting as directors of the company, the plaintiffs contended that the defendants were elected on December 23, 1957; that, therefore, the period within which they must obtain their qualification began to run at midnight on December 23/24, 1957; and that the entry of the defendants' names in the register on February 24, 1958, was too late:—

Held, that the elections of the defendants took place on December 23, when the poll was complete except for the declaration of the result, and on no other day, and the period within which they were required to obtain their qualifications began at midnight on December 23/24, 1957, and expired at midnight, February 23/24, 1958. Therefore, the registration of the defendants' names on February 24 was too late.

MOTION.

By this motion in the action, the plaintiffs, William Arthur Holmes and Zena Daniels, on behalf of themselves and all other shareholders in the Gordon Hotels Ltd., sought an interlocutory injunction restraining the first two defendants, Lord Keyes and Fredman Ashe Lincoln from acting as directors of the company, the third defendant.

On December 23, 1957, at a general meeting of the company, resolutions for the election of the defendants to be directors were presented and, in accordance with a previous demand, a poll was taken on the resolutions. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers communicated the result, namely that the defendants had been elected, to the company. The defendants were not told of the result until about December 27. Article 23 of the Company's Articles of Association provided that "... the transferor shall be deemed to "remain the holder of the share until the name of the transferee "is entered in the register." Article 83 provided: "The quali- "fication of a director other than a nominated director shall be "the holding in his own right of 500 ordinary shares of the "company of £1 each and section 141 of the Act [the Companies "Act, 1929] shall be duly complied with by every director "requiring such qualification." Section 141 of the Companies

[1] Companies Act, 1948, s. 182: "(1) Without prejudice to the restric- "tions imposed by the last foregoing "section, it shall be the duty of the "every director who is by the articles "of the company required to hold a "specified share qualification, and "who is not already qualified, to "obtain his qualification within two "months after his appointment, or "such shorter time as may be fixed "by the articles. ... (3) The office "of director of a company shall be "vacated if the director does not "within two months from the date of "his appointment, or within such "shorter time as may be fixed by the "articles, obtain his qualification, or "if after the expiration of the said "period or shorter time he ceases at "any time to hold his qualification."

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Act, 1929, was in terms similar to those of section 182 of the Companies Act, 1948. No steps were taken by the defendants to acquire the necessary qualification until about January 31, 1958, when the requisite number of shares were purchased by brokers on behalf of each of them. The completion of the purchases was delayed, however, until February, 1958, and the defendants' names were not entered in the company's register as holders of the shares until the afternoon of February 24, 1958.

The plaintiffs contended that the defendants were elected to be directors on December 23, 1957; that the period of two months in which they were required to obtain their qualifications began to run at midnight on December 23/24, 1957, and expired at midnight on February 23/24, 1958, and that the entry of the defendants' names in the company's register on the afternoon of February 24, 1958, was too late. The defendants contended that they were not appointed until December 24, 1957, and the period, therefore, did not begin to run until midnight on December 24/25, 1957.

Charles Russell Q.C. and *Paul Sieghart* for the plaintiffs.

R. W. Goff Q.C. and *T. D. D. Divine* for the first two defendants.

Denys Buckley for the defendant company.

The cases cited in argument are referred to in the judgment.

Danckwerts J. The question raised by this motion is the validity of the appointment and the qualifications of the first and second defendants in the action who claim to be directors of Gordon Hotels Ltd. [His Lordship stated the facts, read section 182 of the Companies Act, 1948, and continued:] The relevant articles of the company taking them in order, are these. Article 23: "The instrument of transfer of a share shall be signed "both by the transferor and the transferee, and the transferor "shall be deemed to remain the holder of the share until the "name of the transferee is entered in the register of members in "respect thereof." Article 66 provides that if a poll be demanded in the manner mentioned in the preceding paragraph "it shall be taken at such time and place and in such manner as "the chairman shall direct, and the result of the poll shall be "deemed to be the resolution of the meeting at which the poll "was demanded. The demand for a poll may be withdrawn." Article 68, "In the case of an equality of votes, either on a show "of hands or at a poll, the chairman of the meeting shall be "entitled to a further or casting vote, in addition to the votes to "which he may be entitled as a member." Article 81 provides: "The directors may from time to time appoint any other person "to be a director, either to fill a casual vacancy or by way of "addition to the board, but so that the maximum number fixed "as above shall not be thereby exceeded." Then follows provision as to how he shall hold office. Article 83 is to be found

in a substituted article contained in a resolution passed on July 29, 1947, and is as follows: "The qualification of a director other "than a nominated director shall be the holding in his own right "of 500 ordinary shares of the company of £1 each and section "141 of the Act shall be duly complied with by every director "requiring such qualification." "Section 141 of the Act" is a reference to section 141 of the Companies Act, 1929, and it is a similar section to section 182 of the Act of 1948. Article 98 provides: "The office of a director shall be vacated . . . (c) If he "ceases to hold the number of shares required to qualify him for "office or does not acquire the same within two months after "election or appointment." It may be that in that article a distinction was being drawn between an appointment of a director, made for the purposes mentioned in article 81, by the board of directors and an election by the company at a general meeting.

The case put forward on behalf of the plaintiffs by Mr. Russell is simple. It is said that the election by the company of these two defendants to be directors took place on December 23, 1957, and that, therefore, the period within which they had to obtain that qualification expired at the latest at midnight on February 23/24, 1958, and, therefore, their registration as holders of shares on the afternoon of the 24th was too late. On the other hand, it is said on behalf of the defendants that the election took place on December 24, and, therefore, the registration on February 24 was not too late.

One point raised by Mr. Goff, on behalf of the defendants, I will mention at once as it seems to me to be quite untenable on the form of the articles. There is no doubt that the two defendants became beneficially entitled in equity to the requisite number of shares in this company at a date earlier than February 23/24, 1958; but it is plain that the qualification must relate back to what is said in article 83, that is to say, that they must *hold* the shares; and there is the provision in article 23 that the previous holder remains the holder of the shares (in effect) until the person who acquires the shares from him is placed on the register of the company. There cannot be two holders of the same shares at the same moment, and, therefore, it is plain that it means "holding" in the sense of completion of the legal title to the shares by the entry of the person in question as the holder of the shares on the company's register, and he does not become the holder until he is so registered. That seems to me to be in accordance with the decision of Astbury J. in *Spencer* v. *Kennedy*,[1] which is binding upon me, and which accords with my own view of the matter.

The other points taken by Mr. Goff, and argued by him with great ingenuity and persistence, do present much more difficulty. He points out that the result of the poll was not known, either to the company or to anybody else, until some time on December 24, 1957, that it is in accordance with common sense that the

[1] [1926] Ch. 125.

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period in which the persons had to obtain a qualification did not start to run until the result was known, and that it would be unfair if time was running before anybody knew the result of the poll. He added that the company could not be said to have elected anybody before the company itself knew what was the result of the election. So far as the argument on the question of time running is concerned, it does not seem to me to be of much weight, because there is a period mentioned in section 182 of the Act; and the argument in regard to the persons who have to acquire the shares would be equally forceful having regard to the fact that they did not actually know of their election till December 27, 1957, and it is quite impossible to contend that the time did not start to run until then. The point really is: When did the election take place? There was only one meeting on December 23, 1957, and at the conclusion of the operations on that day the chairman closed the meeting, the business was determined, and the meeting came to an end. The poll had been taken by all the votes being cast and no further votes could have been received on the 24th, though, as Mr. Goff points out with some force, if there had been a tie upon the votes taken on the poll the chairman would have been able to exercise his casting vote. Therefore, Mr. Goff says, the poll cannot be considered to be complete until it has been ascertained whether the chairman's vote is necessary or not and the result has been declared. Mr. Goff has referred me to three cases which contain observations which seem at first sight to support him in the conclusion which he seeks to draw. These are *Shaw* v. *Tati Concessions Ltd.*[2]; see the observations of Swinfen-Eady J.[3]; *Spiller* v. *Mayo (Rhodesia) Development Company*[4]; and *Jackson* v. *Hamlyn*,[5] which was a case concerning the affairs of this same somewhat stormy company. Those cases, however, were on different sets of circumstances. In the first two cases a poll had been postponed to be taken at a later date than the date of the original meeting; and in the last case the question was simply one of an adjournment; there was a motion on whether a meeting should be adjourned or not, and a poll was demanded. On a poll being taken the motion to adjourn was defeated, but this was not made known till two days after the meeting. It had been announced at the meeting that if the poll was not in favour of an adjournment another meeting would be held. Upjohn J. held that the second meeting was a continuation of the meeting which had begun on the day on which the first meeting was held. It seems to me, therefore, in those cases, that having regard to the expressions used by the learned judges, and in particular to the observations of Russell J. in the *Spiller* case,[6] the poll remained incomplete, or something of that sort, until the result of the poll was declared.

[2] [1913] 1 Ch. 292; 29 T.L.R. 261.

[3] [1913] 1 Ch. 292, 297.

[4] [1926] W.N. 78.

[5] [1953] Ch. 577; [1953] 2 W.L.R. 709; [1953] 1 All E.R. 887.

[6] [1926] W.N. 78, 79.

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HOLMES v. KEYES.

Danckwerts J.

In the present case the meeting was called on December 23 and was on no other day. It is true that the result was not ascertained till the next day, but the meeting was complete and the poll was complete, except for the declaration of the result, on December 23; and the elections of the defendants, if they were valid, took place on that day and on no other day. Consequently, time did start to run from midnight at the end of that day, December 23, and, therefore, expired at midnight on February 23, 1958; and the registration of the defendants' shares in their names on February 24 was too late.

Injunction granted until judgment or valid election or appointment of defendants as directors or further order.

Solicitors: *Basil Greenby & Co.; Alistair Thomson; A. Kramer & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

P. P.

[COURT OF APPEAL.]

BATHAVON RURAL DISTRICT COUNCIL *v.* CARLILE.

C. A.

1958 *Feb.* 10, 24.

[Plaint No. N. 661.]

Hodson and Pearce L.JJ. and Upjohn J.

Housing—Rent—Scheme by local authority—Review increasing rent—Whether operating ipso facto—Whether local authority entitled to override tenants' contractual rights without notice to quit—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 85 (6).

Landlord and Tenant — Notice to quit — Form — Time of expiry—Periodic tenancy—Weekly tenancy to Sunday midnight—Notice to quit "by noon on Monday, July 1, 1957."

The defendant became the tenant of a dwelling-house owned by the plaintiff council on a Monday in 1955 at a rent of £1 5s. 7d. It was a contractual weekly tenancy terminable by either side giving one week's notice in writing before noon on any Monday. In August, 1956, the council gave notice to the tenant by letter that they had decided to operate, as from April 1, 1957, a differential rent scheme and that the rent of the defendant's house would be increased by 12s. a week. The defendant did not pay the extra rent and the council gave him notice to quit "by noon "on Monday, the first day of July, 1957." The defendant remained in occupation and proceedings by the council for possession of the house, arrears of rent and mesne profits were dismissed by the county court. It was argued that the weekly tenancy ran from Monday to Sunday midnight. On appeal:—

Held, (1) that a review of rents under section 85 (6) of the Housing Act, 1936,[1] does not make a tenant liable, ipso facto, for

[1] Housing Act, 1936, s. 85: "(6) "The authority shall from time to "time review rents and make such "changes, either of rents generally or "of particular rents, and rebates (if "any) as circumstances may require."

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an altered rent. In the case of periodic tenancies the right of the tenant is to enter into and remain in occupation until he receives notice to quit, and until the landlord by a positive act exercises his right to terminate the tenancy the original contract persists. There is nothing in section 85 which gives the authority power to override the contractual rights and obligations of the parties, and the powers and duties of the authority can only be exercised in accordance with the general law, which required the tenancy to be determined lawfully by a notice to quit before a new tenancy at a different rent could be created.

Newell v. *Crayford Cottage Society* [1922] 1 K.B. 656; 38 T.L.R. 355 and dictum of Lord Sumner in *Kerr* v. *Bryde* [1923] A.C. 16, 31; 39 T.L.R. 61 applied.

(2) That since a notice to quit was bad if it did not expire at the proper time, which in the case of a periodic tenancy was the end of the current period, in this case Sunday midnight, the words "by "noon on" Monday rendered the notice invalid, and the appeal failed.

Dictum of Lord Campbell C.J. in *Page* v. *Moore* (1850) 15 Q.B. 684, 687 applied.

Queen's Club Garden Estates Ltd. v. *Bignell* [1924] 1 K.B. 124; 39 T.L.R. 496 considered.

Sidebotham v. *Holland* [1895] 1 Q.B. 378 distinguished.

Decision of Judge Elder Jones approved.

Appeal from Judge Elder Jones, sitting at Bath County Court.

On Monday, March 28, 1955, the defendant, T. H. Carlile, became the tenant of a dwelling-house, 53 Frederick Avenue, Peasedown, near Bath, owned by the plaintiffs, the Bathavon Rural District Council. It was a contractual weekly tenancy, the general conditions being printed on a rent card, as follows: "The rent is due in advance on Monday in each week and no "arrears will be allowed. . . . The tenancy may be terminated "by either side by the giving of one week's notice in writing "before 12 noon on any Monday." The rent was fixed at £1 5s. 7d. a week. It was not disputed that the weekly tenancy ran from Monday until Sunday midnight.

By a letter dated August 21, 1956, the council gave notice to the tenant that they had decided as from April 1, 1957, to operate a differential rent scheme and purported to increase the defendant's rent by 12s. a week as from that date. The defendant did not pay the additional rent and therefore the council served him with a notice to quit dated June 14, 1957, in the following terms: "Notice to quit, to Mr. T. H. Carlile, 53 Frederick "Avenue, Peasedown St. John. I hereby give you notice to "quit and deliver up the premises . . . by noon on Monday, the "first day of July, 1957."

The defendant continued in occupation of the house, and the council applied to the county court for an order for possession, arrears of rent and mesne profits. The order was refused, and the council appealed.

Harold Williams Q.C. and *W. M. Huntley* for the council.

R. E. Megarry Q.C. and *G. A. Forrest* for the tenant.

In addition to authorities referred to in the judgment of the court *Shelley* v. *London County Council* [2] and *Metropolitan Asylum District* v. *Hill* [3] were cited in argument.

Cur. adv. vult.

February 24. HODSON L.J. read the judgment of the court, in which he stated the facts and continued: The contention of the council was that the notice of August 21, 1956, had the effect of raising the rent of the house so as to make it recoverable in law by virtue of the Housing Act, 1936, without any variation of the terms of the contract. Section 83 (1) gives power to the authority to make such weekly charge for the tenancy or occupation of the houses as they may determine. Section 85 (5), which is no longer in force, read: "In fixing rents the authority shall "take into consideration the rents ordinarily payable by persons "of the working classes in the locality, but may grant to any "tenant such rebates from rent, subject to such terms and "conditions, as they may think fit." Section 85 (6) reads: "The "authority shall from time to time review rents and make such "changes, either of rents generally or of particular rents, and "rebates (if any) as circumstances may require"; and section 85 (7): "The authority shall make it a term of every letting that the "tenant shall not assign, sublet or otherwise part with the "possession of the premises, or any part thereof, except with "the consent in writing of the authority, and shall not give such "consent unless it is shown to their satisfaction that no payment "other than a rent which is in their opinion a reasonable rent "has been, or is to be, received by the tenant in consideration of "the assignment, subletting or other transaction."

The council relies upon the terms of section 85 (6) as giving authority to review rents so as to make the tenant liable ipso facto, once the review has been made, for an altered rent. We agree with the county court judge that this view of the Act is not tenable. In the case of periodic tenancies, the right of the tenant is to enter into and remain in occupation until he receives notice to quit; and until the landlord by a positive act exercises his right to terminate the tenancy the original contract persists. The subsection imposes a duty on the authority to review rents and make such charges as may be necessary in the interests of such authority itself and of the tenant, and also negatives the possible inference which could be drawn from the preceding subsection that rents once fixed were not open to review. It makes no provision for any form of notice, so that if the authority's contention is correct, the rent could be raised forthwith by the authority and could run at some higher figure before any notice was given to the tenant. Further, the tenant would be bound to continue at the higher rent until such time as he could give a

[2] [1949] A.C. 56; 64 T.L.R. 600; [1948] 2 All E.R. 898.

[3] (1881) 6 App.Cas. 193.

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valid notice to the landlord determining his tenancy. There is nothing in the section which gives the authority power to override the contractual rights and obligations of the parties. That the letting is contractual is not disputed and is borne out by the language of section 85 (7) which has been read. Unless Parliament has otherwise provided, the powers and duties of the authority can only be exercised in accordance with the general law, which in this matter requires the tenancy to be determined lawfully by a notice to quit before a new tenancy at a different rent can be created.

This is not the first time that a problem of this character has fallen to be decided. Under the Rent Restrictions Acts permitted increases of rent may be made, and it was decided in *Newell* v. *Crayford Cottage Society* [1] that a condition precedent to the making of such increase was the termination of an existing contract of tenancy by notice to quit. This decision was approved by the House of Lords in *Kerr* v. *Bryde*.[2] It is true that in the House of Lords opinion was divided, but the argument which caused the difficulty was based on the particular words of section 3 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which referred to the landlord's right to increase rent being dependent, not on whether he would be entitled to possession but whether he would be entitled to obtain possession. No such difficulty appears in the instant case, and the language of Lord Sumner is apt to fit the question which this court has now to consider. He said [3]: "I can find nothing "either in the language or the policy of this legislation to show "that it was intended to permit a landlord to raise a rent during "a period in which under an existing contract, however arising, "he was not entitled to do so, or was only entitled to do so "after a notice had been given and had expired. Wherever the "tenant has, for a time which is or can be made certain, the "right to hold possession at a given rent, these Acts do not seek "to take away that right." We should add that the necessity of giving a formal notice to quit in Rent Act cases is now abolished by the Rent Restrictions (Notice of Increase) Act, 1923, in cases where notice to increase rent is duly given.

The second question raised by the appeal is highly technical and depends on the validity of a notice to quit dated June 14, 1957, which is in the following terms: It is headed with the council's name, "Notice to quit, to Mr. T. H. Carlile, "53 Frederick Avenue, Peasedown St. John. I hereby give "you notice to quit and deliver up the premises known as "53 Frederick Avenue, Peasedown St. John, near Bath, by noon "on Monday, the first day of July, 1957. Dated this fourteenth "day of June, 1957" (a Friday), signed by the clerk of the council. If the notice was good, and not otherwise, the council

[1] [1922] 1 K.B. 656; 38 T.L.R. 355.
[2] [1923] A.C. 16; 39 T.L.R. 61.
[3] [1923] A.C. 16, 31.

is entitled to judgment for mesne profits as claimed from July 1, 1957, to the date of the hearing.

It was contended by the council that on the true construction of the notice, it being agreed that the tenancy ended on Sunday night and not on the Monday following, the notice expired at the same time as the tenancy notwithstanding the words "by noon "on Monday, July 1, 1957." A. L. Smith L.J. said, in *Sidebotham* v. *Holland*[4]: "It cannot be denied that the law upon "notices to quit is highly technical; but the technicalities are too "deeply rooted in our law to be now got rid of." This question depends upon such a technicality, which can be justified because a notice to quit is a unilateral act determining a tenancy without the consent of the opposite party and as such must be strictly construed. The rule of law is that a notice to quit is bad which does not expire at the proper time. The opinion of Lush J. in *Queen's Club Garden Estates Ltd.* v. *Bignell*[5] that the true view was that in any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit must expire at the end of the current period was expressly approved by the Court of Appeal in *Lemon* v. *Lardeur*.[6] It is scarcely necessary to point out that the trap laid by this technicality is commonly avoided by the addition of words to the effect that if the date mentioned is not the real date on which the period expires, then the notice to quit is to expire on the proper day of expiry next after the expiration of the current period.

The next matter to consider is whether a notice expressed to end on the day following the expiration of the period can be good. The answer is "Yes" and is to be found in *Sidebotham* v. *Holland*[7] and in a later decision of the Court of Appeal in *Crate* v. *Miller*.[8] In the former case, which concerned a yearly tenancy, Lindley L.J. delivered a judgment in which Lord Halsbury concurred, A. L. Smith L.J. doubting, but not dissenting. The tenancy there began on May 19 and a notice to quit on May 19 was held to be good, that being the anniversary of the commencement of the term. There is a passage in the judgment of Lindley L.J. which contains this language[9]: "The "validity of a notice to quit ought not to turn on the splitting "of a straw. Moreover, if hypercriticisms are to be indulged in, "a notice to quit at the first moment of the anniversary ought "to be just as good as a notice to quit on the last moment of "the day before. But such subtleties ought to be and are dis-"regarded as out of place." This passage supports the contention that the notice in this case is not rendered bad by expiring on Monday, for, as Lindley L.J. pointed out, a notice to quit on the first moment of the anniversary ought to be just as good as

[4] [1895] 1 Q.B. 379, 388; 11 T.L.R. 154.
[5] [1924] 1 K.B. 117, 124; 39 T.L.R. 496.
[6] [1946] K.B. 613, 616; 62 T.L.R. 600; [1946] 2 All E.R. 329.
[7] [1895] 1 Q.B. 383.
[8] [1947] K.B. 946; 63 T.L.R. 389; [1947] 2 All E.R. 45.
[9] [1895] 1 Q.B. 383.

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a notice to quit on the last moment of the day before, although he continued by saying that such subleties should be and were disregarded as out of place, no doubt on the principle of de minimis non curat lex. However, since the decision of this court in *Crate* v. *Miller*,[10] also the case of a weekly tenancy, it seems clear that the true explanation of this principle is not de minimis non curat lex, but that the court construes a notice given for the anniversary as a notice expiring at the first moment of the anniversary. Somervell L.J. there delivered the judgment of the court and applied the decision of *Sidebotham* v. *Holland* [11] to a weekly tenancy, holding that a weekly tenancy which begins on Saturday and ends on Friday may be determined validly by the landlord giving either a notice to quit on Friday or a notice to quit on Saturday, for in either case the notice is properly construed as a notice to quit when the current week ends, for a notice to quit on the last day of the current period and a notice to quit on the day after that day are both equally intimations that the last day of the current period is the last day of the tenancy.

The council argued upon these authorities that if notice expiring on Monday is good, it could not be rendered bad by the addition of the words "by noon." The answer is that while "Monday" without more can be construed (as the authorities show) as meaning the first moment of the day (the preceding midnight), "by noon on Monday" cannot be so construed. The council seeks to escape from this conclusion by reading the notice as if it expired at midnight and contained a licence to continue in occupation until noon of the following day: compare Salter J.'s consideration of such a possibility in the *Queen's Club Garden* case.[12] The words will not, however, bear this construction, for the words "by noon on Monday" are expressed to mark the expiration of the notice itself and there is no room for a licence to remain on the premises after the expiration of the tenancy. The Council cannot, in our judgment, avoid this conclusion by treating the words "by noon" as surplusage which can be disregarded. Such an attempt failed in *Page* v. *Moore*,[13] which was considered in *Sidebotham* v. *Holland*.[14] This was an action for double value under the Landlord and Tenant Act, 1730, s. 1, for holding over after a notice to quit. We recognize that this statute was of a penal nature and Lindley L.J., in *Sidebotham's* case,[14] treated the decision in *Page* v. *Moore* [15] as authoritative only in an action for double rent (sic, value) when it was necessary to be more particular. The tenancy was from year to year, expiring on December 25, and the notice was expressed so as to demand surrender of the premises at 12 o'clock noon on December 25, 1847. The court refused to reject the words "12 o'clock at noon" so as to make the notice good, and Lord

[10] [1947] K.B. 946.
[11] [1895] 1 Q.B. 383.
[12] [1924] 1 K.B. 117, 133.
[13] (1850) 15 Q.B. 684.
[14] [1895] 1 Q.B. 378.
[15] 15 Q.B. 684.

Campbell C.J. said [16]: "The defendant, holding as he did, was "entitled to keep possession until midnight on December 25. . . . "The defendant is told that, in the event of his not 'so surrender-"'ing,' that is at 12 noon, the plaintiff will demand rent at 7s. a "day till he can obtain possession. How can that be a demand "of possession at the time when the tenancy expires? . . . I "can see no difference between a wrong day and a wrong hour "of the day: a demand for the 24th would have been insufficient; "and this is equally so."

The language of the Lord Chief Justice applies with great force to a notice of such short duration as a week as compared with the six months' notice which he was considering. We agree with the county court judge on both points and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co. for D. M. Woodward, Bath; Knapp-Fisher, Wartnaby & Blunt for Faulkner, Creswick & Gould, Midsomer Norton, near Bath.*

A. W. G.

[16] 15 Q.B. 684, 687.

[QUEEN'S BENCH DIVISION.]

PORT LINE LTD. *v.* BEN LINE STEAMERS LTD.

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Mar. 3, 4, 5, 6, 10.
Diplock J.

[1957 P. No. 85.]

Restrictive Covenant—Chattel—Ship—Charterparty—Time charter in gross—Purchase of vessel—Whether purchaser with notice affected by charter.

Shipping — Charterparty — Sale of vessel under charter — Purchaser's notice of charter—Whether affected by it.

Shipping — Requisition — Compensation — X's bareboat charter from owners determined by requisition—Charterers' time charter with X not so determined—Whether charterers can recover compensation paid to owners for requisition period—Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 4 (3).

Contract—Frustration—Charterparty—Time charter—Requisition for three months—Ten months to run after requisition.

Judicial Precedent—Privy Council decision—How far binding—Difficulty in ascertaining ratio decidendi—Irreconcilability with well-established principles of law—Insoluble problems raised by decision.

The plaintiffs chartered a vessel on a gross time charter from Silver Line Ltd. for a period of about 30 months from March 9, 1955. In February, 1956, Silver Line sold the vessel to the defendants but they chartered by demise the vessel back to Silver Line for the unexpired period of the plaintiffs' time charter. That charterparty contained a clause providing: "If the ship be requisi-"tioned this charter shall thereupon cease." The defendants were

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unaware that the time charter between Silver Line and the plaintiffs contained no similar clause. At the end of August, 1956, the Ministry of Transport requisitioned the vessel and subsequently agreed with the defendants the rate of hire during the period of requisition which continued until November 28, 1956. During the period of requisition the plaintiffs continued to pay the charter hire to Silver Line, despite the latter's contention that the plaintiffs' time charter with them was frustrated. The plaintiffs claimed to recover from the defendants the whole or part of the compensation received by the defendants from the Crown in respect of the requisition period on the grounds, inter alia, that as there was a subsisting contract between the plaintiffs and Silver Line, the plaintiffs were entitled as against the defendants on the principle laid down in *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.* [1926] A.C. 108; 42 T.L.R. 86, to have the vessel used for the carriage of their goods; and that in any event they were entitled to recover from the defendants under the Compensation (Defence) Act, 1939, if it applied, the bareboat element of the compensation under section 4 (3) which provides: "Where, on the day on which any "compensation accrues due by virtue of paragraph (*a*) of sub-"subsection (1) of this section,"—that was the bareboat element—"a person other than the owner of the vessel . . . is, by virtue of a "subsisting charter . . . the person who would be entitled to possession, of or to use, the vessel, . . . but for the requisition, the "person to whom the compensation is paid shall be deemed to "receive it as trustee for the first mentioned person":—

Held, (1) that the requisition of the vessel which, at the time of the requisition was thought likely to, and in fact did, last about three months, did not frustrate the time charterparty between the plaintiffs and Silver Line, which at the time of derequisition still had ten months to run, and, accordingly, there was at all material times a valid and subsisting contract between the plaintiffs and Silver Line.

(2) But that the claim failed because (i) the *Strathcona* case was wrongly decided; (ii) even if it was rightly decided, the defendants did not come within its principles as they had no actual knowledge at the time of their purchase of the plaintiffs' rights under their charter; (iii) even if the defendants came within its principles (a) they were in breach of no duty to the plaintiffs since it was by no act of theirs that the vessel during the period of requisition was used inconsistently with the terms of the plaintiffs' charter—it was by act of the Crown by title paramount—and (b) the plaintiffs were not entitled to any remedy against the defendants except a right to restrain the defendants from using the vessel in a manner inconsistent with the terms of the charter.

Lord Strathcona Steamship Co. Ltd. v. *Dominion Coal Co. Ltd.* not followed.

De Mattos v. *Gibson* (1859) 4 De G. & J. 276 explained.

(3) That, although the Compensation (Defence) Act, 1939, covered the requisition and compensation was payable under it, nevertheless section 4 (3) did not constitute the defendants statutory trustees of the compensation, because although the plaintiffs, at the time when the compensation accrued due, had a subsisting contract with Silver Line, Silver Line did not have possession of the vessel and were not entitled to possession, since the requisition had determined Silver Line's charter from the defendants, and, accordingly, the plaintiffs were not entitled to any part of the compensation paid to the defendants in respect of the requisitioning period.

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ACTION.

The plaintiffs, Port Line Ltd., chartered a vessel from the then owners, Silver Line Ltd., on a gross time charter for a period of about 30 months, and they took delivery on March 9, 1955. In February, 1956, Silver Line sold the vessel to the defendants, Ben Line Steamers Ltd., and provision was made to cover the unexpired terms of the plaintiffs' time charter with Silver Line by the defendants chartering the vessel by demise to Silver Line for the unexpired term of the plaintiffs' charter. The bareboat charter between Silver Line and the defendants contained a clause providing: "If the ship be requisitioned this "charter shall thereupon cease." There was no comparable provision in the plaintiffs' gross time charter. On August 22, 1956, due to the Suez crisis, the Ministry of Transport informed the defendants that the vessel was requisitioned and it was put at the Crown's disposition on August 29. On September 10, the defendants entered into an agreement with the Ministry providing for the rates of hire during the period of requisition. Requisition continued until November 28, 1956, when the vessel was released to the defendants. It was agreed by the parties that when notice of requisition was given on August 22, a reasonable estimate of the duration of the requisition was from three to four months. During the period of requisition the plaintiffs continued to pay the charter hire to Silver Line despite the latter's contention that the plaintiffs' time charter with them was frustrated.

The plaintiffs claimed to recover the whole or part of the compensation received by the defendants from the Crown in respect of the requisition period on the grounds, inter alia, that as there was a subsisting contract between the plaintiffs and Silver Line at the material time, the plaintiffs were entitled as against the defendants on the principle laid down in *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.*[1] to have the vessel used for the carriage of their goods; that they were entitled to recover from the defendants under the Compensation (Defence) Act, 1939, if it applied, the bareboat element of the compensation under section 4 (3)[2]; alternatively, if the Act did not apply, they were entitled to a portion of the compensation in accordance with the principles laid down in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Co. Ltd.*[3]

The defendants alleged that the plaintiffs' contract with Silver Line was frustrated by the requisitioning; that the *Strathcona* case[4] was wrongly decided; that, even if rightly decided, it only

[1] [1926] A.C. 108; 42 T.L.R. 86.

[2] Compensation (Defence) Act, 1939, s. 4 (3): "Where, on the day "on which any compensation accrues "due by virtue of paragraph (*a*) of "subsection (1) of this section, a "person other than the owner of "the vessel . . . is, by virtue of a "subsisting charter or contract of "hiring, the person who would be "entitled to possession of, or to use, "the vessel . . . but for the requisi-"tion, the person to whom the com-"pensation is paid shall be deemed "to receive it as a trustee for the "first mentioned person."

[3] [1916] 2 A.C. 397; 32 T.L.R. 677.

[4] [1926] A.C. 108.

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applied where the subsequent purchaser had express notice of the terms of a subsisting charterparty, and that, in any event, it laid down no principle which entitled the plaintiffs to have the vessel used for the carriage of their goods, and imposed no obligation on the defendants to account as constructive trustees; that the Compensation (Defence) Act, 1939, applied, but gave no rights to the plaintiffs; and that the *Tamplin* case [5] apportionment was excluded by the Act of 1939, and in any event did not apply.

The facts are more fully set out in the judgment.

Eustace Roskill Q.C. and *B. J. Brooke-Smith* for the plaintiffs.

A. A. Mocatta Q.C., *Michael Kerr* and *Peter Oliver* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Admiral Shipping Co. Ltd.* v. *Weidner, Hopkins & Co.*[6]; *Countess of Warwick Steamship Co.* v. *Le Nickel S.A.*[7]; *Elliott Steam Tug Co. Ltd.* v. *Charles Duncan & Sons Ltd.*[8]; *Dominion Coal Co. Ltd.* v. *Maskinonge Steamship Co. Ltd.*[9]; *Dominion Coal Co. Ltd.* v. *The Lord Curzon Steamship Co. Ltd.*[10]; *Warner Bros. Pictures Inc.* v. *Nelson*[11]; *Lorentzen* v. *White Shipping Co. Ltd.*[12]; *Falcke* v. *Gray*[13]; *Catt* v. *Tourle*[14]; *Werderman* v *Societe Generale d'Electricite*[15]; *Taddy & Co.* v. *Sterious & Co.*[16]; *McGruther* v. *Pitcher*[17]; *Macdonald* v. *Eyles*[18]; *The Lord Strathcona*[19]; *Badische Anilin und Soda Fabrik* v. *Isler*[20]; *National Phonograph Co. of Australia Ltd.* v. *Menck*[21]; *Cox* v. *Bishop*[22]; *Smith* v. *Colbourne*[23]; *Pooley* v. *Budd*[24]; *Hudston* v. *Viney*[25] and *Jones* v. *Smith.*[26]

Shirlaw v. *Southern Foundries (1926) Ltd.*[27] was not cited in argument.

Cur. adv. vult.

March 10. Diplock J. read the following judgment: In this case the plaintiffs claim to recover from the defendants the whole or part of the compensation received by the defendants from the Crown in respect of the requisition by the Crown at the time of the Suez crisis of a vessel now known as the *Benvannoch*.

This vessel, then known as the *Silveroak*, was chartered to the

[5] [1916] 2 A.C. 397.
[6] [1916] 1 K.B. 429; [1917] 1 K.B. 222; 33 T.L.R. 70.
[7] [1918] 1 K.B. 372.
[8] (1918) 34 T.L.R. 583.
[9] [1922] 2 K.B. 132; 38 T.L.R. 591.
[10] (1922) 12 Ll.L.Rep. 490.
[11] [1937] 1 K.B. 209; 53 T.L.R. 14; [1936] 3 All E.R. 160.
[12] (1943) 74 Ll.L.Rep. 161.
[13] (1859) 4 Drew 651.
[14] (1869) 4 Ch.App. 654.
[15] (1881) 19 Ch.D. 246.
[16] [1904] 1 Ch. 354; 20 T.L.R. 102.
[17] [1904] 2 Ch. 306; 20 T.L.R. 652.
[18] [1921] 1 Ch. 631; 37 T.L.R. 187.
[19] [1925] P. 143.
[20] [1906] 1 Ch. 605; 22 T.L.R. 326.
[21] [1911] A.C. 336; 27 T.L.R. 239.
[22] (1857) 8 De G.M. & G. 815.
[23] [1914] 2 Ch. 533.
[24] (1851) 14 Beav. 34.
[25] [1921] 1 Ch. 98.
[26] (1841) 1 Hare 43.
[27] [1939] 2 K.B. 206; 55 T.L.R. 611; [1939] 2 All E.R. 113.

plaintiffs by its then owners, Silver Line Ltd., on a gross time charter dated November 5, 1954, for a period of about 30 months from February/March, 1955, at 26s. per deadweight ton per month. The charter was in the form approved by the New York Produce Exchange, and it is only necessary to note that by clause 1 the owners were to provide and pay for provisions, master and crew, and by clause 26 that nothing contained in the time charter was to be construed as a demise of the vessel to the plaintiffs. There was no provision for substituting another vessel and the off-hire clause (clause 15) does not include time lost by requisition. Delivery of the vessel took place on March 9, 1955, and redelivery was accordingly not due until about September 9, 1957.

In January, 1956, negotiations took place between Silver Line and the defendants for the sale of the vessel, by then named *Port Stephens*, to the defendants. As at that date the plaintiffs' time charter had still some 21 months to run, the original intention of Silver Line and the defendants was that the defendants should demise the vessel back to Silver Line for the period of the remainder of the plaintiffs' existing gross time charter from Silver Line, and that the approval of the plaintiffs to the arrangements for carrying out the balance of their time charter should be obtained by Silver Line.

The method of carrying this out, although there is no suggestion of bad faith on anyone's part, was in the result unfortunate. On January 30, 1956, Silver Line sent to the defendants a draft of the agreement for sale of the vessel. This draft and the final agreement for sale as executed contained the two following clauses: " 11. The vendors having committed the vessel on time-" charter to Port Line Ltd. of London for a period of $2\frac{1}{2}$ years " commencing March 9, 1955, and estimated to terminate about " September, 1957, it is hereby agreed that purchasers shall " charter the vessel to the vendors for the remaining period of " the aforesaid time-charter upon the terms and conditions of the " charterparty attached thereto such charter to commence imme-" diately on transfer of the vessel to purchasers under this " agreement . . . 13. This agreement is subject to vendors " obtaining the approval of Port Line Ltd. to the transfer of " ownership of the vessel to the purchasers and the arrangements " herein provided for the carrying out of this balance of the time-" charter to Port Line Ltd."

The draft of the bareboat charter referred to in clause 11 was being prepared by the defendants, and had not yet been submitted to Silver Line, but on February 2, 1956, Silver Line wrote to the plaintiffs a letter in the following terms: " Dear Sirs, *M.V. Port* " *Stephens*. We wish to advise you that we have agreed, subject " to your approval, to sell the above vessel to Ben Line Steamers " Ltd. A condition of the sale is that the vessel will immediately " be chartered by demise to us for the balance of her time charter " with you. Under this arrangement the management of the

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" vessel will, of course, remain entirely in our hands, and we " would greatly appreciate your formal confirmation that you are " agreeable to this arrangement. Yours faithfully, Silver Line " Ltd."

To this the plaintiffs replied on February 8 as follows: " Dear " Sirs, *M.V. Port Stephens*. We have your letter of February 2 " and are very interested to learn that you have agreed to sell " this vessel to Ben Line Steamers Ltd. We note that you have " arranged that she will be chartered on demise from Ben Line " for the balance of our time charter and we appreciate that as " far as we are concerned we shall still be dealing with your- " selves, as disponent owners, since the management of *Port* " *Stephens* will remain entirely in your hands. We would con- " firm that we have no objection to the sale of this vessel. Yours " faithfully, Port Line Ltd." In the meantime, on February 6, two days before the date of the plaintiffs' letter to Silver Line, the defendants, who had not either at this or any stage seen the terms of the plaintiffs' time charter, sent to the Silver Line Ltd. a proposed draft of the bareboat charter drawn up on the basis of a Ministry of Transport document. This draft contained a clause giving to the defendants a right by notice in writing to terminate the bareboat charter if the defendants " shall at any " time require the ship for any purpose for which British ships " registered in the United Kingdom may at that time be " requisitioned." Correspondence followed between Silver Line Ltd. and the defendants and, in particular, on February 9, 1956, the Silver Line proposed a number of minor alterations, some of which were stated to be to bring the bareboat charter in line with the plaintiffs' gross time charter. Among the alterations suggested by Silver Line (although not expressed to be to bring the bareboat charter in line with the plaintiffs' charter) was an amendment to the requisition clause to make it read as follows: " If the ship be requisitioned this charter shall thereupon expire." This amendment was accepted by the defendants on February 10, and on February 13 Silver Line Ltd. in a letter which suggested some further amendments to the bareboat charter to bring it into line with the plaintiffs' time charter, forwarded to the defendants the plaintiffs' letter of February 8 consenting to the transfer of ownership. The agreement of sale and the bareboat charter were finally signed in February 15, although backdated to February 8.

It is to be observed that the requisitioning clause in the bare- boat charter as a result of the amendment proposed by Silver Line Ltd. had the effect of automatically terminating the bareboat charter in the event of requisition of the vessel, although the plaintiffs' gross time charter contained no provision for termina- tion in that event. It is not, however, suggested that the defendants were aware of this difference in the possible duration of the bareboat charter and the plaintiffs' time charter. They never saw or asked to see the plaintiffs' time charter and it is, I think, plain from the correspondence that they relied on Silver

Line to see that the bareboat charter was in terms which would enable Silver Line to fulfil its obligations to the plaintiffs under the plaintiffs' time charter.

Mr. Roskill has suggested that a careful examination of the plaintiffs' letter of February 8 would have shown the defendants that, although it bore a date two days after the draft bareboat charter had been submitted to Silver Line, the reference in that letter to Silver Line's letter of February 2, should have aroused the defendants' suspicions that the plaintiffs had not in fact seen the proposed terms of the bareboat charter. I should be sorry to hold that commercial men had to read commercial correspondence so meticulously either in the modern sense of that adverb, or in the sense preferred by Fowler.

No doubt in February, 1956, it was not expected by any of the parties that the question of requisitioning would arise during the remaining period of the plaintiffs' gross time charter; but, unfortunately, in August the Suez crisis arose, and by a telegram dated August 22 addressed to the defendants the Ministry of Transport requisitioned the vessel and required her to be put at the Crown's disposal on completion of discharge. She was, in fact, put at the Crown's disposal at noon on August 29, 1956. It was at all times contemplated that she should be managed under requisition by the defendants, the owners, and accordingly on requisition the then crew of the vessel provided by Silver Line were discharged and a fesh crew obtained by the defendants. Silver Line had crewed the vessel with Lascars; the crew quarters were not regarded as suitable for a European crew, and the defendants provided her with a Chinese crew whom they obtained from Hong Kong at a cost of £11,724. Their reasons for so doing were partly that the defendants' officers were accustomed to Chinese crews and not to Lascars, and partly because they thought that in view of the attitude adopted by India and Pakistan in the Suez crisis it would be undesirable to have a crew who were either Moslems or Indians. I find (in case it may be relevant if this action goes further) that in all the circumstances this was a reasonable course to adopt.

On September 10 the defendants, in common with all other shipowners whose vessels were requisitioned, entered into an agreement on terms contained in a pro forma charterparty with the Ministry of Transport providing for the rates of hire and management of the vessel by the defendants during the period of requisition. Requisition in fact continued until November 28, 1956, when the vessel was released to the defendants. This was in fact a little over three months from August 22 when notice of requisitioning was given, and it is also agreed by the parties that on August 22 a reasonable estimate of the probable duration of the requisition was a period of three to four calendar months. During the period of requisition the plaintiffs continued to pay the charter hire to Silver Line despite the latter's contention that the plaintiffs' time charter with them was frustrated.

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Negotiations ensued between the plaintiffs and defendants as a result of which agreement was reached as to the future employment of the vessel without prejudice to their respective rights in respect of the period of requisition. It is with this period alone, therefore, that this action is concerned. A settlement has also been reached between the plaintiffs and Silver Line Ltd., with the result that I am not today concerned with any claims by the plaintiffs against Silver Line for breach of the plaintiffs' gross time charter with that company. The only issue which I have to determine is as to the respective rights of the plaintiffs and the defendants to the compensation or requisition hire which the defendants have received from the Crown in respect of the use of the vessel from August 29 to November 28, 1956.

The plaintiffs contend: (1) that throughout the relevant period they had a valid and subsisting contract with Silver Line Ltd.; (2) that by the virtue of that contract they were entitled, as against the defendants, on the principle laid down in *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.*[1] to have the vessel used for the carriage of their goods; (3) that they are entitled to recover from the defendants (a) under the Compensation (Defence) Act, 1939, if it applies, the whole compensation, or alternatively, the bareboat element of the compensation, received by the defendants in respect of the requisition, or (b) if the Compensation (Defence) Act, 1939, does not apply, a portion of the compensation, such portion being ascertained in accordance with the principles laid down by Lord Parker in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*[2] and applied in *Chinese Mining and Engineering Co. Ltd.* v. *Sale & Co.*[3] and other cases; or (c), as an alternative to (a) and (b), the profits made by the defendants out of the requisition of the vessel.

The defendants challenge these contentions to the polls and to the array. The plaintiffs' contract with Silver Line Ltd., they say, was frustrated by the requisition; the *Strathcona* case[4] was wrongly decided; even if rightly decided it applies only where the subsequent purchaser has express notice of the terms of a subsisting charterparty; in any event it lays down no principle which entitles the plaintiffs to have the vessel used for the carriage of their goods, and it imposes no obligation on the defendants to account as constructive trustees; the Compensation (Defence) Act, 1939, applies, but gives no rights to the plaintiffs. The *Tamplin* case[5] apportionment is excluded by the Compensation (Defence) Act, 1939, and in any event does not apply. It is conceded that if the defendants are right as to the plaintiffs' gross time charter being frustrated by the requisition, their claim must fail.

[1] [1926] A.C. 108; 42 T.L.R. 86.
[2] [1916] 2 A.C. 397; 32 T.L.R. 677.
[3] [1917] 2 K.B. 599; 33 T.L.R. 464.
[4] [1926] A.C. 108.
[5] [1916] 2 A.C. 397.

The requisition in this case took place not under any statutory powers but under the prerogative power of the Crown, a fact which is not without some relevance on the question of frustration, since the Crown's power to retain possession of ship under the prerogative extends only for such period as possession is needed for the defence of the realm, although of this the Crown is no doubt, in the absence of male fides, the sole judge. A requisition under the prerogative power is, therefore, necessarily a temporary taking of possession, although the period of possession may be lengthy. It is, however, agreed in this case that on August 22 it would have been reasonably expected that the requisition would last three to four calendar months, as in fact it did. No proclamation or Order in Council is required to entitle the Crown to exercise its prerogative power of requisition, and none had been published by August 22 when notice of requisition of the vessel was given to the defendants. In fact, however, an Order in Council, the Requisition of Ships Order, 1956, regulating the requisition of ships had been made on August 3, but was not published until August 28 when it appeared in the "London "Gazette." I shall have to look at its terms later to see what provision it makes for compensation.

Those being the circumstances, the question poses itself neatly: is a time charter for thirty months of which a little over seventeen months have expired and a little under thirteen months remain to be fulfilled frustrated by a requisition which would be expected to and does in fact last three to four months, and accordingly leaves about ten months at the end of the requisition when the vessel will be available for use in performing services under the charter? It would appear to be the fate of frustration cases when they reach the highest tribunals that either there should be agreement as to the principle but differences as to its application, or differences as to the principle but agreement as to its application. I do not propose to add to what, according to Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham Urban District Council*,[6] had already become by 1919 an anthology of phrases by venturing on any restatement of the principle myself. Lest it be thought, however, that I do not remain an unrepentant adherent of the "implied term" theory of frustration, I would add that I have carefully considered the terms of the plaintiffs' charter including in particular the "off-hire clause," and have borne in mind that at the time the charter was entered into the Compensation (Defence) Act, 1939—at which I shall have to look later—was in force, and provided in effect for the apportionment between the owner and time charterer of compensation payable by the Crown in respect of requisition.

I think, however, that whichever of the many suggested tests are applied, the result in this case is the same. Whether one applies the practical test favoured by Lord Loreburn in *Tamplin's*

[6] [1956] A.C. 696, 727; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145.

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case [7] that in the case of a time charter, if the requisition is likely to last for substantially less than the remaining period of the charterparty, the contract is not frustrated, or whether one asks oneself with Lord Dunedin in *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.*[8]: Was the interruption one which was likely to be so long as to destroy the identity of the work or service, when resumed, with the work or service interrupted?—which was Lord Sumner's favourite of his anthology in *Bank Line Ltd.* v. *Arthur Capel & Co.*,[9] the answer in this case must, I think, be that this charterparty was not frustrated. It is also the answer which Mackinnon L.J.'s "officious bystander" (see *Shirlaw* v. *Southern Foundries* (1926) *Ltd.*,[10] would I think have received at the time the contract was made had he posed the question to Silver Line and Port Line, or to two disembodied and unincorporated reasonable shipowners (see *per* Lord Radcliffe in *Davis's* case [11]) entering into a contract in similar terms.

Finally, if however reluctantly I had to ask myself the metaphorical question: "Was the basis of the contract overthrown" by the requisition—see *per* Lord Reid in *Davis's* case [12]—or less metaphorically, is the contract not wide enough to apply to the new situation,[13] my answer still would be no, and the law accordingly did not step in to terminate the contract when the vessel was requisitioned, or at any time during the requisition.

In the result I hold that at all material times there was a valid and subsisting contract between Silver Line and the plaintiffs for breach of which (if there was any breach during the period of requisition) the plaintiffs could recover damages from Silver Line. But that is a claim with which I am not concerned. What is said, however, is that by virtue of that contract the plaintiffs were entitled as against the defendants Ben Line to have the vessel used for the carriage of their goods.

The plaintiffs' charterparty with Silver Line was a gross time charter, not one by demise. It gave the plaintiffs no right of property in or to possesion of the vessel. It was one by which Silver Line agreed with the plaintiffs that for thirty months from March 9, 1955, they would render services by their servants and crew to carry the goods which were put on the vessel by the defendants. (See *per* Mackinnon L.J. in *Sea and Land Securities Ltd.* v. *William Dickinson & Co. Ltd.*[14]) By parting with their property in the vessel on February 8, 1956, and retaining a right to possession and use which terminated on its requisition, Silver Line put it out of their power to continue to perform their contractual services after the vessel was requisitioned. It is true that during the period of requisition (which is the only period with which I am concerned) Silver Line could not have performed their contractual services to the plaintiffs anyway, but

[7] [1916] 2 A.C. 397.
[8] [1918] A.C. 119; 34 T.L.R. 113.
[9] [1919] A.C. 435; 35 T.L.R. 150.
[10] [1939] 2 K.B. 206, 227; 55 T.L.R. 611; [1939] 2 All E.R. 113.
[11] [1956] A.C. 696, 728.
[12] Ibid. 719.
[13] Ibid. 721.
[14] [1942] 2 K.B. 65, 69; 58 T.L.R. 210; [1942] 1 All E.R. 503.

the plaintiffs would have been entitled under section 4 (3) of the Compensation (Defence) Act, 1939, to the bareboat element of any compensation received by Silver Line from the Crown, and would have had to pay to Silver Line a rather larger sum by way of hire under the charterparty. It would seem, therefore, that so far as the period of requisition itself is concerned, the plaintiffs would have gained rather than lost by any breach of the contract by Silver Line which relieved the plaintiffs from paying to Silver Line the chartered hire. This, however, is a matter between Silver Line and the plaintiffs with which I am not called upon to deal except insofar (if at all) as it may be relevant to the determination of the plaintiffs' rights against the defendants. There was no privity of contract between the plaintiffs and the defendants. On what ground, therefore, can they assert against the defendants all or any of the contractual rights they had against Silver Line, or any statutory rights which they would have had against Silver Line by virtue of the existence of such contractual rights?

It is contended that the plaintiffs' rights against the defendants stem from the principle laid down by Knight Bruce L.J. in *De Mattos* v. *Gibson* [15] in 1858 as approved by the Privy Council in the *Lord Strathcona* case.[16] The principle laid down by Knight Bruce L.J. in *De Mattos* v. *Gibson* [17] in granting on appeal an interlocutory injunction to restrain a mortagee of a ship who had acquired his mortgage with knowledge of the plaintiffs' subsisting charterparty from interfering with the performance of a subsisting voyage charter was in the following oft-quoted terms [18]: "Reason and justice seem to prescribe that, "at least as a general rule, where a man, by gift or purchase, "acquires property from another, with knowledge of a "previous contract, lawfully and for valuable consideration "made by him with a third person, to use and employ the "property for a particular purpose in a specified manner, the "acquirer shall not, to the material damage of the third person, "in opposition to the contract and inconsistently with it, use "and employ the property in a manner not allowable to the "giver or seller." In 1858 this was new law. In *Tulk* v. *Moxhay* [19] decided ten years before, on which Knight Bruce L.J.'s statement has been assumed to be based, Lord Cottenham's ratio decidendi was based on the retention by the covenantee of land the value of which would be diminished by breach of the covenant. Turner L.J., who sat with Knight Bruce L.J. in the interlocutory appeal in *De Mattos* v. *Gibson*,[20] gave a separate judgment which was subsequently treated as correctly propounding the questions to be determined at the trial, and expressed no concurrence with Knight Bruce L.J.'s reasons. When the action

[15] (1859) 4 De G. & J. 276.
[16] [1926] A.C. 108.
[17] 4 De G. & J. 276.
[18] Ibid. 282.
[19] (1848) 2 Ph. 774.
[20] 4 De G. & J. 276.

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came for trial before the Chancellor,[21] Lord Chelmsford L.C. did not grant an injunction. It would appear on analysis of his judgment that he treated the right to an injunction as depending on the same principle as the right to damages in *Lumley* v. *Gye*,[22] decided five years before, namely, that it is a tort knowingly to procure a breach of contract by another person.

De Mattos v. *Gibson*[23] was followed five years later with expressed reluctance by Wood V.-C. in *Messageries Imperiales* v. *Baines*[24] but I am inclined to think on the principle laid down by Lord Chelmsford L.C. rather than that laid down by Knight Bruce L.J. The broad principle as laid down by Knight Bruce L.J. applies to all species of property—real property, chattels and choses in action alike. It was applied (or at any rate treated as correct) in a number of cases relating to each of those species up to the turn of the century, but as a doctrine dependent upon notice alone was finally discredited in *London County Council* v. *Allen*.[25] Scrutton L.J. there shed a tear over its demise as respects real property, but five years later in *Barker* v. *Stickney*[26] he regarded the period of mourning as over, and his judgment conveniently lists (and so saves me from citing) the cases which he considered had buried it as respects each class of property. In 1926, however, it rose from the grave in the *Strathcona* case[27] which, being a decision of the Privy Council, is not binding upon me, but being one of a Board which included Lords Haldane, Wrenbury and Blanesburgh, in addition to Lord Shaw, is (so far as it deals with questions of equity) entitled to respect which in a common lawyer borders upon awe.

It may be relevant to note that in the *Strathcona* case[27] the buyers of the vessel subject to the time charter in favour of the plaintiffs had express notice of the terms of the charter, and had covenanted with the sellers to perform and accept all responsibilities under it. It was, as the Board said,[28] not a mere case of notice of the existence of a covenant affecting the use of the property sold, but a case of acceptance of the property expressly sub conditione. The initial emphasis on this, and the reference at a later stage to the possibility that a shipowner might declare himself a trustee of his obligations under a charterparty so as to bind his assignee might suggest as a possible ratio decidendi that the *Strathcona* case[29] was one where either the purchaser used expressions which amounted to a declaration of trust in favour of the charterers, or the vendor himself accepted the benefit of the covenant as trustee for the charterers. But an examination of the Board's opinion as a whole seems to indicate that they accepted the full doctrine of Knight Bruce L.J. as respects chattels, namely, that mere notice does give rise to the equity, the only qualification that the Board imposed being that[30] "an

[21] 4 De G. & J. 276, 288 et seq.
[22] (1853) 2 E. & B. 216.
[23] 4 De G. & J. 276.
[24] (1863) 7 L.T. 763.
[25] [1914] 3 K.B. 642.
[26] [1919] 1 K.B. 121.
[27] [1926] A.C. 108.
[28] Ibid. 116.
[29] [1926] A.C. 108.
[30] Ibid. 122.

" interest must remain " (sc. in the person seeking the remedy) " in the subject matter of the covenant before a right can be " conceded to an injunction against the violation by another of the " covenant in question." The only remedy which the Board in terms recognized is a remedy by injunction against the use of the ship by the purchaser inconsistent with the charterparty, but they said,[31] in a passage on which Mr. Roskill for the plaintiffs strongly relies, that the purchaser " appears to be plainly in the position " of a constructive trustee with obligations which a court of " equity will not permit him to violate."

These passages pose several problems: (1) If, as the Board state,[32] the ship is the " subject-matter " of the covenant of which the violation by another is to be restrained, it is difficult to see in what sense a charterer under a gross time charter has an interest in that subject-matter except in the broad sense that it is to his commercial advantage that his covenantor should continue to use the ship to perform the services which he has covenanted to perform. But the time charter is a contract for services. The time charterer has no proprietary or possessory rights in the ship, and if the covenantee's commercial advantage in the observance of the covenant is sufficient to constitute an " interest " in the chattel to which the covenant relates, it is difficult to see why the principle does not apply to price fixing cases such as *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[33] The Board[34] explain cases like *Dunlop's* case,[35] which had been cited to them, as cases where the plaintiff had no interest in the subject-matter of the contract. They say[36] that the charterer has and will have during the continuance of the charterparty " a plain interest " (in the ship) " so long as she is " fit to go to sea." Plain though it may be, if the expression " interest " is used colloquially, the Board nowhere explain what the legal nature of that interest is.

(2) Whether the reference to the subsequent purchaser with notice as being, also " plainly," in the position of a constructive trustee imports that equity provides other remedies against him by his cestui que trust, such as the right to an account, the making of a vesting order or the appointment of a new trustee is nowhere discussed in the *Strathcona* case[36]; but the whole trend of the opinion, the actual order made and the observation of the Board[37]: " It is incredible " that the owners will lay up the vessel rather than permit its " use under the contract " all strongly suggest that the only remedy in the view of the Board that the charterer acquired against the subsequent purchaser was the purely negative remedy, namely, to restrain a user of the vessel inconsistent with the terms of his charter with the former owner, and the obligations of

[31] [1926] A.C. 108, 125.
[32] Ibid. 123.
[33] [1915] A.C. 847; 31 T.L.R. 399.
[34] [1926] A.C. 108, 121.
[35] [1915] A.C. 847.
[36] [1926] A.C. 108, 123.
[37] Ibid. 125.

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the purchaser which a court of equity will not allow him to violate are the negative obligation not to make such inconsistent user of the vessel. As a "constructive trustee" the subsequent purchaser seems to be one sui generis, and I should hesitate as a common lawyer to seek to devise other remedies against him which did not apparently occur to the Board.

(3) The Board in the *Strathcona* case,[37] beyond saying that that case was not one of "mere notice," did not discuss what kind of notice to the purchaser of the charterer's rights gives rise to the equity, namely, whether at the time of his acquisition of his interest in the vessel he must have actual knowledge of the charterer's rights against the seller, the violation of which it is sought to restrain, or whether "constructive" notice" will suffice. "Reason and justice"—the sole though weighty grounds on which Knight Bruce L.J. based the equity—do not seem to me to prescribe the introduction into commercial matters such as the sale of a ship the doctrine of constructive notice. I respectfully agree with Lindley L.J.'s observations in *Manchester Trust* v. *Furness*.[38] Furthermore, as between vendor and purchaser of real property, where the doctrine has been developed, constructive notice—like estoppel in less esoteric matters—is a shield not a weapon of offence. It protects an already existing equitable interest from being defeated by a purchaser for value without notice. It is not itself the source of an equitable interest.

The *Strathcona* case,[39] although decided over thirty years ago, has never been followed in the English courts, and has never come up for direct consideration. In *Clore* v. *Theatrical Properties Ltd.*,[40] Lord Wright M.R. suggested in passing that it might be peculiar to ships, but no such suggestion is to be found in the *Strathcona* case[41] itself. In *Greenhalgh* v. *Mallard*[42] Lord Greene M.R. in a judgment concurred in by Luxmoore L.J. and Goddard L.J. was clearly of opinion that it was wrongly decided, although it is only fair to add that as recently as 1952, Denning L.J. gave it a not unfriendly passing glance in *Bendall* v. *McWhirter*.[43]

It seems, therefore, that it is in this case for the first time after more than thirty years that an English court has to grapple with the problem of what principle was really laid down in the *Strathcona* case,[44] and whether that case was rightly decided. The difficulty I have found in ascertaining its ratio decidendi, the impossibility which I find of reconciling the actual decision with well-established principles of law, the unsolved and, to me, insoluble problems which that decision raises combine to satisfy me that it was wrongly decided. I do not propose to follow it.

[37] [1926] A.C. 108, 123, 125.
[38] [1895] 2 Q.B. 539, 545.
[39] [1926] A.C. 108.
[40] [1936] 3 All E.R. 483, 490.
[41] [1926] A.C. 108.
[42] [1943] 2 All E.R. 234.
[43] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.
[44] [1926] A.C. 108.

I naturally express this opinion with great diffidence, but having reached a clear conclusion it is my duty to express it.

If I am wrong in my view that the case was wrongly decided, I am certainly averse from extending it one iota beyond that which, as I understand it, it purported to decide. In particular, I do not think that it purported to decide (1) that anything short of actual knowledge by the subsequent purchaser at the time of the purchase of the charterer's rights, the violation of which it is sought to restrain, is sufficient to give rise to the equity; (2) that the charterer has any remedy against the subsequent purchaser with notice except a right to restrain the use of the vessel by such purchaser in a manner inconsistent with the terms of the charter; (3) that the charterer has any positive right against the subsequent purchaser to have the vessel used in accordance with the terms of his charter. The third proposition follows from the second; ubi jus, ibi remedium. For failure by the subsequent purchaser to use the vessel in accordance with the terms of the charter entered into by his seller there is no remedy by specific performance as was held in the *Strathcona* case [44] itself. There is equally no remedy in damages, a consideration which distinguishes the *Strathcona* case [44] from such cases as *Lumley* v. *Wagner* [45] and *Lumley* v. *Gye*.[46] The charterer's only right is coterminous with his remedy, namely, not to have the ship used by the purchaser in violation of his charter.

I must, however, still deal with the third step in the plaintiffs' contentions since, as formulated by Mr. Roskill, they are not exclusively dependent on the correctness of the decision in the *Strathcona* case.[47] The defendants received requisition hire under the terms of the requisition charterparty entered into with the Crown. It is not now contended by the defendants that upon their entering into the pro forma (whatever that may mean) charterparty with the Crown, the vessel ceased to be under requisition: see *The Broadmayne*.[48] Curiously enough, the Order in Council of August 3, the Requisition of Ships Order, 1956, regulating the requisition, provides that the "owner" of the requisitioned vessel shall receive such payment and compensation "as "may be provided by any enactment relating to payment or "compensation in respect of the exercise of powers conferred by "this order and, in the absence of such an enactment, such pay-"ment or compensation as may be agreed . . . or, failing such "agreement, as may be determined by arbitration." Except for the reference to an enactment, this bears a close similarity to the similar clause in the Proclamation of 1914, and in this context the expression "owner" would appear to include any charterer: see *per* Lord Parker in *Tamplin's* case.[49] Since, however, Her Majesty has not yet by Order in Council declared that the original

[44] [1926] A.C. 108.
[45] (1852) 5 De G.M. & G. 604.
[46] 2 E. & B. 216.
[47] [1926] A.C. 108.
[48] [1916] P. 64; 32 T.L.R. 304.
[49] [1916] 2 A.C. 397.

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emergency which was the occasion of the passing of the Compensation (Defence) Act, 1939, has come to an end, it would appear from section 1 of that Act that it remains in force, and from the definition of emergency powers (in section 17 (1)) to include "any "power exerciseable by virtue of the prerogative of the Crown" that the Act covers the requisition of the *Port Stephens*, and that by the terms of the Order in Council regulating the requisition and by section 15 of the Act, as well as under the principle in *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*,[50] compensation is payable by the Crown in accordance with the Act, and not otherwise.

Section 4 of the Act, which deals with compensation in respect of requisition or acquisition of vessels, in subsection (1) splits the compensation into various elements of which the first in paragraph (*a*) may be conveniently described as the bareboat hire, the second in paragraph (*b*) the expenses of management if undertaken by the owner or by the person who but for the requisition would be entitled to possession of the vessel, and the fifth in paragraph (*e*) the expenses reasonably incurred for the purpose of compliance with any directions given by Her Majesty in connexion with the requisition. "Owner" is defined in section 17 (1) as the "person "entitled to sell the property, it being assumed not to be subject "to any mortgage, pledge, lien or other similar obligation." The defendants were thus clearly the "owners" of the vessel at the time of requisition. Subsection (2) provides that the bareboat element of the compensation "shall be considered as accruing due "from day to day during the period for which the vessel . . . is "requisitioned . . . and be apportionable in respect of time "accordingly, and shall be paid to the person who, at the time "when the compensation accrues due, is the owner of the "vessel . . ." Subsection (3), however, provides as follows: "Where, on the day on which any compensation accrues due by "virtue of paragraph (*a*) of subsection (1) of this section,"—that is the bareboat element—"a person other than the owner of the "vessel . . . is, by virtue of a subsisting charter or contract of "hiring, the person who would be entitled to possession of, or to "use, the vessel . . . but for the requisition, the person to whom "the compensation is paid shall be deemed to receive it as trustee "for the first mentioned person."

The plaintiffs contend that this subsection constitutes the defendants trustees for the plaintiffs of all compensation or, alternatively, the bareboat element of the compensation received by the defendants. I say no more of their claim to the whole of the compensation save that it will be still open to them to advance it to a higher and possibly more receptive tribunal than myself. I do not understand it.

Their claim to the bareboat element I do understand. It is said in the first instance, independently of the *Strathcona* principle,[51]

[50] [1920] A.C. 508; 36 T.L.R. 600, H.L.

[51] [1926] A.C. 108.

that the plaintiffs were the persons who, by virtue of a subsisting charter (namely, their gross time charter with Silver Line) would be entitled to use the vessel but for the requisition. I agree that in this context the expression " entitled to use the vessel " must include " entitled to require the person who has or is entitled to " possession of the vessel to use the vessel," for otherwise it would exclude all charterers other than charterers by demise, and since persons " entitled to possession of the vessel " are already expressly included, the words " or to use " would be otiose. But the relevant time for seeing whether the plaintiffs have any rights under the subsection is after the requisition has taken effect. At that time, although the plaintiffs had a subsisting charter from Silver Line, Silver Line had not got possession of the vessel and were not entitled to possession of the vessel, and the plaintiffs' own charter from Silver Line was not one which entitled them to use the vessel, or to require the person who had or was entitled to possession of the vessel to use it. It was by then no different from any other charter executed by someone who had no interest in the vessel. It is quite true that if the vessel had never been requisitioned, the plaintiffs would have been entitled to require the persons entitled to possession of the vessel to use it, for Silver Line's bareboat demise charter would not have determined. But the expression " but for the requisition " must in this context mean " but for the fact that the possession by the Crown under " requisition was subsisting at the time the compensation " accrued due "; and Silver Line's right to possession as against the owners of the vessel eo instanti when the vessel was requisitioned, and even if the requisition were terminated a few months afterwards, would not revive. I hold, therefore, that, so far as their claim under the subsection against the defendants as statutory trustees is advanced independently of the *Strathcona* principle,[51] it fails.

If I am right in my view that the *Strathcona* case [51] was wrongly decided, this disposes of the plaintiffs' claim under the subsection, as is also the case if I am right in thinking that the *Strathcona* case [51] (even if rightly decided) applies only in the case of actual knowledge of the subsequent purchaser at the time of the purchase of the charterer's right which in the result is violated—for it is agreed that the defendants had no actual knowledge of the terms of the plaintiffs' charter with Silver Line. But even assuming that the principle laid down in the *Strathcona* case [51] does apply, and the plaintiffs are entitled to avail themselves of it, it still does not assist them under the section, since in my view it gives the plaintiffs no positive rights against the defendants to have the vessel used in accordance with the terms of their charterparty with Silver Line. It merely gives them a right to restrain inconsistent user by the defendants, and this is not sufficient to bring them within the section as a person who by virtue of a subsisting charter would be entitled to use the vessel.

[51] [1926] A.C. 108.

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Port Line Ltd. v. Ben Line Steamers Ltd.

Diplock J.

For these reasons I think that any claim by the plaintiffs as against the defendants as statutory trustees of the compensation money under section 4 (3) of the Compensation (Defence) Act, 1939, fails.

Mr. Mocatta advanced other arguments why the plaintiffs' claim under the Act should fail, including the argument that since an agreement was reached between the defendants and the Crown as to compensation, the operation of section 4 (3) was excluded by section 15. I should be sorry to think that this particular argument was right, but it and the others that he advanced will be open to him if necessary elsewhere.

Since I have held that the compensation payable for the requisition is payable in accordance with the Act and not otherwise, the plaintiffs' alternative claim under the principles laid down by Lord Parker in *Tamplin's* case [52] does not arise. As it must be founded on some positive right to the use of the ship by application of the *Strathcona* case [53] principle, I should in any event reject it.

Finally, there is the plaintiffs' contention that independently of the Act or the *Tamplin's* case [52] principle the defendants are bound to account as constructive trustees for any profit they have made out of the requisition of the vessel. This is based on an extension of the *Strathcona* case,[53] and asserts a right to all equitable remedies against the defendants on the basis that they were constructive trustees of the vessel.

As is obvious from what I have already said, in my view this claim fails: (1) Because the *Strathcona* case [53] was wrongly decided; (2) because, even if it was rightly decided, the defendants do not come within its principles as they had no actual knowledge at the time of their purchase of the plaintiffs' rights under their charter; (3) because, even if it was rightly decided, and the defendants come within its principles (a) they were in breach of no duty to the plaintiffs since it was by no act of theirs that the vessel during the period of requisition was used inconsistently with the terms of the plaintiffs' charter—it was by act of the Crown by title paramount—and (b) the plaintiffs are not entitled to any remedy against the defendants except a right to restrain the defendants from using the vessel in a manner inconsistent with the terms of the charter.

This interesting action—in which I have been very much indebted to counsel for their clear and learned arguments—therefore fails at least so far as this court is concerned.

Judgment for the defendants.

Solicitors: *William A. Crump & Son; Holman, Fenwick & Willan.*

C. J. E.

[52] [1916] 2 A.C. 397.

[53] [1926] A.C. 108.

[COURT OF CRIMINAL APPEAL.]

REGINA *v.* GREEN.

C. C. A.

1958
Feb. 3.

Lord Goddard C.J., Hilbery, Cassels, Barry and Salmon JJ.

Criminal Law—Sentence—Probation order—Breach—Sentence of two months in a detention centre for subsequent offence — Minimum sentence three months — Illegal sentence — Whether conviction amounted to breach of probation order—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 6 (4) (*b*) (6), 8 (5).

Criminal Law—Court of Criminal Appeal—Sentence, appeal against—Breach of probation order—Jurisdiction of court—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (3).

The appellant was convicted of shop-breaking and larceny in January, 1957, and placed on probation for two years. During the currency of the probation order he was convicted of a further offence for which in October, 1957, he was sentenced to two months in a detention centre. Under section 18 of the Criminal Justice Act, 1948, the minimum sentence to a detention centre in the circumstances being three months, the Home Secretary ordered his release. The appellant was subsequently sentenced at quarter sessions under section 6 (4) (*b*) of the Act of 1948 [1] for the offence for which he was placed on probation and an order was made for Borstal training. He appealed against that sentence:—

Held, (1) that, in considering an appeal against sentence for the breach of a probation order, the Court of Criminal Appeal was not limited to a consideration of the quantum of the sentence, but had jurisdiction to consider whether there had been a breach of the order at all for which any sentence could be imposed on the appellant.

(2) That by virtue of subsection (6) of section 6 of the Act of 1948 quarter sessions could only deal with a breach of a condition imposed by the probation order and there was no power under that section which enabled the court to deal with a further offence committed during the probation period.

(3) That as, if the sentence of two months' detention had been brought before the Divisional Court by way of certiorari, that court would have quashed it, that sentence should not be allowed

[1] Criminal Justice Act, 1948, s. 6: "... (4) ... (*b*) where the probationer is brought or appears before "the court of assize or quarter sessions, and it is proved to the satisfaction of that court that he has "failed to comply with any of the "requirements of the probation order, "that court may deal with him, for "the offence in respect of which the "probation order was made, in any "manner in which the court could deal "with him if he had just been convicted before that court of that offence. "... (6) ... and without prejudice "to the provisions of section 8 of this "Act, a probationer who is convicted "of an offence committed during the "probation period shall not on that "account be liable to be dealt with "under this section for failing to "comply with any requirement of the "probation order."

S. 8 (5): "Where it is proved to the "satisfaction of the court by which "a probation order or an order for "conditional discharge was made "... that the person in whose case "that order was made has been convicted and dealt with in respect of "an offence committed during the "probation period, or during the "period of conditional discharge, as "the case may be, the court may "deal with him, for the offence for "which the order was made, in any "manner in which the court could "deal with him if he had just been "convicted by or before that court of "that offence."

[Reported by RICHARD HARTLEY, Esq., Barrister-at-Law.]

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to stand as a breach of recognizance and, accordingly, the sentence of Borstal training should be quashed.

Quaere whether the words "convicted and dealt with" in section 8 (5) of the Act of 1948 mean that justices have made some order so that they are functus officio or whether it means convicted and sentenced.

Per curiam. It was an unfortunate hiatus in the law that where a sentence has been passed by magistrates not justified by law the High Court had no power to amend the sentence but can only quash the conviction.

Appeal against sentence.

In January, 1957, the appellant, Noel Green, who was aged 19, was placed on probation for two years by the Buckinghamshire Quarter Sessions for shop-breaking and larceny. In October, 1957, he pleaded guilty before the Odiham justices sitting at Aldershot to a charge of larceny and was sentenced to be detained for two months in a detention centre. Under section 18 (1) of the Criminal Justice Act, 1948, the minimum term to which the appellant could have been ordered to be detained in the circumstances was three months, and, accordingly, the Home Secretary, while not quashing his conviction, ordered his release. In November, 1957, the Buckinghamshire Quarter Sessions held that the result of the trial before the Odiham justices was not a "conviction" within section 8 of the Act of 1948, but that, because the appellant had pleaded guilty before the justices this amounted to a breach of his recognizances within section 6 of the Act of 1948 and sentenced him to Borstal training.

Green appealed on the grounds that as the conviction could have been quashed by way of certiorari it could not used to support a breach of recognizance, and that the chairman of quarter sessions had no power to act under section 6 because certain preliminary procedure laid down in that section had not been carried out. On the appeal the Crown raised a preliminary point that the court had no jurisdiction to consider the question of breach of probation but only the quantum of the sentence.

On January 28, 1958, the Court of Criminal Appeal adjourned the appeal to a court of five judges.

J. M. Milne for the Crown. It is not in dispute that as the finding of a breach of probation is not a conviction this appeal can only be against sentence. Under section 4 (3) of the Criminal Appeal Act, 1907, the court only has power to consider the quantum of the sentence and has no jurisdiction to inquire whether the appellant was in breach of probation. The court has acted for over 50 years as if it had power to look at the breach of probation, but this point has never been taken before. An authority directly contrary to the Crown's contention is *Rex* v. *Smith* [2] where, after referring to *Rex* v. *Callaghan*,[3] in which the court expressly stated that it was not determining whether or

[2] [1925] 1 K.B. 603; 41 T.L.R. 359.

[3] (1913) 8 Cr.App.R. 185.

not there was power to consider the breach, it was held that where there was an appeal against sentence on the ground that the appellant had not broken his recognizance he was entitled to appeal against the whole of the sentence. In *Rex* v. *Pine* [4] the decision that there had been a breach of recognizance was referred to as a conviction, but this was disapproved of in *Rex* v. *David* [5] which followed *Rex* v. *Smith*.[6]

Denis Henry for the appellant. Section 4 (3) of the Act of 1907 only sets out the machinery to be followed and ought not to be construed so as to cut down the general right of appeal given by section 3 (*c*) of that Act. [*Rex* v. *Ettridge* [7] was referred to.]

As regards the appeal itself, quarter sessions had no jurisdiction to proceed under section 6 of the Criminal Justice Act, 1948, because the procedure necessary for bringing the appellant before the court had not been carried out and section 6 is only applicable to deal with breaches of conditions imposed by a probation order and does not apply where a person has been convicted for an offence. Quarter sessions were right in holding that section 8 of the Act of 1948 did not apply as the words of that section "... that the person in whose case that order was made has "been convicted and dealt with in respect of an offence com- "mitted during the probation period ..." must mean legally convicted and sentenced. The conviction was bad on the face of the record and would have been quashed on a certiorari as the court has no power to amend the conviction. [*Rex* v. *Willesden Justices, ex parte Utley* [8] and *Rex* v. *Head* [9] were referred to.]

J. M. Milne in reply. On the appeal itself it must be conceded that the decision under section 6 cannot be upheld.

LORD GODDARD C.J., delivering the judgment of the court, stated the facts and continued: Quarter sessions came to the conclusion that they would deal with the appellant under section 6 of the Criminal Justice Act, 1948, which enables the court to deal with a breach of conditions which may be imposed on a person who is put on probation. With regard to a young offender very often one of the conditions of the probation is that he shall live at a certain place or where directed by the probation officer. Sometimes a condition is imposed that he shall not live at a certain place, and there are various other terms which the court can place on a probationer and, of course, there is always the condition that he shall keep the peace. Sometimes there is a condition inserted that he shall lead an industrious life so that if he is offered work and will not take it he may be brought before the court for breach of probation, but apparently section 6

[4] (1932) 24 Cr.App.R. 10.
[5] (1939) 27 Cr.App.R. 50; [1939] 1 All E.R. 782.
[6] [1925] 1 K.B. 603; 41 T.L.R. 359.
[7] [1909] 2 K.B. 24; 25 T.L.R. 391.
[8] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.
[9] [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426.

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of the Act is meant to deal only with breaches of that description because the concluding words of subsection (6) of that section are " and without prejudice to the provisions of section 8 of this " Act, a probationer who is convicted of an offence committed " during the probation period shall not on that account be liable " to be dealt with under this section for failing to comply with " any requirement of the probation order "; so section 6 is not applicable.

Mr. Henry has quite rightly called attention to the fact that there is a certain procedure laid down under section 6 whereby the probationer has to be brought before a court of summary jurisdiction, and if the probation order was made by a court of assize or quarter sessions he has, under subsection (3) (*b*), to be committed in custody or released on bail until he can be brought or appear before the court of assize or quarter sessions. Then when he is brought before either of those courts " and it is proved " to the satisfaction of that court that he has failed to comply " with any of the requirements of the probation order, that court " may deal with him, for the offence in respect of which the " probation order was made, in any manner in which the court " could deal with him if he had just been convicted before that " court of that offence " (subs. (4) (*b*)).

Before I deal with section 8, I think the first point we have to deal with is this: Mr. Milne has addressed an interesting argument to the court whether there is any right to appeal here at all because he says there has been no conviction against which an appeal will lie, and the only possible appeal would be against the quantum of sentence when one is dealing with an appeal against sentence. But it appears from the cases which Mr. Milne has most properly brought to our attention that from a very early period of the history of this court the court has always dealt with the question whether a person brought before a court for a breach of recognizance has a right of appeal, and he has always been granted a right of appeal. One case in which the court has doubted, but the doubt was afterwards set at rest, is *Rex* v. *Smith*,[1] a judgment given by Salter J. Since that case I think it has been quite clear this court must be taken to have decided that they always have power to deal with these cases where a sentence is passed on a person who is brought before the court under the terms of a probation order or a common law recognizance and is subsequently sentenced. We think, therefore, that we should not be following the cases which have been decided if we held that there was no right of appeal.

Then what are we to do? We have said that we do not think that section 6, under which quarter sessions purported to act, applies. We do not think the attention of quarter sessions could have been called to the concluding words of subsection (6). Quarter sessions did consider section 8, and the difficulty which they felt with regard to that section is a very real difficulty. It

[1] [1925] 1 K.B. 603; 41 T.L.R. 359.

is the difficulty of using a conviction which is recognized to be bad so far as the sentence passed on that conviction is concerned to establish a ground for saying that a person had committed a breach of recognizance. The matter is put quite shortly in the appellant's notice of appeal when he says: "In September, "1957, I was charged with the stealing of a cycle and sent to "a detention centre for two months by the Aldershot magistrate. "It was later found that the minimum sentence was three "months and the offence was squashed and I was discharged "after serving only eight days. If this offence was squashed I "fail to see how I could be charged with breach of probation for "which I have received Borstal training." In other words, he is saying that the conviction for which he was brought before the court could not be used to say that he had committed a breach of probation. As I have said, the conviction in fact never was quashed, but it is quite clear that if the appellant could have been advised at the time, he would have been advised to apply for an order of certiorari to this court to bring up that conviction before the Aldershot magistrates and get it quashed, and quashed it would have been. I think it is an unfortunate hiatus in our law, and one to which the Queen's Bench Division has on more than one occasion called attention, that where a conviction by magistrates is brought before the court and where the magistrates per incuriam have passed a sentence which is not justified by law as, for instance, where they impose a fine of £10 in what they regard as a very bad case, but the statute only allows a fine of £5 to be ordered, the High Court has no power to amend. They can only look at the conviction, and, it being bad on its face, set aside. It is quite absurd, because if a man appeals against his sentence to quarter sessions, quarter sessions can put the matter right. If a man is convicted on indictment and an illegal sentence is passed, this court can put it right. It is only where a sentence is passed by magistrates and is challenged by means of certiorari that the court has no power to put it right, and I hope at no great distance of time a provision will be made in the law, though it must be made by an Act of Parliament, to give the Queen's Bench power to alter an illegal sentence which is passed to a legal sentence because otherwise the person goes unpunished.

The one thing which has given us trouble in this case is that subsection (5) of section 8 provides: "Where it is proved to the "satisfaction of the court by which a probation order or an order "for conditional discharge was made, or, if the order (being a "probation order) was made by a court of summary jurisdiction, "to the satisfaction of that court or the supervising court, that "the person in whose case that order was made has been con-"victed and dealt with in respect of an offence committed during "the probation period, or during the period of conditional dis-"charge, as the case may be, the court may deal with him, for "the offence for which the order was made, in any manner in

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"which the court could deal with him if he had just been convicted by or before that court of that offence." Those words "convicted and dealt with" cause some difficulty. It may be on their true construction that it simply means that the magistrates have made some order so that they are functus officio; or it may be said it means convicted and sentenced, and therefore dealt with. The court does not propose to resolve that difficulty, and really it is more or less academic. What we do feel is that as the sentence that was passed on the appellant by the magistrates at Aldershot could not be upheld because it was for two months instead of three months, and as for that reason the Home Secretary felt obliged to discharge him from custody, and as, if the case had been brought before the Divisional Court by certiorari they would have quashed it, we do not think on the whole we ought to allow that sentence to stand as a breach of recognizance. If it had been brought before the Queen's Bench Division the conviction would have had to be quashed, and, of course, if the conviction was quashed, then, as the appellant argues in his notice of appeal, it could not have been used to support a breach of recognizance. It is unsatisfactory, it is wholly technical, and there are no merits in the application at all, as Mr. Henry, who has appeared for the appellant and has quite properly taken every point, has admitted, but the criminal law still allows technical points to be taken and, if the technical point succeeds, the prisoner goes unpunished. In this case it may be unfortunate that the appellant, who is obviously in need of discipline and training, will have to be discharged, but this court cannot see any way in which this order can properly be upheld, and the appeal is therefore allowed and the appellant will be discharged.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; N. M. Fowler, High Wycombe.*

[COURT OF APPEAL.]

C. A.
1958
March 7.

Lord Evershed M.R., Parker and Sellers L.JJ.

In re PHOENIX TIMBER CO. LTD.'S APPLICATION.

[1957 R. No. 1543.]

Interpleader—Submission of issue to arbitration—Discretion of court to refer to arbitration—Principles of exercise—Charterparty—Arbitration clause—Issue between owners and charterers—Master's order referring issue to commercial court—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 4, 5.

A time charter of a ship provided that the owners were to have a lien on all cargoes and sub-freights belonging to the charterers for claims under it, and that all disputes arising under it should be referred to arbitration in London. The ship carried a cargo of

timber from Archangel to London. The freight amounted to some £13,000 and the owners claimed about £10,000 of that sum from the consignees of the cargo in purported exercise of their lien in respect of unpaid hire. The charterers disputed their claim. The consignees of the cargo interpleaded and paid the sum in dispute into court. The master made an order directing that the dispute between the owners and the charterers should be tried by the commercial court. The charterers appealed:—

Held, (1) that the discretion conferred on the court by section 5 of the Arbitration Act, 1950,[1] to direct that an interpleader issue shall be determined in accordance with an arbitration agreement was not an unlimited discretion to say whether the issue should be determined in accordance with the arbitration agreement or not, but that the discretion conferred by section 5 was to be exercised on similar principles to those applicable to the discretion conferred by section 4.

(2) That although the issues which had arisen might be of a nature which were particularly appropriate to be tried by the commercial court, that was not a sufficient ground for refusing to give effect to the parties' agreement to be bound by arbitration and, accordingly, the issue must be referred to arbitration.

Heyman v. *Darwins* [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337 applied.

APPEAL from Master Lawrence.

The respondents, the Compania Isla de Oro Limitada, of St. Jose, Costa Rica, were the owners of the steamship *Ange*. The appellants, V/O Sovfracht, were the charterers of the vessel under a time charter which provided, inter alia, that the owners were to have a lien upon all cargoes and sub-freights under the charter and, further, that all disputes arising under the charter-party should be referred to arbitration in London. The applicants, the Phoenix Timber Co. Ltd., were the owners of timber imported from the U.S.S.R. on the S.S. *Ange* which was discharged in London. £12,879 10s. 2d. was due from them for freight in respect of this shipment. The owners claimed a lien on that sum in respect of unpaid hire. The charterers objected to any part of the freight being paid to the owners, contending that they had themselves valid claims against the owners for breach of warranties under the charter. The applicants took out an interpleader summons under which they paid £10,538 into court.

[1] Arbitration Act, 1950, s. 4: "(1) If any party to an arbitration "agreement, . . . commences any "legal proceedings in any court "against any other party to the "agreement, . . . in respect of any "matter agreed to be referred, any "party to those legal proceedings may "at any time after appearance, and "before delivering any pleadings or "taking any other steps in the pro-"ceedings, apply to that court to stay "the proceedings, and that court or "a judge thereof, if satisfied that "there is no sufficient reason why the "matter should not be referred in "accordance with the agreement, and "that the applicant was, at the time "when the proceedings were com-"menced, and still remains, ready "and willing to do all things neces-"sary to the proper conduct of the "arbitration, may make an order "staying the proceedings."

S. 5: "Where relief by way of "interpleader is granted and it "appears to the High Court that the "claims in question are matters to "which an arbitration agreement, to "which the claimants are parties, "applies, the High Court may direct "the issue between the claimants to "be determined in accordance with "the agreement."

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The matter came before the master and he (inter alia) ordered that the issue as to the entitlement to the sum of £10,538 as between the owners and the charterers should be tried by the commercial court.

The charterers appealed on the grounds that the issue fell within the arbitration clause in the charterparty, that it was a dispute eminently suited to be tried by a commercial tribunal pursuant to that clause, that the agreement should be adhered to and further, that the master exercised his discretion wrongly in refusing to order the issue to be tried by arbitration.

The facts are more fully stated in the judgment of Lord Evershed M.R.

R. A. MacCrindle for the charterers, the appellants.
Basil Eckersley for the owners, the respondents.

The case referred to in argument was mentioned in the judgments.

LORD EVERSHED M.R. This is an appeal against an order made by the master on January 30 upon an application by way of originating summons on the part of a company, Phoenix Timber Co. Ltd., who had paid money into court.

The circumstances, quite briefly, were that the applicants, the Phoenix Timber Co. Ltd., were the consignees or receivers of a cargo of timber, which had been carried in the S.S. *Ange* from Archangel to London. The steamer was and is owned by the respondents before this court, Compania Isla de Oro Limitada, of Costa Rica, and she was voyaging under the terms of a time charter, the charterers being the appellants in this court, V/O Sovfracht, of Moscow. The actual voyage was the subject of a sub-time charter, a transaction permitted by the original charter; but for present purposes no significance attaches to that circumstance. The bills of lading had been made out on behalf of the charterers, and the sum for freight, prima facie, was, therefore, upon the discharge of the goods and delivery of the bills of lading. payable to the charterers.

Clause 17 in the time charter provides as follows: "Owners "to have a lien upon all cargoes and sub-freights belonging to the "time charterers for all claims under this charter." A number of disputes had arisen between the owners and the charterers. It was said, for example, that the steamer had not the capacity which, according to clause 28 of the charter, she was stated to have had. There was again a dispute about bunkering and the like. The result had been a refusal on the part of the charterers to pay sums which otherwise would have been due to the owners for hire.

Thus it came about that when the consignees of the timber proceeded to pay what they owed for freight amounting to some £13,000, the owners claimed a lien on that sum for £9,000 or

perhaps £10,000 in respect of unpaid hire. The actual sum has since been reduced by a payment out to £6,000 or £6,500, but to that extent it is not now in doubt that there is a series of issues between owners and charterers which arise under the terms of the contract of charter—that is to say, whether there is a valid claim by the charterers against the owners for breach of warranties or other terms of the charter, on the one side, and, on the other, a claim for unpaid hire.

The charter contains an arbitration provision in these terms: "Any dispute arising under this charterparty shall be referred to "arbitration in London. One arbitrator to be nominated by the "owners and the other by the charterers," with provisions in ordinary form for appointment of an umpire. The disputes between the owners and the charterers are admittedly disputes arising under the charterparty.

When the matter was before the master it was upon the application of the consignees, but in the ordinary course he called upon the two contestants to say, aye or no, whether they claimed this money. So far as the owners are concerned, as Mr. Eckersley informed us, their answer to that question was: Yes, they did, subject to the claim which they did not attempt to deny or conceal that, as to some part of it, there was an issue, the solution of which would or might seriously affect the quantum which the owners could recover by way of the alleged lien. Equally, on the part of the charterers an affirmative answer was given to the question: did they lay claim to this money? But Mr. MacCrindle has made it clear that since this was an interpleader proceeding on the initiative of a third party, he was conscious that he must not prejudice the position which he desired to take under the charterparty (namely, that this claim was subject to the arbitration clause) by doing something which might otherwise be regarded as equivalent to taking a step in the action, and he informed us, therefore, that though he did put the point that he claimed the sum, and, indeed, alleged that the lien was not one which could be asserted against him, he submitted that the issue which arose was one within the arbitration clause and which should accordingly be referred by the parties to arbitration.

We were told that the hearing before the master took half an hour, and that by far the greater part of that time was spent in looking into the terms of the contract and seeing how the dispute arose, and so on, and that the question whether this matter should go to arbitration or be referred to the arbitrament of the commercial court was dealt with somewhat briefly at the end. As Sellers L.J. pointed out, on the face of it this dispute is of a kind eminently suited for trial in the commercial court, and the advantages of despatch and economy of procedure as well as costs in that court may perhaps not always be sufficiently appreciated. It remains the fact that these parties, when they made their bargain, included as part of it the arbitration clause.

The question, therefore, is, in brief, should they now be held

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to that part of the bargain or should this matter be determined by the court notwithstanding the bargain? The question is dealt with expressly by section 5 of the Arbitration Act, 1950: "Where "relief by way of interpleader is granted and it appears to the "High Court that the claims in question are matters to which "an arbitration agreement, to which the claimants are parties, "applies, the High Court may direct the issue between the "claimants to be determined in accordance with the agreement." On the face of it that would appear to give an unlimited discretion to the High Court to say whether, in all the circumstances of the case, the issue should be determined in accordance with the arbitration clause or not. Although that section re-enacts the section in the Act of 1934, there appears to be no authority which serves as a guide to the meaning of the discretion in that section. But a somewhat similar discretion is enshrined in the preceding section 4 (1) which provides: "If any party to an arbitration "agreement, or any person claiming through or under him, com- "mences any legal procedings in any court against any other "party to the agreement, or any person claiming through or "under him, in respect of any matter agreed to be referred," then any party before taking any steps may apply to stay and the court or judge "if satisfied that there is no sufficient reason why "the matter should not be referred in accordance with the agree- "ment, and that the applicant was, at the time when the "proceedings were commenced, and still remains, ready and "willing to do all things necessary to the proper conduct of the "arbitration, may make an order staying the proceedings"

There, again, the power of the court is expressed as a discretion, but as regards that discretion there is the highest authority as to its significance. We have been referred by Mr. MacCrindle to *Heyman* v. *Darwins Ltd.*[1] There the question arose under the corresponding section of the Act of 1889 and there is admittedly no relevant difference in language between that section and the present. In that case Cassels J. at first instance had thought that the issues which had arisen between the parties were of a nature which made it particularly appropriate and economically beneficial that the matter should be tried in the commercial court. Lord Wright said this[2]: "The judge in this "case, like the master, has carefully set out his reasons in "writing. His view in effect is that the broad issue is a question "of law, apparently not so much on the construction of the con- "tract as on that of the correspondence, whether in law or in fact "or in both there has been a repudiation. In my opinion, these "reasons are not sufficient to justify staying the action.", and Lord Porter in his speech and the other noble Lords gave similar reasons for the view which the House took.

It must, therefore, be taken that in a case under section 4 the mere fact that the dispute is of a nature eminently suitable for

[1] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[2] [1942] A.C. 356, 388.

trial in court is not a sufficient ground for refusing to give effect to what the parties have by contract agreed. It is quite true, as Mr. Eckersley observed, that in section 4 some guide to a conclusion is given by the parliamentary language; for the section speaks of the court being "satisfied that there is no sufficient "reason why the matter should not be referred in accordance "with the agreement," words which are not repeated in section 5. But the absence of any repetition in section 5 does not persuade me that the discretion in section 5 is to be exercised for some different, still less some opposite, reason. In my judgment the discretion in section 5 is to be exercised on similar grounds as the discretion in section 4. After all, section 5 is only dealing with a different procedural occasion in which an issue arises which has been previously the subject of an arbitration contract. There seems to be no ground of principle why there should be a different basis for deciding that question in the one case from that to be applied in the other. I, therefore, think that the principles which were laid down in *Heyman* v. *Darwins Ltd.*[2] for application under section 4 ought also to be applied in a case, such as this, under section 5.

In those circumstances I think, with all respect to him, that the master erred in directing, as he did, that this issue should be tried in the commercial court and should not be referred to arbitration. In fairness to him, I think that it is plain from what has been said that this matter was rather left as a kind of postcript to the main part of the argument, and I have no doubt, therefore, that his attention was not fully directed to the matter as ours has been in this court. Had it been so directed, it is highly probable that he would have taken the view that, however suitable for trial in the commercial court, still the bargain should be adhered to. I am also satisfied that nothing that the parties here did before the master in any way forfeits or qualifies their right now to ask that effect should be given to the contract.

In those circumstances, I have come to the conclusion that this order should be, so far as necessary, varied so as to direct that the issue between the two parties should be referred in accordance with their contract to the arbitration provided by the time charter.

PARKER L.J. I agree, and I would only add this. I think it is plain that if the owners in this case had started proceedings in the High Court to re-claim the sum now in dispute, and the time charterers had applied for a stay, it would have been granted. The owners, on whom the onus would rest to show there were good reasons why the court should deal with it rather than the tribunal agreed upon between the parties, would be completely unable to put up any good ground for opposing the stay. In those circumstances, it does seem to me surprising if, as is suggested, different principles apply when instead of the owners

[2] [1942] A.C. 356, 388.

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taking proceedings the issue is started in interpleader proceedings. It seems to me it cannot in principle matter how the question whether there is to be arbitration or not comes before the court.

Mr. Eckersley has stressed the different wording in section 5 of the Arbitration Act, 1950, as compared with section 4, and it is suggested that section 5 gives the master a much wider discretion. It seems to me, however, following as it does directly after section 4, that the same principles apply, and indeed I take it to be the law that where this court has power to interfere with what parties have agreed, they will not do so except for good reasons shown. Lord Porter said in *Heyman* v. *Darwins Ltd.*,[3] to which my Lord has referred in connexion with an application under section 4[4]: "The parties have chosen to refer their differences to arbitration, and to arbitration they should go in the ordinary course unless there is some good reason to the contrary."

Accordingly I feel in this case that there was no evidence on which the master could exercise his discretion in the way he did and I would allow the appeal.

Sellers L.J. I agree, reluctantly but without doubt. Reluctantly because I think the master was right when he said this was a very proper and suitable case to try before the commercial court, but without doubt because I can see no ground to justify a refusal to stay the action or in effect to make the order that the parties should not be bound by their agreement to arbitrate.

I agree with my Lords in their interpretation of section 5 of the Act.

Appeal allowed.

Solicitors: *Middleton Lewis & Co.; Constant & Constant.*

B. A. B.

[3] [1942] A.C. 356. [4] Ibid. 391.

[COURT OF APPEAL.]

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[Plaint No. 669.]

Landlord and Tenant—Rent restriction—Premises within the Acts—Shop—Business premises with living accommodation above—Whether let as a separate dwelling—Sitting tenant in residential part at time of lease—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 1, 12 (2) *and* 14—*Rent and Mortgage Interest (Restrictions) Amendment Act*,

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1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 16—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 (1) *and* (3).

In July, 1947, the plaintiffs purchased the freehold of premises consisting of a shop and residential accommodation, subject to a lease which was due to expire in June, 1956, at a rent which at the material time was £90 per annum. D., the lessee, who carried on business in the shop, sublet, with the plaintiffs' consent, the residential part of the premises to M. at an inclusive rent of £1 a week. In February, 1955, D. sold the goodwill of her business to the defendant company, subject to her being able to obtain from the plaintiffs a new lease for 15½ years at a rent of £325 per annum. That condition was fulfilled, and on May 4, 1955, D. surrendered her old lease and was granted by the plaintiffs a new lease, which she assigned to the defendants with the consent of the plaintiffs, M. continuing in occupation of the residential part of the premises. In September, 1956, the defendant company claimed that the premises were subject to the control of the Rent Acts and that they were entitled to be repaid the difference between the standard rent of £90 and the rent of £325. The plaintiffs brought proceedings in the county court claiming arrears of rent, and the defendants counterclaimed the return of excess rent allegedly paid:—

Held, that by virtue of section 3 (3) of the Act of 1939, the premises were let as a separate dwelling-house, notwithstanding that, subject to M.'s sitting tenancy, they were let as business premises, for the only relevance of the fact that at the time of the demise the residential part of the premises was occupied by a sitting tenant was that, in this case, it afforded conclusive evidence of the intention of the parties as to the residential purpose for which that part of the premises would be used; accordingly, the defendants were liable only for the standard rent of £90 a year.

Dicta of Jenkins L.J. in *Levermore* v. *Jobey* [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362, and of Evershed L.J. in *Wolfe* v. *Hogan* [1949] 2 K.B. 194; [1949] 1 All E.R. 570 applied.

APPEAL from Judge Rawlins, sitting at Reading County Court.

In July, 1947, the plaintiffs, the British Land Co., Ltd., purchased the freehold of 14 High Street, Godalming, Surrey, subject to and with the benefit of a lease of the same for a term of years, which was due to expire on June 24, 1956, at a rising rent which at all material times was £90 per annum. At the time of this purchase the lessee (an assign of the original lessee) was a Miss Daniels, who carried on upon the shop part of the premises the business of a ladies' outfitter. The ground floor of the premises consisted of a shop, and at the back residential accommodation (consisting of a kitchen, bathroom and water closet) to which there was a connecting door. On the first floor there was a living room and three bedrooms, reached by a staircase from the residential part of the ground floor. The residential part of the premises was let to a subtenant who went out of possession in or before 1952.

On Feb. 2, 1953, Miss Daniels, with the consent of the plaintiff company, let the residential part of the premises to Miss Emily Medland on a weekly tenancy at an inclusive rent of £1 per week. Miss Medland was still in occupation as a contractual tenant upon the terms of that tenancy. By an agreement in

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writing dated February 10, 1955, Miss Daniels agreed to sell to the defendant company, Herbert Silver (Menswear) Ltd., the goodwill of her business, and certain fixtures and fittings, for the sum of £1,685. The agreement was expressed to be conditional upon Miss Daniels obtaining from the plaintiff company a new lease of the premises at a rent of £325 per annum for a term of 15½ years from December 25, 1954. That condition was fulfilled, the existing lease was surrendered, and on May 4, 1955, the plaintiff company granted a new lease to Miss Daniels. On June 25, 1955, Miss Daniels assigned that lease to the defendant company in accordance with the agreement of February 10, 1955, with the written consent of the plaintiff company.

In the above circumstances the defendant company on September 19, 1956, wrote to the plaintiff company claiming that the premises were subject to the Rent Restriction Acts and that it was entitled to be repaid the difference between the rent of £325 and the standard rent, or to set off the excess against future rent. The defendant company refused to pay more than the standard rent and on March 8, 1957, the plaintiff company issued a plaint in the Reading County Court claiming arrears of rent due by the terms of the lease. The defendant company counter-claimed for rent alleged to be overpaid.

The county court judge decided that the premises were within the protection of the Rent Restrictions Acts and he ordered repayment of rent paid in excess of the standard rent.

The plaintiff company appealed.

R. E. Megarry Q.C. and *P. V. Baker* for the plaintiffs.
G. G. Baker Q.C. and *Roger Willis* for the defendants.

In addition to the authorities referred to in the judgment the following cases were cited in argument: *Signy* v. *Abbey National Building Society* [1]; *Wheeler* v. *Wirral Estates* [2]; *Stagg* v. *Brickett* [3]; *Macmillan & Co.* v. *Rees* [4]; *Court* v. *Robinson* [5]; *Mitchell* v. *Barnes* [6]; *Haskins* v. *Lewis* [7]; *Morleys (Birmingham) Ltd.* v. *Slater* [8]; *Shooter* v. *Gaitley* [9]; *Hyman* v. *Stewart* [10]; *Fordree* v. *Barrell* [11]; *Brown* v. *Prestwick.* [12]

Cur. adv. vult.

March 6. HODSON L.J. The judgment of the court will be read by Upjohn J.

[1] [1944] K.B. 449; [1944] 1 All E.R. 448.
[2] [1935] 1 K.B. 294, 297 et seq.; 51 T.L.R. 73.
[3] [1951] 1 K.B. 648; [1951] 1 T.L.R. 82; [1951] 1 All E.R. 152.
[4] 62 T.L.R. 331; [1946] 1 All E.R. 675.
[5] [1951] 2 K.B. 60; [1951] 1 All E.R. 209.
[6] [1950] 1 K.B. 448; 65 T.L.R. 734; [1949] 2 All E.R. 719.
[7] [1931] 2 K.B. 1; 47 T.L.R. 195.
[8] [1950] 1 K.B. 506; 66 T.L.R. (Pt. 1) 483; [1950] 1 All E.R. 331.
[9] (1935) 80 S.J. 74.
[10] [1925] 2 K.B. 702; 41 T.L.R. 501.
[11] [1931] 2 K.B. 257.
[12] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

UPJOHN J. This is an appeal from the judgment delivered on November 11, 1957, by Judge Rawlins at Reading, deciding in favour of the defendants, that certain premises were within the protection of the Rent Restrictions Acts, and he ordered repayment of rent paid in excess of the standard rent.

[His Lordship stated the facts as set out above and continued:] The condition under which the defendants agreed to purchase the goodwill of Miss Daniels's business was fulfilled; the existing lease was surrendered and on May 4, 1955, the plaintiff company granted a new lease to Miss Daniels. Clause 1 was, so far as relevant, in these terms: "1. In consideration "of the rents hereinafter reserved and of the covenants on the "part of the lessee hereinafter contained the company hereby "demise unto the lessee all that messuage or shop and premises "situate and being number 14 High Street Godalming in the "County of Surrey as the same is in the occupation of the "lessee." Then followed certain exceptions and reservations, and the clause continued: "To hold the premises hereby demised "unto the lessee from December 25, 1954, for the term of fifteen "years and six months of another year yielding and paying there-"for during the said term yearly and proportionately for any "fraction of a year the rent of £325 such rent to be paid without "any deduction except for landlord's property tax by equal "quarterly instalments in advance on the usual quarter days the "first of such instalments to become due and payable on the "signing hereof." Clause 2 contained a number of repairing and other covenants, and subclause (21) contained certain covenants restrictive of user but, as it has not been suggested that, in the circumstances mentioned in a moment, it prohibits the lessee or her subtenants from using the residential part as living accommodation, we need not read it.

It is at once obvious that the subject-matter of the demise of May 4, 1955, was not free from ambiguity, and the plaintiff company in fact pleaded that the residential part of the premises in the occupation of Miss Medland was not included in the demise. That plea was, however, abandoned before the county court judge, and counsel for the plaintiff company concedes that the demise did include the residential part of the premises subject to and with the benefit of Miss Medland's weekly tenancy, and the lease must either be so construed or, alternatively, for the purposes of this case, be rectified accordingly. That, however, is without prejudice to the question—should it ever arise—whether as against the plaintiff company Miss Medland is entitled to the protection of the Rent Restrictions Acts. Clearly she is so entitled as against Miss Daniels and her successors in title, the defendant company.

The transaction into which the defendant company entered was from start to finish a business transaction with no doubt the rent of £325 negotiated principally upon the suitability of the site as business premises, but having regard to the profit rental of

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£52 per annum, yet on September 19, 1956, the company wrote claiming that the premises were subject to the Rent Restrictions Acts and that it was entitled to be repaid the difference between the rent of £325 and the standard rent or to set off the excess against future rent. The defendant company's claim is utterly without any merit, but it is entitled to take the point and, if established, to relief accordingly. The defendant company refused to pay more than the standard rent, so on March 8, 1957, the plaintiff company issued a plaint in the county court claiming arrears of rent due by the terms of the lease; and the defendant company counterclaimed for rent allegedly overpaid.

The parties have either agreed, or it is conceded, that (1) if the demised premises were rent controlled they were first controlled by the Rent Restriction Act of 1939, and the standard rent for the purposes of the Acts is £90 per annum; (2) that at all material times the rateable value of the demised premises was £66; and (3) that so far as the future is concerned the demised premises will in any event become decontrolled by the Rent Act, 1957. There is, therefore, no issue before the court upon the figures.

We must now refer to some sections of the Rent Restrictions Acts. The defendant company's claim depends on section 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which, as amended by the Rent and Mortgage Interest (Restrictions) Act, 1939, and omitting references to mortgage interest, is as follows: "Subject to the provisions of this Act "where the rent of any dwelling-house to which this Act applies ". . . has been since September 1, 1939, or is hereafter increased "then if the increased rent exceeds the standard rent by more "than the amount permitted under this Act . . . the amount of "such excess shall notwithstanding any agreement to the con-"trary be irrecoverable from the tenant." Section 12 (2) so far as relevant is in these terms: "This Act shall apply to a "house let as a separate dwelling where either the annual amount "of the standard rent or the rateable value does not exceed . . . "(*c*) elsewhere, £78, and every such house or part of a house "shall be deemed to be a dwelling-house to which this Act "applies." By section 14 of the Act of 1920 sums which are irrecoverable by virtue of the Act if paid may be recovered from the landlord or deducted from any rent payable by the tenant. Section 16 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, further defined "dwelling-house" in these terms: "Dwelling-house has the same meaning as in the "principal Acts that is to say a house let as a separate dwelling "or a part of a house being a part so let."

The last Act to which we must refer is the Rent and Mortgage Interest (Restrictions) Act, 1939. Section 3 (1) applied the Rent Acts to every dwelling-house outside London or Scotland where the rateable value did not exceed £75. Section 3 (3) is important and is so far as relevant in these terms: ". . . the application

" of the principal Acts by virtue of this section to any dwelling-" house shall not be excluded by reason only that part of the " premises is used as a shop or office or for business, trade or pro-" fessional purposes."

The question which has to be answered is really a very short one. Bearing in mind section 3 (3) of the Act of 1939, can these premises be properly described for the purposes of the Rent Acts as a house let as a separate dwelling or part of a house being a part so let?

Mr. Megarry, for the plaintiff company, argued that this letting could not properly be regarded as a letting of premises as a dwelling-house at all. The lease to Miss Daniels was essentially a lease of business premises. He illustrated his point in this way. Any estate agent, he said, wanting to introduce a purchaser to the property would seek out some one interested in business premises and business premises only. He would offer them as such adding that there was £1 a week coming in as the rent of controlled premises. The rent to be paid, he argued, would be negotiated solely in relation to the business part of the premises bearing in mind that it was producing an income of £52 per annum. No one, he submitted, could regard such a letting as the letting of premises " as a separate dwelling-house." Indeed, he contended that no one could sensibly say that it was a letting of a dwelling-house as such when in fact the premises were already let to a separate residential tenant.

As we understand Mr. Megarry's argument, it essentially depends upon the fact that in this case there was a sitting tenant in rent-controlled premises at the time of the lease. He concedes that if at the date of the lease the residential part of the premises had been vacant, leaving it open to the defendant company to instal a manager there, or with the consent of the plaintiff company to sublet that accommodation, he could not escape the conclusion that the premises would be properly described as premises let as a separate dwelling-house and, therefore, subject to control. That was expressly decided in this court on November 12, 1956, in *Rofe* v. *Sidney Macfarlane Ltd.*[1]

Mr. Baker, for the defendant company, submitted that you must look at the actual facts and see for what purpose as to user the premises were let. You find that, construing the lease in the manner already mentioned, in this case a letting of property " as a separate dwelling " for the parties contemplated continued user of the residential part of the premises as such. It cannot matter, he submitted, whether there was a sitting tenant or not. You cannot change the nature of the letting or of the premises merely because a tenant is already in occupation. He further submitted that this case was covered by the decision of this court in *Anspach* v. *Charlton Shipping Co.*[2] He pointed out (and in our judgment it must be taken as clearly settled by authority

[1] C.A., May, 1956 (unreported).

[2] [1955] 2 Q.B. 21; [1955] 2 W.L.R. 601; [1955] 1 All E.R. 693.

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binding on this court) that, so far as the Rent Restrictions Acts affect the recovery of rent due under a contractual tenancy, they apply as well to the case when a company is the tenant as to the case of an individual, although the company is incapable of enjoying personal occupation, but can only do so through its servants, agents, licensees or subtenants: *Carter* v. *S.U. Carburetter Co.*[3]; *Anspach* v. *Charlton Shipping Co.*[4] That, in our judgment, is indeed only one example of the wider proposition that to secure the protection of the Acts during the subsistence of a contractual tenancy it is not necessary to show that the tenant either intended to occupy or in fact occupied the premises personally: *Ebner* v. *Lascelles*[5]; *Whitty* v. *Scott Russell.*[6]

There was some discussion before us as to the moment of time at which the issue whether the premises are let as a separate dwelling-house must be decided. When suing for rent unpaid or for excess rent overpaid, the latest time would seem to be the date of the issue of the plaint when the cause of action must have accrued. It is quite different from a claim for possession. As there has been no change in the circumstances between the letting in 1955 and the issue of the plaint in 1957, it seems unnecessary to say more on this subject.

A long line of authorities, for the most part in this court, has established that on the issue whether the premises are let as a separate dwelling you must look to the bargain made between the parties and see for what purpose the parties intended the premises would be used. The first place to ascertain their intentions is in the lease itself. If that does not provide an answer, you look to all the surrounding circumstances and see what must have been in the contemplation of the parties; if that yields no solution you must look to the nature of the premises and the actual user at the relevant time. All the earlier authorities have been very recently reviewed in this court by Jenkins L.J. in *Levermore* v. *Jobey*,[7] and we do not propose to refer to them again, but will content ourselves with one sentence from Mr. Megarry's book on the Rent Acts, which was approved by Evershed L.J. in *Wolfe* v. *Hogan*[8]: "Where the terms of the tenancy "provide for or contemplate the use of the premises for some "particular purpose, that purpose is the essential factor, not the "nature of the premises or the actual use made of them." This part of the judgment of Evershed L.J. was quoted by Jenkins L.J. with approval in *Levermore* v. *Jobey*,[9] and the quotation from Mr. Megarry's book has been approved on at least two other occasions in this court: see The Rent Acts, by Megarry, 8th ed., p. 58.

Applying that test to this letting, it seems clear that there

[3] [1942] 2 K.B. 288; 58 T.L.R. 348; [1942] 2 All E.R. 228.
[4] [1955] 2 Q.B. 21.
[5] [1928] 2 K.B. 486.
[6] [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884.
[7] [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362.
[8] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.
[9] [1956] 1 W.L.R. 697.

can only be one answer. The demised premises included the residential part of the premises; the lease (construing it, as admittedly it must be construed, as subject to and with the benefit of Miss Medland's tenancy) plainly contemplated that such part would be used as a separate dwelling-house. Bearing in mind section 3 (3) of the Act of 1939, that provides an affirmative answer to the question: Were the premises let as a separate dwelling-house?

In our judgment, the only relevance of the fact that at the time of the demise the residential part of the premises was occupied by a sitting tenant on a rent-controlled tenancy is that in this case it affords conclusive evidence as to the intentions of the parties. It is otherwise irrelevant.

No doubt the parties reasonably regarded the arrangements made in 1955 between the plaintiff company, Miss Daniels and the defendant company as a purely business transaction relating to business premises with the benefit of a rent-controlled tenancy bringing in £52. The plaintiffs' argument, however, overlooks the point that the transaction in fact involved the demise of a dwelling-house, albeit with the benefit of a sub-demise, with the intention that it should be used as such. We agree with the county court judge when he said in reference to Mr. Megarry's argument that " the fact that the defendants had no immediate " right to the residential portion of the premises does not prevent " the premises from being let as a dwelling-house."

We agree with Mr. Megarry that *Anspach* v. *Charlton Steam Shipping Co.*[10] does not cover this case, because, as the county court judge pointed out in his judgment, it was a decision on section 12 (1) of the Act of 1920 made upon an application to fix the standard rent. It has been settled by the House of Lords that the standard rent may be fixed by reference to rent paid when the premises are not controlled: *Capital and Provincial Property Trust* v. *Rice.*[11]

Nevertheless, in view of Mr. Megarry's argument, some of the observations of Denning L.J. in the *Anspach* case[12] are of some persuasive force. In that case certain premises were subject to an existing furnished tenancy in 1940. The owners granted a five years' lease of the flat subject to and with the benefit of the furnished tenancy to a property company. Denning L.J. said[13]: " Mr. Blundell's third point was that the lease in 1940 " was in its nature a letting for business purposes. It was a " business transaction not within the Acts. I cannot agree. The " lease was a letting of a dwelling-house as a separate dwelling, " and it is not deprived of that character simply because the " lessee was a limited company who could only occupy by servants " or agents or by subtenants. This is in accord with the view

[10] [1955] 2 Q.B. 21.
[11] [1952] A.C. 142; [1951] 2 T.L.R. 557; [1951] 2 All E.R. 600.
[12] [1955] 2 Q.B. 21.
[13] Ibid. 27.

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" expressed by Bailhache J. in *Prout* v. *Hunter*,[14] by Charles J. " in *Ebner* v. *Lascelles*,[15] and it is implicit in *Carter* v. *S.U. Carburetter Co. Ltd.*[16] "

In our judgment the county court judge reached a perfectly correct conclusion and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Russell, Sons & Bass; Cunliffe & Mossman for Hewett & Pim, Reading.*

A. W. G.

[14] [1924] 2 K.B. 736; 40 T.L.R. 868.
[15] [1928] 2 K.B. 486; 44 T.L.R. 460.
[16] [1942] 2 K.B. 288.

[Queen's Bench Division.]

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ADAMS and Others *v.* NATIONAL BANK OF GREECE AND ATHENS S.A.
PRUDENTIAL ASSURANCE CO. LTD. and Others *v.* SAME.

[1956 A. N. No. 1802. 1957 P. No. 982.]

Conflict of Laws—Foreign legislation—Foreign bank liable on English debt—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank "universal "successor" to rights and liabilities of former banks—Creditors' rights vested in English law—Subsequent foreign amending legislation retrospectively excepting obligation on English debt from universal succession—Whether a law governing succession or status—Whether confiscatory or discriminatory—Right of creditor to sue new bank.

Conflict of Laws—Succession—Corporation—Retrospective foreign legislation—Conflict of Laws—Confiscatory or political legislation. Conflict of Laws—Foreign legislation—Comity.

In 1927 a Greek mortgage bank issued sterling mortgage bonds repayable as to principal in 1957 with interest thereon meanwhile. The bonds were unconditionally guaranteed as to principal and interest by another Greek bank, and the proper law of the bonds and of the ancillary contract of guarantee was English law. In 1953 by an Act of the Government of Greece and by royal decree the guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company, the defendant company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies. In *National Bank of Greece and Athens S.A.* v. *Metliss* (*post*) (proceedings instituted in December, 1955, by a bondholder claiming arrears of interest against the defendants), it was held that the English courts would give effect to that decree as transferring to the defendants the liabilities of the guarantor bank. On July 16, 1956, the Greek Government passed a legislative decree amending the law and decree of 1953 so that the defendant

company, as from the time of its creation, became the universal successor to the rights and obligations of the companies amalgamated "except for the obligation to which such companies were liable "whether as principal or guarantor . . . under bonds payable . . . "in gold or foreign currency, issued by limited liability companies." Under Greek law that decree had a retrospective effect and absolved the defendants from the obligations of the original guarantor bank in respect of the bonds.

On dates subsequent to July 16, 1956, a number of bondholders presented for payment coupons covering certain arrears of interest due under the bonds. Payment was refused by the mortgage bank and by the defendants. In an action by the bondholders against the defendants as guarantors under the bonds in which the defendants relied on the Greek decree of 1956 as a decree governing status which the English courts would recognize and the bondholders contended that that decree was a confiscatory or discriminatory foreign law to which English law would refuse to give effect:—

Held, that the decree of 1956 was not a law of succession or a law relating to capacity or status, but was in substance a law relating to the discharge of liabilities and altered rights which had vested in English law and as such was not, under English rules of private international law, effective to discharge the liability of the defendants to the plaintiffs as guarantors under the bonds.

National Bank of Greece and Athens S.A. v. *Metliss* [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, and *Lynch* v. *Paraguay Provisional Government* (1871) L.R. 2 P. & D. 268 considered.

Per Diplock J. There is no authority which compels me to hold that when a sovereign State has created a fictitious person with attributes and capacity to confer rights in English law upon third parties not subject to the jurisdiction of that sovereign State, and such rights have become vested, an English court should give effect to legislation of the sovereign State purporting to annul those vested rights either directly or under the guise of restricting the attributes or capacity of the fictitious person which it has previously created.

ACTIONS.

On December 1, 1927, the National Mortgage Bank of Greece issued £2,000,000 7 per cent. sterling mortgage bonds, and the National Bank of Greece unconditionally guaranteed the due payment of the principal moneys and interest and the due performance of all the conditions of the bonds. Both banks were companies incorporated under Greek law. The bonds provided that any question arising thereon should be settled by arbitration in London in accordance with the laws of England, and it was not disputed that the proper law of the bonds and of the ancillary contract of guarantee was English law. On December 1, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to 4¾ per cent., which modifications were agreed to by the guarantor.

On February 18, 1953, the Greek Government passed a law, Law No. 2292, which authorized the amalgamation or merger of banking companies, and provided, by section 4, that the company which absorbed another company by merger, or the new company formed by the amalgamation, "becomes the universal successor "to the rights and obligations in general of the amalgamated "companies, without any further formality or act whatsoever."

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By a royal decree dated February 27, 1953, made under that law the National Bank of Greece and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company, the National Bank of Greece and Athens S.A., the defendant company, was formed; by clause 5 of the decree the National Bank of Greece and the Bank of Athens ceased to exist, and the defendant company was " substituted ipso jure . . . in all " rights and obligations of the said amalgamated banks as their " universal successor." The effect of Law No. 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece S.A. as guarantor of the bonds.

In *National Bank of Greece and Athens S.A.* v. *Metliss* [1] in which a bondholder claimed against the defendants for arrears of interest due under the bond, it was held that the English courts would recognize and give effect to the Greek Law No. 2292 and the decree as transferring to the defendants the liabilities of the former National Bank of Greece S.A., and that, accordingly, the defendants were liable to the bondholder under the contract of guarantee.

On July 16, 1956, the Greek Government passed a legislative decree, No. 3504 substituting for the relevant paragraph of article 4 of Law No. 2292 of 1953, as from the time it entered into force, a paragraph whereby the company absorbing another company by amalgamation or the new company formed by the amalgamation became " the universal successor to the rights and obligations of " the companies amalgamated, except for the obligations to which " such companies were liable whether as principal or guarantor " or otherwise under bonds, securities in general or contracts " howsoever in relation to loans through bonds payable . . . in " gold or foreign currency, issued by limited liability companies " . . . the new company formed by the amalgamation shall not be " or be deemed by reason of this law or other law or decree or " articles of association . . . to be the successor to the above " obligations under loans in gold or foreign currency . . ." The legislative decree also abolished paragraph 5 of the royal decree of February, 1953, and provided that the rights and obligations of the defendant company were governed as from the time of its creation by the amended provisions of Law No. 2292. In Greek law that decree absolved the defendants from any liabilities as guarantors of the bonds in question, and was a decree to which the Greek courts would give retrospective effect.

On dates subsequent to July 16, 1956, a number of bondholders presented coupons covering interest due under the bonds since January 1, 1950, to the National Mortgage Bank of Greece for payment, and in August and September gave notice thereof to the defendants. Payment was refused by the mortgage bank and by the defendants and on September 17, 1956, and June 4, 1957, the bondholders issued the writs in these actions claiming

[1] [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

the arrears of interest against the defendants as guarantors of the bonds.

The defendants contended, inter alia, that the liability alleged against them was governed by Greek law under which, by virtue of the decree Law No. 3504 of 1956, they were not at the material times liable to the plaintiff bondholders under the guarantee. The plaintiffs, in reply, contended that it would be contrary to English public policy to give such or any effect to the Greek Decree Law No. 3504 on the ground that it was confiscatory and discriminatory in that it was enacted for the purpose of depriving a particular class of bondholders of rights of property vested in them immediately before such decree was passed.

The actions were heard together.

John Foster Q.C., *Mark Littman* and *L. J. Blom-Cooper* for the plaintiffs.

T. G. Roche Q.C., *N. H. Lever* and *John Newey* for the defendants.

The following cases were cited in argument: *National Bank of Greece and Athens S.A.* v. *Metliss* [1]; *Anthony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* [2]; *Lynch* v. *Paraguay Provisional Government* [3]; *In re Aganoor's Trusts* [4]; *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* [5]; *In re Claim by Helbert Wagg & Co. Ltd.* [6]; *Nokes* v. *Doncaster Amalgamated Colleries Ltd.* [7]; *Russian and English Bank* v. *Baring Brothers & Co. Ltd.* [8]; *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Credit Bank* [9]; *Kahler* v. *Midland Bank Ltd.* [10]; *Beavan* v. *Lord Hastings* [11]; *Regazzoni* v. *K. C. Sethia (1944) Ltd.* [12]; *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* [13]; *Scott* v. *Attorney-General* [14] and *Warter* v. *Warter.* [15]

DIPLOCK J. These two actions are brought by the holders of a number of sterling bonds issued by the National Mortgage Bank of Greece against the defendants as guarantors of the payment of interest under the bonds for arrears of interest, payment of which was refused on behalf of the principal debtor upon presentation by the plaintiffs of the relative coupons to the agreed paying agents in London upon a date subsequent to July 16,

[1] [1957] 3 W.L.R. 1056.
[2] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.
[3] (1871) L.R. 2 P. & D. 268.
[4] (1895) 64 L.J.Ch. 521.
[5] [1935] 1 K.B. 140; 50 T.L.R. 284.
[6] [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.
[7] [1940] A.C. 1014; 56 T.L.R. 988; [1940] 3 All E.R. 549.
[8] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.
[9] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.
[10] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.
[11] (1856) 2 K. & J. 724.
[12] [1957] 3 W.L.R. 752; [1957] 3 All E.R. 286.
[13] [1921] 3 K.B. 532; 37 T.L.R. 777.
[14] (1886) 11 P.D. 128.
[15] (1890) 15 P.D. 152; 6 T.L.R. 391.

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1956. The bonds are of the same issue as those the subject of the decision in the House of Lords in *National Bank of Greece & Athens S.A.* v. *Metliss*.[1] The original guarantor was another Greek company, the National Bank of Greece S.A.

By a Greek Law No. 2292 of 1953 and a ministerial decree made pursuant to it dated February 27, 1953, the National Bank of Greece S.A. was amalgamated with another Greek company, the National Bank of Athens S.A., to form a new company, the present defendants. They were created by the Law No. 2292 and the decree itself which at the same time dissolved the two former companies which were so amalgamated. It was held by the House of Lords in the above mentioned decision that the effect of Law No. 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece S.A., inter alia, as guarantor of the bonds, and that, as the provision in Law No. 2292 and the decree which had this effect was one which created the defendants and constituted them the "universal successor" of the two dissolved companies, the relevant provision was one which dealt with "succession" or with the "status" of the newly created juristic person and was one to which the English courts would accordingly give effect as transferring to the defendants the liability of the former National Bank of Greece S.A., as guarantor of the bonds, notwithstanding that the proper law of the bonds and of the ancillary contract of guarantee was English law.

It would be open to the defendants to contend upon fresh evidence as to Greek law that Law No. 2292 and the decree in the form in which they were at the time of the *Metliss* case [1] did not have in Greek law the effect which the House of Lords found it had. They do not, however, seek to do so, and it is accepted that the House of Lords' findings of fact as to the meaning and effect of Law No. 2292 and the decree in the form in which they were at the relevant date in the *Metliss* case [2] (that is before July 16, 1956) are correct. What the defendants say is that by virtue of a Greek legislative decree No. 3504 passed on July 16, 1956, which has the same effect as a Greek law, they are absolved from any liability as guarantors of the bonds. The relevant terms of Law No. 2292 and the decree as they existed before July 16, 1956, are set out in the speech of Viscount Simonds in the *Metliss* case.[3] It is only necessary to repeat here for clarity section 4 of Law No. 2292 and clause 5 of the decree, adding that the expert evidence of Greek law called in this case shows that although the Law No. 2292 does not expressly provide that the companies to be amalgamated shall cease to exist upon the amalgamation, clause 5 of the decree was in fact otiose since it only re-states what would in any event have resulted implicitly from Law No. 2292 itself and from general principles

[1] [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

[2] [1957] 3 W.L.R. 1056.

[3] Ibid. 1058.

of Greek law as a consequence of the amalgamation of the two former companies by ministerial decree.

Section 4 of Law No. 2292 was in the following terms: "No "description of the items contributed is required in the relative "contract of amalgamation nor in the statutes, in the case of "amalgamation by formation of a new company, provided that "all the assets and liabilities of the banking companies amalga- "mating are contributed as a whole. The company which absorbs "another company by merger, or the new company formed by "the amalgamation, becomes the universal successor to the rights "and obligations in general of the amalgamated companies, with- "out any other formality or act whatsoever."

Clause 5 of the decree read as follows: "As from the publica- "tion of the present decree, the National Bank of Greece Ltd. "and the National Bank of Athens, Ltd. cease to exist and the "entire property of each of them in its whole (assets and "liabilities) on the day of publication is considered as being auto- "matically contributed to the new limited liability banking com- "pany by shares, constituted by virtue of these presents, which "is substituted, ipso jure and without any other formality, in "all rights and obligations of the said amalgamated banks, as "their universal successor."

The legislative decree passed on July 16, 1956, No. 3504 so far as is relevant reads as follows: "Article 1. The second para- "graph of article 4 of Law 2292/1953 'Concerning the Amalga- "'mation of Limited Liability Banking Companies' is substi- "tuted as from the time it entered into force as follows: 'The "'company absorbing another company by amalgamation or the "'new company formed by the amalgamation becomes, without "'any other formality or act, the universal successor to the "'rights and obligations of the companies amalgamated, except "'for the obligations to which such companies were liable "'whether as principal or guarantor or otherwise under bonds, "'securities in general or contracts or otherwise howsoever in "'relation to loans through bonds payable to bearer or not in "'gold or foreign currency, issued by limited liability companies, "'public bodies, municipalities and communities, etc.

"'The company absorbing another company or the new com- "'pany formed by the amalgamation shall not be or be deemed "'by reason of this law or other law or decree or articles of "'association issued pursuant thereto or otherwise howsoever to "'be the successor to the above obligations under loans in gold or "'foreign currency until the promulgation of law providing for "'the extent and the manner of their submission to these "'obligations.'

"Article 2. Is abolished as from the time of its promulgation "paragraph 5 of the sole article of the royal decree of 26/27th "February, 1953, 'Concerning the Amalgamation of the National "'Bank of Greece and the Bank of Athens by the Creation of "'a New Limited Liability Banking Company.' The rights and

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"obligations of the new limited liability banking company under "the name of 'National Bank of Greece and Athens' created by "said decree are governed as from the time of its creation by "the relative provisions of Law 2292/1953 as amended by the "present law. Article 3. The present enters into force as from "its promulgation in the official gazette," and the date is July 16, 1956.

It is established by expert evidence of Greek law that in Greek law this legislative decree absolves the defendants from any liability as guarantors of the bonds which are the subject-matter of this action, and also that the Greek courts (as one would expect) would give retrospective effect to this enactment although it would not have the effect of disturbing any judgment given before July 16, 1956, on the basis of the pre-existing law, nor would the new law be given retrospective effect in any case in which the hearing was concluded before July 16, 1956, even although judgment were given thereafter. The expert witnesses were unable to say positively whether, if the defendants had in fact made a payment (not under a judgment) in satisfaction of a liability from which they were absolved retrospectively by the legislative decree of July 16, 1956, they could recover the amount so paid from the payee. I am not surprised at their inability to answer this question upon which there must be a dearth of precedent. In the absence of satisfactory evidence that Greek law in this respect differs from English law, I hold (if it be relevant) that if any such payments had been made they would not have been recoverable by the defendants.

It is important to keep in the forefront of one's consideration of the legal problems involved the fact that the defendants were not a party to the contract of guarantee contained in or evidenced by the bonds of which the proper law is English law. The original guarantor was the dissolved company, the National Bank of Greece S.A. There was no novation of the original contract of guarantee. To establish the defendants' liability the plaintiffs must rely upon some provision of Greek law which will be given effect to by the English courts as transferring to the defendants a liability of the dissolved Greek company under a contract of which the proper law is English law.

The defendants' case (if I may put the cart before the horse) is that at the time when the plaintiffs' cause of action arose—that is after July 16, 1956, when they presented their interest coupons to the paying agents for payment and were not paid—there was in existence no provision of Greek law which transferred to the defendants the liability of the dissolved company as guarantors of the bonds. The plaintiffs on the other hand adopt the historical approach. They say that on July 15, 1956, the defendants were liable to the plaintiffs in English law under the guarantee: The House of Lords has so decided. If the defendants have ceased to be liable since that date, but have nevertheless continued to exist as a juristic person, it must be by virtue

of a discharge of their contractual liability that is valid in English law, which is the proper law of the contract.

Although the arguments have ranged over a wide field, I think that the case really turns on which of these two rival methods of approach to the defendants' liability is correct. The point is a short one and, like that in the *Metliss* case,[4] is itself devoid of previous authority. It is not, I think, possible to shirk it by holding (as Mr. Foster argued) that even if the original Law No. 2292 and the original decree had been initially in the form which they have now retrospectively assumed, the English court could have applied that part of them which made the defendants the successor of the dissolved National Bank of Greece S.A., and ignored that part which excluded from the succession its liability as guarantor of the bonds. Although the English court can recognize and give effect to the attributes of the new fictitious person given to it by its creator, the Greek Government—since those attributes have in the circumstances in which the defendants were created been held by the House of Lords to be part of its status and governed by the law of its domicile—the English court cannot usurp the function of the creator by bestowing upon it attributes with which its creator has not endowed it. Put bluntly, I do not think that the English court can blow hot and cold.

Mr. Foster argues that there is a rule of public policy that entitles the English court to blow hot and cold, and permits it to give effect to part of the law, but prevents it from giving effect to that part which is confiscatory and/or discriminatory. That English law will give effect to confiscatory legislation relating to property and rights within the territorial jurisdiction of the legislating State is well established; *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.*[5]; *Princess Paley Olga* v. *Weisz* [6]; and I agree with Upjohn J. in *In re Claim by Helbert Wagg & Co. Ltd.*[7] that this is so whether the owners of the property or rights are nationals of or domiciled in the legislating State or not. Mr. Foster contends that as an exception to this rule the courts will not give effect to the confiscatory legislation where it purports to operate upon private proprietary rights outside the jurisdiction of the legislating State. This I think may be true of any foreign legislation whether confiscatory or not, but I do not think that the exception would cover Law No. 2292 and the decree if they had originally been made in the form in which they now are. The proprietary rights outside the jurisdiction of Greece were rights against the National Bank of Greece S.A. They were extinguished by the dissolution of that company; but it is conceded that, subject only to its own statutory power to wind up the company in England, the English court must give

[4] [1957] 3 W.L.R. 1056.

[5] [1921] 3 K.B. 532; 37 T.L.R. 777.

[6] [1929] 1 K.B. 718; 45 T.L.R. 365

[7] [1956] 1 Ch. 323, 348; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.

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effect to that dissolution; see *Lazard Brothers & Co.* v. *Midland Bank Ltd.*[8] The existing rights being so extinguished, the real complaint against Law No. 2292 and the decree in their now existing form is that they fail to create new rights against a different guarantor in substitution for rights against the dissolved guarantor.

I do not see on what principle the English courts can create new rights which the Greek legislature has omitted to do itself. This is something quite different from refusing to recognize the destruction of existing rights. There would be the same fundamental objection in seeking to apply any rule of English law against giving effect to discriminatory legislation. I need not, therefore, embark upon the inquiry whether this rule exists in the form contended for by Mr. Foster, or to what kind of legislation it applies.

In considering and rejecting these two arguments of Mr. Foster I should make it plain that I am expressing no moral judgment one way or the other about the policy or purpose of the Greek Government in passing Law No. 3504 on July 16, 1956. In the view that I take of this case this is irrelevant. The only question I have to determine is, has that law had the effect of relieving the defendants of the liability which lay upon them in English law before the date of Law No. 3504 as guarantors of the bonds held by the plaintiffs? On what I regard as the crucial point in this case I think that the plaintiffs' historical method of approach is the correct one. I ought not to shut my eyes to what has happened even although the Greek courts are by their legislature compelled to do so. The rights that the plaintiffs are seeking to enforce are contractual rights. They are none the less so because the person against whom they seek to enforce them was not originally a party to the contract, but has been substituted as a party by operation of a law (albeit passed by the Greek Government) which the English courts recognize as effective to bring about the substitution. To say that the plaintiffs are seeking to exercise statutory rights arising under a Greek statute, while true in one sense, does not seem to me to be true in the relevant sense of making the proper law of the plaintiffs' rights Greek law—which I apprehend in the case of a Greek statutory right it must be—instead of English law which is the proper law of the contract. I think that this is also implicit in that part of the House of Lord's decision in the *Metliss* case[9] which rejected the application to a bondholder's rights against the defendants of the Greek laws relating to the moratorium to which effect must have been given if the proper law of the bondholder's rights against the defendants was Greek law.

Whatever may be the proper method of approach to rights under some other type of contract, it seems to me that in the case of a contract contained in bearer bonds, the benefit of which

[8] [1933] A.C. 289, 297; 49 T.L.R. 94.

[9] [1957] 3 W.L.R. 1056.

is transferable by delivery of the bonds, and where individual bondholders may have acquired their rights under the contract at any time since the issue of the bonds in 1927—including the period between the passing of Law No. 2292 and Law No. 3504—it would be quite wrong to approach the legal problem with which I am confronted in this case except on the basis that upon July 15, 1956 (the day before Law No. 3504 was passed), the holder of the bond possessed legally enforceable rights against the defendants as guarantor under a contract of which the proper law is English law. It is, therefore, I think for the defendants to show that their liability which existed on July 15, 1956, has been discharged.

They rely upon Law No. 3504. I have to look at the substance of the law, not merely at its form. If it is a law which in substance merely discharges as from July 16 the liability of (inter alios) the defendants from liabilities which include (inter alia) liabilities under the contract of guarantee contained in the bonds whose proper law is English, it is in my view beyond question that an English court will not treat it as effective to do so so far as the liabilities under a contract whose proper law is English law are concerned. I have deliberately inserted the latin parentheses to make it clear that my judgment is in no way dependent on any inference that Law No. 3504 was specifically directed against the holders of this issue of bonds, although I should have drawn that inference if the matter were relevant.

The discharge of contractual liabilities of banks in the position of the defendants is obviously one of the objects which Law No. 3504 is seeking to achieve. Is it saved from being in substance a law discharging contractual liabilities, and brought into the category of a law of succession because it purports to achieve that object by amending a pre-existing law of succession? I think that the short answer to that is that a law which alters the rights and liabilities of persons who are already successors, although it may be a law relating to "successors," is not a law of succession at all. A law of succession deals with what happens to the rights and liabilities of a natural person upon his decease, or in the case of a company upon its ceasing to exist. A law which deals with the existing rights and liabilities of a person not upon his decease, but upon some other date or event, does not become a law of succession merely because, as a matter of history, those rights and liabilities originally vested in him as the result of a law of succession. In my view, therefore, Law No. 3504 is not a law of succession, but a law which discharges contractual liabilities.

Mr. Foster, while arguing (in my view correctly) that Law No. 3504 was not a law of succession, relied upon an alternative argument that in any event it should be ignored because, for the purpose of probate and administration, the English courts only recognized the laws of succession in force in the country of the deceased's domicile at the date of his death. The rule is so stated

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in Dicey's Conflict of Laws, 6th ed. (1949), p. 817, and is supported by *Lynch* v. *Paraguay Provisional Government* [10] and *In re Aganoor's Trusts*.[11] This rule, Mr. Foster urged, should be applied by analogy to the case of succession of fictitious persons which ceased to exist on amalgamation. Although Lord Penzance in *Lynch's* case,[12] when applying the rule to a grant of probate, appears to have based it as much on convenience as anything else, I think that probably the true basis is that which I have expressed above, namely, that a law which regulates the rights of persons who are already successors is not a law of succession, and the English courts recognize as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased.

This branch of the case has been argued principally on the basis that the question whether the English court would give effect to Law No. 3504 depended upon whether it was a law of succession; but although this was the ground upon which the Court of Appeal [13] and the minority of the House of Lords [14] (Lord Morton of Henryton and Lord Keith) decided that effect should be given to Law 2292, the majority of the House of Lords (Lords Simonds, Tucker and Somervell of Harrow) appear to have based their decision upon the ground that comity which requires us to recognize the existence of a fictitious person created by another sovereign State requires us to recognize also the attributes with which it has been created, for those can properly be regarded as a matter pertaining to its "status," which is governed by the law of the country which created it. But there is no authority which compels me to hold that when a sovereign State has created a fictitious person with attributes and capacity to confer rights in English law upon third parties not subject to the jurisdiction of that sovereign State, and such rights have become vested in such third parties, an English court should give effect to legislation of that sovereign State which purports to annul those vested rights in English law, either directly or under the guise of restricting the attributes or capacity of the fictitious person which it has previously created.

I think that the matter can be tested quite simply. If the Greek legislature in 1952 had passed a law saying that the National Bank of Greece S.A. had not the capacity to pay the interest on this issue of bonds, or any particular class of bonds which it had already issued, or that it was ultra vires for them to do so, would the English court have given effect to such a law? The answer is, I think, plainly No. The reason being that such a law is not in substance a law relating to capacity or "status": it is a law discharging a liability.

[10] (1871) L.R. 2 P. & D. 268.
[11] (1895) 64 L.J.Ch. 521.
[12] L.R. 2 P. & D. 268, 272.
[13] [1957] 2 Q.B. 33; [1957] 2 W.L.R. 570; [1957] 2 All E.R. 1 (sub nom. *Metliss* v. *National Bank of Greece and Athens S.A.*).
[14] [1957] 3 W.L.R. 1056.

Finally, I have to consider whether—even although Law No. 3504 might have been ineffective to discharge the defendants' liability which existed on July 15, 1956, had it purported to do so as from the date of the law coming into force—its retrospective character converts it into a law of succession or status, and thus one to which an English court should give effect. No doubt when the British Parliament passes a retrospective law and tells a statutory lie (which it may do for the best possible motives), the English law has got to pretend to believe it. But if I am right in thinking that a law which alters the rights and liabilities of persons who are already successors is not a law of succession, it does not become so because it says untruthfully that they never were successors at all. So also, if a Greek law which purported to deprive a fictitious person created by Greek law of the capacity to fulfil an obligation which it had validly incurred would be treated by the English court as a law discharging a liability, and not as a law relating to capacity or "status," I do not see how its substance is changed merely because it purports to say untruthfully that the fictitious person never had the capacity to incur the liability.

In my view, Law No. 3504 of July 16, 1956, was not a law of succession or relating to capacity or "status," but was in substance a law relating to the discharge of liabilities, and as such it is not, under English rules of private international law, effective to discharge the liability of the defendants as guarantors of the bonds held by the plaintiffs, which I am bound by the decision of the House of Lords in the *Metliss* case [15] to hold existed on July 15, 1956, before Law No. 3504 was passed.

This action, therefore, succeeds.

Judgment for the plaintiffs.

Solicitors: *Herbert Smith & Co.; Stibbard, Gibson & Co.*

J. F. L.

[15] [1957] 3 W.L.R. 1056, 1057.

[PRIVY COUNCIL.]

MARY NG . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.*

1958

March 19.

ON APPEAL FROM THE HIGH COURT OF THE COLONY OF SINGAPORE.

Burden of Proof—Criminal case—Facts especially within knowledge of accused—No burden on accused to prove that no crime has been committed—Onus on prosecution to prove commission of offence—Evidence Ordinance (Laws of Singapore, 1955, *c.* 4), *ss.* 107, 115. *Singapore. Ceylon—Ceylon Evidence Ordinance, s.* 106.

* *Present*: LORD REID, LORD TUCKER, the RT. HON. L. M. D. DE SILVA.

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By section 107 of the Singapore Evidence Ordinance: "When "any fact is especially within the knowledge of any person, the "burden of proving that fact is upon him."

The appellant was charged with and convicted of attempting to cheat a man and thereby attempting dishonestly to obtain money from him by representing to him that she was able to induce the magistrate before whom the man was to be charged with a criminal offence to show favour to him. The trial judge held that whether or not the appellant could induce the magistrate to show favour to the accused man was a fact which was especially within the knowledge of the appellant, and that under section 107 of the Evidence Ordinance the onus was on her to prove that she could induce the magistrate to show favour:—

Held, that by reason of section 107 no burden was placed on the appellant to prove that there had been no deceit. The burden was on the prosecution to prove affirmatively that there had been. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the magistrate, and that had not been done. There was in fact no evidence against the appellant on a principal ingredient of the charge, namely, deceit, and the case therefore came within the range of cases in which the Board would interfere.

Dictum in *Attygalle* v. *The King* [1936] A.C. 338, 341; 52 T.L.R. 390; [1936] 2 All E.R. 116, that "It is not the law of "Ceylon"—section 106 of the Ceylon Evidence Ordinance being identical with section 107 of the Singapore Ordinance—"that the "burden is cast upon an accused person of proving that no crime "has been committed," applied.

Decision of the High Court of Singapore reversed and conviction quashed.

Appeal (No. 20 of 1957), by special leave, from a judgment of the High Court of the Colony of Singapore (Knight J.) (June 17, 1957), dismissing an appeal from a judgment of the First Criminal District Court of Singapore (Chua D.J.) (October 9, 1956), whereby the appellant had been convicted on a charge of attempting to cheat and thereby attempting to obtain $2,500 from one Hou Say Lian by representing that she was able to induce a magistrate to show favour to him in a case in which he had been charged with being in possession of prepared opium and smoking utensils. The appellant, who had denied the charge, was sentenced to three months' imprisonment and a fine of $5,000, the fine being reduced by the High Court to $3,000.

Section 107 of the Evidence Ordinance of Singapore provided that: "When any fact is especially within the knowledge of any "person, the burden of proving that fact is upon him," and a question in this appeal was whether, as held by the trial judge, section 107 placed on the appellant the onus of proving that she could induce the magistrate to show favour to Hou Say Lian, or whether the burden was on the prosecution to prove affirmatively that there had been deceit.

1958. Jan. 27, 28. *Bernard Gillis Q.C.* and *John Lloyd-Elcy* for the appellant.

J. G. Le Quesne for the Crown.

The following cases were referred to in argument: *Attygalle* v. *The King* [1]; *Seneviratne* v. *The King* [2]; *Chan Kau* v. *The Queen* [3]; *Reg.* v. *Abbott* [4]; *Cotterill* v. *Lempriere* [5]; *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* [6]; *Deputy Legal Remembrancer* v. *Karuna Baistobi* [7]; *Balmakand Ram* v. *Ghansamram* [8]; *Woolmington* v. *Director of Public Prosecutions* [9]; *King-Emperor* v. *U Damapala* [10]; *Rex* v. *Power* [11]; *Dharmasena* v. *The King* [12]; *Mohindar Singh* v. *King-Emperor*. [13]

March 19. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA. There were two charges in the alternative against the appellant framed thus: —

"CHARGE

"You Mary Ng are charged that you between 26th February "and 28th February, 1956, at Singapore, attempted to obtain "from one Hou Suai [sic] Lian for yourself a gratification of two "thousand five hundred dollars as a reward for inducing, by the "exercise of personal influence, a public servant, to wit, Mr. J. M. "Devereux-Colebourn, 4th Magistrate, Singapore, in the exercise "of his official functions as 4th Magistrate, to show favour to the "said Hou Suai Lian in connexion with 4th Magistrate Court "Case No. 1571/55, and thereby committed an offence punishable "under section 163 of the Penal Code (Cap. 119).

"Alternatively,

"You Mary Ng are charged that you, between 26th February "and 28th February, 1956, at Singapore, did attempt to cheat "one Hou Suai [sic] Lian by representing to him that you were "able to induce Mr. J. M. Devereux-Colebourn, 4th Magistrate, "Singapore, to show favour to him in connexion with 4th Magis-"trate Court Case No. 1571/55, and thereby dishonestly "attempted to induce the said Hou Suai Lian to deliver to you "the sum of two thousand five hundred dollars, and you thereby "committed an offence punishable under sections 420 and 511 of "the Penal Code (Cap. 119)."

The appellant was convicted on the second charge. She was acquitted by the trial judge on the first charge for reasons which their Lordships do not propose to discuss as no question as to the correctness of those reasons falls for decision on this appeal. But, whatever the reasons for the acquittal, it will be seen from what follows that the charge which arose directly from the facts spoken to by the witnesses was the first one. It may be regarded as the

[1] [1936] A.C. 338; 52 T.L.R. 390; [1936] 2 All E.R. 116.
[2] [1936] 3 All E.R. 36.
[3] [1955] A.C. 206; [1955] 2 W.L.R. 192; [1955] 1 All E.R. 266.
[4] [1955] 2 Q.B. 497; [1955] 3 W.L.R. 369; [1955] 2 All E.R. 899.
[5] (1890) 24 Q.B.D. 634; 6 T.L.R. 262.
[6] [1916] 2 A.C. 575; 32 T.L.R. 673.
[7] (1894) I.L.R. 22 Cal. 164.
[8] (1894) I.L.R. 22 Cal. 391.
[9] [1935] A.C. 462; 51 T.L.R. 446.
[10] (1936) I.L.R. 14 Rang. 666.
[11] [1919] 1 K.B. 572; 35 T.L.R. 283.
[12] [1951] A.C. 1, 12.
[13] (1932) L.R. 59 I.A. 233.

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main charge. The grave offence alleged in it was that of attempting to obtain from an accused person a gratification as a reward for influencing a magistrate. The second charge makes the subsidiary allegation that the appellant attempted to cheat by making the representation that she could influence the magistrate. For the second charge to succeed it must be established both that she made the representation and that at the time of making it she did not believe it to be true.

In brief outline the prosecution evidence was to the following effect: On July 26, 1955, one Hou Say Lian was charged in the Fourth Magistrate's Court with being in possession of prepared opium and smoking utensils. After some postponements the case was fixed for hearing on February 29, 1956. On February 25, 1956, Hou Say Lian accompanied by a friend Liang San Han met one Kok Min Yin by appointment. Kok Min Yin informed Hou Say Lian that he had been sent by the appellant to speak to him about the opium charge and that the appellant could help him. By arrangement Kok Min Yin took Hou Say Lian and Liang San Han on February 26 to the appellant's flat. She introduced herself as the wife of the Fourth Magistrate and showed them a photograph of herself with the magistrate's arm around her. She said that she could get an acquittal for Hou Say Lian for a sum of 3,500 dollars. Hou Say Lian said that he could not pay. There were some negotiations for a reduction of the amount, but no payment was made. The appellant warned him that if at least 2,500 dollars were not paid he would be fined 3,000 dollars by the court and would be sent to jail for six months. The next day Hou Say Lian was tried in the Fourth Magistrate's Court, convicted and sentenced to three months' imprisonment and a fine, in default a further three months' imprisonment.

On a search of the appellant's flat the police found, amongst other things, a visitor's permit to the General Hospital to visit the magistrate in question, a card relating to a change of address by him, and an invitation to a party given by him.

The trial court and the High Court held that the evidence established the facts mentioned, and their view of the evidence is not challenged on this appeal.

The evidence led by the prosecution, if accepted, would have sustained a conviction on the first charge. With regard to the second charge, it is not disputed that falsity of the representation made by the appellant that she could induce the magistrate to show favour was, under the relevant sections of the Penal Code of Singapore, a necessary ingredient of the charge. It will be seen that the evidence set out above failed to establish this ingredient. The magistrate himself, whose evidence was relevant upon this point, was not called. He was in attendance up to a certain stage of the proceedings. Defence counsel pointed out that he was about to leave the colony, whereupon the prosecuting officer said he did not desire to call him.

It was argued before the trial judge that the prosecution had

failed to prove that the representation made by the appellant that she could influence the magistrate was false. He was of opinion that falsity and deceit had been established by reason of a statutory provision in the Singapore Evidence Ordinance. He said: "In my view I don't think it was necessary for the prosecution "to call Mr. Devereux-Colebourn as a witness to say that he "could not be influenced by the accused before the court could "be satisfied that there was deceit. Whether the accused could "or could not induce Mr. Devereux-Colebourn to show favour to "Hou Say Lian was a fact which was especially within the "knowledge of the accused and I was of the opinion that under "section 107 of the Evidence Ordinance (Cap. 4) it was not "necessary for the prosecution to prove deceit by calling Mr. "Devereux-Colebourn to say that the accused could not influence "him. The onus was on the accused to prove that she could "induce Mr. Devereux-Colebourn to show favour to Hou Say "Lian."

This view is erroneous. Section 107 of the Singapore Evidence Ordinance is to the following effect:—"When any fact "is especially within the knowledge of any person, the burden "of proving that fact is upon him." This section is identical with section 106 of the Indian Evidence Ordinance and with section 106 of the Ceylon Evidence Ordinance. The latter was considered by the Board in *Attygalle* v. *The King*,[1] in which two accused were prosecuted, the first for performing an illegal operation, the second for aiding and abetting him. The trial judge directed the jury thus[2]:—". . .; that section says when any "fact is especially within the knowledge of any person, the "burden of proving that fact is upon him. Miss Maye—that "is the person upon whom the operation was alleged to have "been performed—was unconscious and what took place in that "room that three-quarters of an hour that she was under chloro-"form is a fact especially within the knowledge of these two "accused who were there. The burden of proving that fact, the "law says is upon them, namely, that no criminal operation "took place, but that what took place was this speculum "examination."

Viscount Hailsham, delivering the judgment of the Board, said of this passage[2]:—"Their Lordships are of opinion that "that direction does not correctly state the law. It is not the "law of Ceylon that the burden is cast upon an accused person "of proving that no crime has been committed. The jury might "well have thought from the passage just quoted that that was "in fact a burden which the accused person had to discharge."

It is clear, therefore, that by reason of the section no burden was placed upon the appellant in the present case to prove that there had been no deceit. The burden was upon the prosecution to prove affirmatively that there had been.

[1] [1936] A.C. 338; 52 T.L.R. 390; [1936] 2 All E.R. 116.

[2] [1936] A.C. 338, 341.

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The learned judge of the High Court who affirmed the conviction does not uphold the view of the trial court on the effect of section 107. He makes no reference to that section. He bases himself on section 115 of the Evidence Ordinance, which was not referred to by the trial judge. This section is to the following effect:—" The court may presume the existence of any " fact which it thinks likely to have happened, regard being had " to the common course of natural events, human conduct, and " public and private business, in their relation to the facts of the " particular case.

" Illustrations

" The court may presume—. . . (e) that judicial and official " acts have been regularly performed."

The section says that " The court may presume the existence " of any fact which it thinks likely to have happened " regard being had to certain things " in their relation to the facts of the " particular case." In this particular case what is the fact which the court could think is " likely to have happened " ? It may be argued that the presumption arises that, when the magistrate convicted Hou Say Lian, he was not influenced by the appellant. Assuming, without deciding, that this argument is correct, it does not help the prosecution because, according to the prosecution, she had not taken any money to influence the magistrate or undertaken for any other reason to influence him, and therefore the fact that he was not influenced is of no significance. As there is no other fact in aid of the prosecution which could be suggested was " likely to have happened," resort to section 115 fails to establish deceit. Further, even if it had been established not merely that the magistrate was not influenced but that he could not have been influenced, the inference of deceit does not necessarily arise. There is still left open the possibility that the appellant might have quite genuinely, though incorrectly, thought that she could have influenced the magistrate. In that case she would have been guilty of an error of judgment, not of deceit. Something more was necessary to establish deceit. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the magistrate. This has not been done. The evidence of the magistrate would have been material on this point and it is remarkable that he was not called. The High Court observed:— " Mr. Devereux-Colebourn, the magistrate involved, was present " at the trial but for some reason was not called by the prosecu- " tion. I might add that this was a very serious case involving " as it did, inter alia, the integrity of the Magisterial Bench, " and I am astonished that the prosecution was not conducted " by an experienced Crown counsel from the Attorney-General's " chambers rather than a police officer . . ."

With these remarks their Lordships agree. There were matters in this case which needed a full investigation and, even if it had been possible for the prosecution to rely on statutory

presumptions to secure a conviction, the investigation should have taken place. Their Lordships are of opinion that section 115 cannot be relied on to establish deceit. It is not necessary for them in this case to examine the broader ground whether section 115, any more than section 107, can dispense with the necessity for proof by the prosecution of one of the principal ingredients alleged in the charge.

The appellant in the course of the proceedings on October 8 and 9, 1956, put in two written statements, which she was entitled to do under section 172 (1) of Criminal Procedure Code of Singapore (Cap. 132, Vol. III, Laws of the Colony of Singapore, p. 408). In one of them she gave a version entirely different from that given by the prosecution of what had happened and completely exculpated herself. She said that Hou Say Lian, Kok Min Yin and Liang did come to see her and asked her for her intervention with the magistrate to obtain an acquittal of Hou Say Lian. She said " I replied that I was in no position to do so and " that it was very wrong of them to have come to see me on a " matter of this nature." The High Court appears to regard these words as having a bearing on the question of proof of deceit. The trial judge made no reference to them. It is clear that if the exculpatory statement, as a whole, of the appellant were to be accepted she would have to be acquitted. The conviction therefore involved a rejection of the statement as a whole. Does the part of the statement quoted, properly regarded, possess any probative value? Their Lordships do not find it necessary to discuss here the effect of an unsworn statement put in under section 172 (1). It is sufficient to say that what was said in the sentence quoted is in direct conflict with the sworn testimony of witnesses who were regarded by both courts as truthful. The trial judge says: " I had no doubt that Hou Say Lian and Liang San Han were truthful witnesses." Liang San Han said:— " The accused did not say she had no influence with the Fourth " Magistrate. The accused did not say that we had no right to " go there and ask her to do such a thing." Hou Say Lian:— " The accused did not say she could not influence the Fourth " Magistrate. Not true the accused refused to help me."

Their Lordships are of opinion that the words quoted must be regarded as having no probative value and could not be utilized either for or against the appellant.

It is not necessary to refer to the second statement the appellant put in under section 172 (1). The High Court regarded it as of no probative value and their Lordships are of the same opinion.

It has been repeatedly stated that the Judicial Committee is not a court of criminal appeal and it is now necessary to examine whether this is a case in which their Lordships should interfere. Every error of law would not justify an interference. It is clear that but for erroneous views of the courts below on the statutory presumptions earlier discussed the case against the appellant

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would, without doubt, have failed. There was in fact no evidence against her on a principal ingredient of the charge, namely, deceit. The case therefore comes within the range of cases in which their Lordships will interfere.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the order of conviction set aside and the appellant acquitted.

Solicitors: *Kingsley Wood & Co.; Charles Russell & Co.*

C. C.

[COURT OF APPEAL.]

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1958
Feb. 10, 11, 12, 28.
Lord Evershed M.R., Parker and Sellers L.JJ.

PENN AND ANOTHER *v.* GATENEX CO. LTD.

[Plaint No. N. 2188.]

Landlord and Tenant—Covenant—Central refrigeration installation—Block of flats—Provision of motive power—Refrigerator sole provision for food storage — Liability of landlord — Terms of tenancy agreement—Tenant to have "use of fixtures and fittings" of landlord—Covenant for quiet enjoyment.

The landlords of a block of flats let one of the flats unfurnished under a tenancy agreement which contained no express reference to the provision of services by the landlords. The flat contained a refrigerator which was worked by a central installation under the landlords' control. The refrigerator was the only receptacle for food storage in the flat. By the tenancy agreement the use of the fixtures and fittings belonging to the landlords was granted to the tenant, but no specific reference was made to the refrigerator; the agreement also contained the usual covenant by the landlords for quiet enjoyment. In an action by the tenants of the flat for damages for breach of covenant in failing to keep the refrigerator in proper working order:—

Held, (Sellers L.J. dissenting) that no obligation to supply the motive power to the refrigerator was expressed in or could be implied from the terms of the agreement, and, accordingly, the tenants had no cause of action against the landlords.

Rex v. *Paddington and St. Marylebone Rent Tribunal; ex parte Bedrock Investments, Ltd.* [1947] K.B. 984; 63 T.L.R. 303; [1947] 2 All E.R. 15, D.C. (affirmed on a different point [1948] 2 K.B. 413; 64 T.L.R. 388; [1948] 2 All E.R. 528) and *Rex* v. *Croydon and District Rent Tribunal; ex parte Langford Property Co. Ltd.* [1948] 1 K.B. 60 applied.

Per Sellers L.J. Without the refrigerator the flat was incomplete for ordinary domestic living having no other provision for storing food. The landlord had contracted to give the use of the refrigerator to the tenant and he was under the obligation so to maintain it as not to deprive the tenant of that use. The provision of hot water to radiators or pipes might be in a different category because central heating was not as vital for the use of a flat as a refrigerator where no other reasonable provision for food storage was made.

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1958
PENN v. GATENEX CO. LTD.

APPEAL from Judge Leon, sitting at Willesden County Court.

By a tenancy agreement dated July 3, 1942, and made between the predecessors in title of the defendant company, Gatenex Co. Ltd., of the first part, the plaintiffs, P. Penn and R. E. Penn, of the second part and a guarantor, an unfurnished flat known as No. 255B, Minehead Court, South Harrow, Middlesex, was let for one year from June 15, 1942, at a yearly rent of £67 12s. with provision for additional rent for electricity and to cover any increases in the general and water rates which might be made from time to time. The letting included "the use of the "fixtures and fittings [in the demised premises] belonging to the "landlord," and the tenant covenanted, inter alia, by clause 2 (iii) to maintain repair and keep the demised premises and all "locks bolts glass taps gas and electric fittings "of and in the demised premises belonging to the landlord "clean and in good and sufficient repair," subject to exceptions for fair wear and tear and damage by fire, and so to deliver them up at the determination of the term. The tenant further covenanted not to alter the demised premises or to remove, cut or injure "partitions doors cupboards "or other fixtures therein." The agreement contained in clause 3 (*a*) a covenant by the landlord for quiet enjoyment in common form which so far as material read: "shall peaceably hold and "enjoy the demised premises . . . without any interruption by "the landlord." The flat, which was one of 24 owned by the same landlords, contained a refrigerator designed to be operated from a central installation supplying all the flats and under the sole control of the landlords. This was the only specific provision for food storage in the flat. There was no larder. When the tenants entered into occupation and for some time thereafter the refrigerator worked intermittently. Early in October, 1956, the defendants acquired the freehold and thereupon the refrigerator stopped working. At some date not stated the contract of tenancy was determined by service of a notice to quit on the tenants and they thereafter continued in occupation of the flat as statutory tenants on the terms, so far as appropriate, of the original tenancy agreement.

The tenants brought proceedings against the landlords claiming, inter alia, that by the express or implied terms of the tenancy agreement they were entitled to be supplied with refrigeration by the landlords and that the landlords were liable to maintain and keep the central plant in proper working order. In the alternative they claimed that such terms were to be implied from the nature and circumstances of the agreement. The county court judge gave judgment in their favour and the landlords appealed.

Harold Heathcote-Williams Q.C. and *Bernard Finlay* for the landlords.

G. D. Lovegrove for the tenants.

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In addition to the cases referred to in the judgments the following were cited in argument: *Regis Property Co. Ltd.* v. *Dudley* [1]; *Asher* v. *Seaford Court Estates Ltd.* [2]; *Leech* v. *Schweder* [3]; *The Moorcock* [4]; *Hamlyn & Co.* v. *Wood & Co.* [5]; *Adams* v. *Adams* [6]; *Luxor (Eastbourne) Ltd.* v. *Cooper* [7]; *Anderson* v. *Oppenheimer* [8]; *Cohen* v. *Tannar* [9]; *Rylands* v. *Fletcher* [10]; *Davis* v. *Town Properties Investment Corporation Ltd.* [11]; *Sarson* v. *Roberts* [12]; *Paradine* v. *Jane.* [13]

Cur adv. vult.

February 28. Lord Evershed M.R. stated the facts and continued: It is plain that the judge greatly sympathized with the tenants, and in this respect I entirely share his view. The refrigerator is a bulky object which fully occupies the space that would otherwise be employed as a larder. It was said with great force by Mr. Lovegrove that in its present condition the flat lacks the ordinary means which every housewife requires for keeping perishable food. True, the tenancy agreement was made in the most critical period of the late war when, as we all know, it was difficult to obtain supplies of many kinds of goods and labour and then the apparatus for supplying power to the refrigerator was already deficient. Still, the then landlords forbore from inserting in the document which they put forward any reservation clearly protecting them from the alleged liability. On the contrary, they put forward a document which required the joinder of a guarantor for the tenants' obligations and of which the second clause contained no less than 18 separate covenants on the part of the tenants comprehending such matters as the keeping of rabbits and reptiles, the mowing of lawns and the weeding of gardens, which may have owed their presence more to precedents than the requirements of the actual contract being made. But these criticisms and the sympathy which I feel for the tenants cannot be invoked in order to enable the court to discern the covenant alleged if the covenant is not there expressly or by necessary implication.

The essential provisions of the contract are found in the habendum, with such assistance as can be got from the landlords' covenant for quiet enjoyment in clause 3. The habendum, so far as relevant, is as follows:—"All that flat situate and known as 255B, Minehead Court . . . with the use of the fixtures and "fittings therein belonging to the landlord." The material terms of the covenant for quiet enjoyment, which is in common form, include (clause 3 (*a*)):—". . . shall peaceably hold and enjoy the

[1] [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510.
[2] [1950] A.C. 508; 66 T.L.R. (Pt. 1) 943; [1950] 1 All E.R. 1018.
[3] (1874) L.R. 9 Ch. 463.
[4] 5 T.L.R. 316.
[5] [1891] 2 Q.B. 488; 7 T.L.R. 731.
[6] [1941] 1 K.B. 536; 57 T.L.R. 329; [1941] 1 All E.R. 334.
[7] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.
[8] (1880) 5 Q.B.D. 602.
[9] [1900] 2 Q.B. 609.
[10] (1868) L.R. 3 H.L. 330.
[11] [1903] 1 Ch. 797.
[12] [1895] 2 Q.B. 395; 11 T.L.R. 515.
[13] (1647) Aleyn 26.

"demised premises . . . without any interruption by the "landlord . . ."

Although the tenants' case is pleaded alternatively on the basis of express or implied obligation, in truth the problem is in my judgment one and the same. Nor, in my view, can Mr. Lovegrove improve his position by invocation of the principle that a landlord cannot derogate from the grant; for it is well established that the principle cannot serve to enlarge the grant. The question then is:—according to the terms of the contract and particularly clauses 1 and 3 (*a*), did the landlords expressly or by necessary implication promise to provide the motive power which alone would render the refrigerator capable of use as such, and to do all such other things by way of repairs as would be incidentally necessary? I can conveniently dispose here of one point. Mr. Heathcote-Williams contended that the refrigerator, even if incapable of use for the purposes for which it had been made, could still serve for the tenants the purpose of containing such things as tinned food and boots or other objects which called for no treatment by way of refrigeration. In my judgment, there is no substance in this argument. Beyond doubt the use of the refrigerator, in so far as it was contemplated by the parties to the contract, must have been its use for refrigeration.

Mr. Lovegrove put his case very simply (and therefore, as is so often true, most effectively) thus:—It is not in doubt that the refrigerator was and is one of the fixtures and fittings belonging to the landlord, the use of which was included in the grant: if, therefore, the landlord promised that the tenants should have the use of the refrigerator, how is that promise fulfilled, if in fact the refrigerator cannot be used at all?

In support of this formulation of his case, Mr. Lovegrove referred to such authorities as *Birmingham, Dudley & District Banking Co.* v. *Ross* [1] (in the Court of Appeal) as supporting the proposition that [2] "when a man grants a house, he grants that "which is necessary for the existence of that house"; and [3] "prima facie he cannot interfere with that which he has granted; "there is an implied obligation on him not to interfere with that "which he has granted; namely, the house, and enjoyment of the "house" (see *per* Cotton L.J.). Mr. Lovegrove referred also to the judgment of Stirling J. in *Aldin* v. *Latimer Clark, Muirhead & Co.*,[4] where the judge referred [5] to "the principle . . . "that the grantor of land to be used for a particular purpose is "under an obligation to abstain from doing anything on the "adjoining property belonging to him which would prevent the "land granted from being used for the purpose for which the "grant was made." Assuming, however, that Mr. Lovegrove can get in the present case so far as to make such principles

[1] (1888) 38 Ch.D. 295; 4 T.L.R. 437.
[2] 38 Ch.D. 295, 306.
[3] Ibid. 308.
[4] [1894] 2 Ch. 437; 10 T.L.R. 452.
[5] [1894] 2 Ch. 437, 447.

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applicable, he would still be faced with the difficulty that the landlords here have not in fact done anything. They have not, according to the evidence, deliberately disconnected the refrigerator from its motive power. They have merely refrained from taking steps to prevent the mechanism, already deficient, from becoming altogether inoperative. Their sins, if sins they be, are therefore sins of omission only. It is true that omissions may amount to breaches of the ordinary covenant for quiet enjoyment: but it seems that such omissions should be of a character as would amount, or be liable to amount, in themselves to wrongful acts. See *Booth* v. *Thomas* [6] (*per* Russell J. and in this court [7]): where a landlord's omission consisted of failure to repair an artificial watercourse so that the results would have been liable to constitute wrong to a neighbouring landowner.

But in my judgment Mr. Lovegrove cannot in the present case surmount the first hurdle which confronts him. If the habendum here contained express reference to the use of the refrigerator, he would to my mind be in a far stronger position, and Mr. Heathcote-Williams so conceded. The case would then be fairly analogous to the example put in the course of the argument of the grant of a tenancy of a flat at the top of a building, together with the right to use the lift which remained in the landlord's control and was the ordinary means of access to the flat. But there is no reference in terms to the refrigerator in the contract before us. To that extent it seems to me that Mr. Lovegrove cannot assert any express obligation. He must rely upon the necessary inferences to be extracted from the general words "fixtures and fittings." Undoubtedly the refrigerator was one of the fixtures and fittings: but the general phrase would include many other things such as cupboards, and bathroom and lavatory fittings. What, if Mr. Lovegrove is right, is the extent of the landlords' obligation, quoad these last-mentioned things, implicit in the grant plus the covenant for quiet enjoyment? Are they bound to supply water for the bath—more particularly, hot water for the hot tap? And do the obligations extend for the 24 hours of day and night throughout the tenancy?—an aspect of the matter on which the judge obviously felt a difficulty. It is true that it cannot be said of the bath that it would be wholly incapable of use as such in the absence of a central supply of hot water; whereas the refrigerator is wholly useless as a refrigerator in the absence of the motive force which the landlords alone control. But I have felt compelled to the conclusion that so much significance cannot be extracted fairly, and still less necessarily, from the general terms of the habendum aided by the covenant for quiet enjoyment; and I observe for what it is worth (though I do not attach much significance to it) that the tenants appear not to be under any obligation to keep the refrigerator in repair (see clause 2 (iii)).

[6] [1926] Ch. 397; 42 T.L.R. 296. [7] [1926] Ch. 397.

Somewhat similar contentions were considered by the Divisional Court in the years 1947 and 1948 in cases affecting the Furnished Houses (Rent Control) Tribunals. The first was that of *Rex* v. *Paddington and St. Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd.*[8] In that case the terms of the grant included the words: "Together with the right to use the water "closets lavatory accommodation and bathrooms situate in the "building." It was held that no covenant could be implied to supply hot water to the bathrooms. Similarly in the second case, *Rex* v. *Croydon and District Rent Tribunal, ex parte Langford Property Co. Ltd.*[9] the Divisional Court held (though Macnaghten J. vigorously dissented from his brethren) that no covenant to supply hot water for the central heating radiators could be implied, though such radiators would plainly be quite useless without such supply and the tenant could not remedy the matter for himself. In the *Croydon* case [9] there appears to have been no grant of the use of the radiators, though the landlord had not failed to advertise the central hot water supply as an attraction. The county court judge therefore distinguished the present case in reliance upon the express language "with the "use of the fixtures and fittings" etc. But, in my judgment, the *Paddington* [10] and *Croydon* [11] cases cannot be distinguished on so narrow a ground. The basis of the decisions is well illustrated by Lynskey J.'s citation in the *Croydon* case [12] from the earlier judgment:—"There is no ground in my opinion for imply-"ing any covenant and none ought ever to be implied unless the "implication is so necessary that the court can have no doubt "what covenant or undertaking to write into the agreement." True, these cases are not binding upon this court. But they have, I do not doubt, been frequently acted upon since they were decided in many of the numerous cases to which rent control has given rise. I think, therefore, that the court should be very slow to disturb them. It would no doubt be possible, by basing the result on the particular words of the particular contract here in question, to distinguish this case from the Divisional Court cases. But, again, I think this court should be slow to introduce fine distinctions into the law. Moreover, I do not think that on principle such distinctions could be supported.

In the result, I have come to the conclusion that the tenants' cause of action cannot be sustained. The result is no doubt a hard one for the tenants, and I reach with some regret a conclusion which may be said in modern conditions to reflect a blemish in the law of landlord and tenant. But sympathy for the tenants is, I fear, no safe guide to legal conclusions, particularly for conclusions in the long-established law relating to landlord and tenant.

I would, therefore, allow the appeal.

[8] [1947] K.B. 984; 63 T.L.R. 303; [1947] 2 All E.R. 15 (affirmed on a different point) [1948] 2 K.B. 413; 64 T.L.R. 388; [1948] 2 All E.R. 528).

[9] [1948] 1 K.B. 60.

[10] [1947] K.B. 984.

[11] [1948] 1 K.B. 60.

[12] Ibid. 65.

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Parker L.J. I have come to the same conclusion.

It is, I think, important to bear in mind the exact facts of this case. When the tenants entered into occupation the refrigerator was not in proper working order. It was only working intermittently, though it was of some use. From about October, 1956, it ceased to work entirely. Why this occurred is not as clear as it might be, since the landlords called no evidence, but from the evidence of Mr. White, an engineer called on behalf of the tenants, it seems to me that the only proper inference is that the plant was old, and that long before 1956 its condition was such that Mr. White's company had refused to undertake a maintenance contract. In his view it would cost £500 to put the plant in order, always assuming that spare parts were obtainable. It is not, therefore, a case of the defendants having deliberately cut off the refrigeration. Indeed, as I understand it, no suggestion of that kind was made at the trial.

The question, in these circumstances, is whether the county court judge was right in holding that it was a term of the tenancy agreement that "the landlord would keep the refrigerator in "reasonable working order." So far as demised premises themselves are concerned, I take it to be the law that, in the absence of express covenant, a landlord is under no obligation to keep the premises in repair. No such covenant will be implied. Nor in the case of unfurnished premises is there any implied warranty that the premises will be fit for habitation. It is true that in the case of furnished premises such a warranty will be implied as at the commencement of the letting, but it does not extend to the period of the letting. Apart, therefore, from the words "with "the use of the fixtures and fittings therein belonging to the "landlord" the position is, I think, plain. The refrigerator, being clearly a fixture, would have passed in the demise to the tenants, and there would have been no warranty that it was then in reasonable working order, much less a warranty or implied term that the landlord would keep it in reasonable working order throughout the letting. Do the words quoted have a contrary effect? I think not. Apart from these words the tenant would have had the right to use the refrigerator, it being, as I have said, a fixture included in the demise.

The matter does not, however, end there, since the "defect" complained of is not in the refrigerator as a fixture but in the plant supplying the refrigeration which is situated outside the demised premises. If, in these circumstances, there had been a specific grant of the use of the refrigerator the position might well be different, but here the only specific grant is of the use of the refrigerator as a fixture and, therefore, any obligation to supply refrigeration must be based on an implied term. Once that position is reached, I find it quite impossible to imply a term which could be said to be necessary or inevitable in the minds of both parties had they considered the matter. In the first place, it would have to be a term applicable to all the "fixtures and

" fittings." Secondly, what are its precise terms in regard to the extent of the refrigeration and as to the contingencies, if any, which will excuse the landlord, bearing in mind, inter alia, that at the time of the demise the war was at its height?

A somewhat similar question came before the Divisional Court in *Rex* v. *Croydon and District Rent Tribunal, ex parte Langford Property Co. Ltd.*[13] A furnished house rent tribunal had claimed to exercise jurisdiction on the basis that under the contract of letting in question the landlords were obliged to render services, in that case the supply of hot water and central heating. The contract provided for the letting of the premises " together with " all fixtures, privileges, rights, easements and appurtenances to " the said premises." The fixtures and appurtenances included a hot water system for the supply of hot water to the kitchen taps, the bath and the heating radiators. The hot water system was controlled by the landlords. It was argued that it was a necessary implication that the landlords should supply the heating and the hot water, but the court (Lord Goddard C.J. and Lynskey J., Macnaghten J. dissenting) refused to accept that argument. Lynskey J., giving the judgment of the majority of the court, said [14]: " A similar argument was advanced in *Rex* v. *Paddington* " *and St. Marylebone Rent Tribunal, ex parte Bedrock Invest-* " *ments Ltd.*[15] without success. We said in that case [16]: ' There " ' is no ground in my opinion for implying any covenant and none " ' ought ever to be implied unless the implication is so necessary " ' that the court can have no doubt what covenant or undertaking " ' to write into the agreement.' In these days of shortage of " essential commodities, landlords may well refuse to provide any " service, however willing to give it as a matter of grace or " concession. Where it is intended to impose upon a landlord an " obligation to give such services it is usually set out in express " terms in the agreement of tenancy with limitations as to hours " and periods during which such services are to be rendered. In " this case, such a term is missing from the agreement, and, in " our view, this was a deliberate omission. In our opinion, it is " unlikely that, in the circumstances, the landlords would have " been prepared to bind themselves contractually to give these " services. In this case we are satisfied that no such term as " suggested can or should be implied. It may well be that the " tenant expected and the landlords hoped that such services as " could reasonably be given for heating and the supply of hot " water would be given, but unless there was a contractual obliga- " tion to render such services on the part of the landlords, this " would not avail to make the rent one which includes payment " for services so as to confer jurisdiction on the rent tribunal."

Each case must, of course, depend on its own facts, and Mr. Lovegrove, for the tenants, sought to distinguish the present case.

[13] [1948] 1 K.B. 60.
[14] Ibid. 65.
[15] [1947] K.B. 984.
[16] Ibid. 990.

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He pointed out that in the *Croydon* case [17] the words " and the " use of the fixtures and fittings " did not appear, a fact which the county court judge also relied on. For my part, however, I do not think that the presence of those words affords any valid distinction. Whether it said so expressly or not the tenants in the *Croydon* case [17] clearly were granted the use of radiators, the bath and the taps. Indeed, in *Rex* v. *Paddington Rent Tribunal, ex parte Bedrock Investments Ltd.*,[18] the tenant was expressly granted the " right to use . . . lavatory accommodation and bath- " room." Mr. Lovegrove further contended that hot water was not, whereas refrigeration in the absence of a larder was, essential, but again I doubt whether this argument is sound. Whether the one is more " essential " than the other may be a matter of taste. Nor does it make any difference in my judgment that a supply of hot water is not needed every hour of the day and night, whereas a supply of refrigeration is.

Mr. Lovegrove, however, invited us to overrule the *Croydon* case.[19] For my part, I think that it was properly decided, but even if I felt any doubt I should hesitate a long time before overruling a decision which has stood unchallenged for 10 years, and upon which furnished rent tribunals throughout the country have acted. Moreover, no doubt as a result of that decision, Parliament has by section 40 of the Housing Repairs and Rents Act, 1954, provided a remedy for tenants in such circumstances.

Mr. Lovegrove also based his claim on the covenant for quiet enjoyment, and he has referred to *Booth* v. *Thomas* [20] in support of the proposition that there may be a breach of that covenant by acts of omission as well as acts of commission. Whilst accepting that proposition I feel myself some difficulty in seeing how the tenants are in any better position by basing their claim on this covenant. Prima facie, the covenant for quiet enjoyment is an undertaking to indemnify the tenant against lawful acts. If an unlawful act is committed whether by the landlord or anyone else, the tenant has a right against the wrongdoer. No doubt, however, if the landlord is guilty of a wrongful act against the tenant, as in *Booth* v. *Thomas*,[20] by reason of his being an adjoining occupier he also may be liable under the covenant for quiet enjoyment. But here there being no wrongful act, unless it be under the agreement, one is at once thrown back on the meaning of the words " with the use of the fixtures and fittings."

Finally, Mr. Lovegrove said that the landlords were derogating from their own grant. The validity of this contention, as it seems to me, stands or falls with the answer to the question whether there has been a breach of covenant. I do not think the principle assists.

Accordingly, I feel constrained to allow the appeal.

Sellers L.J. The agreement on which the tenants sue for damages for its breach provides that the landlord lets and the

[17] [1948] 1 K.B. 60.
[18] [1947] K.B. 984.
[19] [1948] 1 K.B. 60.
[20] [1926] Ch. 397.

tenant takes "all that flat situate and known as 255b Minehead "Court with the use of the fixtures and fittings therein belonging "to the landlord." There was no inventory or statement of what the fixtures and fittings were, and the evidence does not refer to anything except a refrigerator. It would seem that there were electric light fittings, but in the absence of evidence I see no reason to infer that there were any radiators or other provision for central heating.

The tenants complain that since October 1, 1956, they have not had the use of the refrigerator as the tenancy agreement provided for them.

It appears that the tenants' flat is one of 24 flats, each of which was provided with a refrigerator, worked from a central plant solely in the control of the landlord as regards its situation and its operation. The "fitment" in the flat was not a refrigerator unless it was continuously supplied through the central plant with the means of refrigeration. The flat which the tenants covenanted to use only as a private dwelling had no larder and was not in any practical sense equipped for keeping the food which would ordinarily and normally be kept in any household. It would appear that the refrigerator provided in the tenants' flat was a substitute for a larder—it may be that this was so in respect of all the flats—and the inclusive rent for the flat to be used as a private dwelling included the use of the refrigerator.

If the refrigerator had been a self-contained unit—operated by electricity or gas which was supplied to the flat—and solely under the control of the tenants, then under this agreement the tenants could not complain against the landlord if the refrigerator was old, defective or unsatisfactory, or if in the course of time it became unusable. But they could at least have taken steps to keep it in running order.

The well-established law on which my Lords have relied may well apply in such circumstances. Where I differ from my Lords, with deference, is that I feel that the new and different circumstances revealed in this case permit and require a different construction of the contractual obligation of the landlord.

Fixtures let to a tenant are normally complete in themselves and are capable of being maintained by the tenant (frequently under the requirement of a covenant) in serviceable order and suitable for their purpose. It is unusual to have the necessary component parts of a fixture partly in control of the tenant and partly (and, in this case, in respect of a vital part) in the control of the landlord. Here an essential part of its functioning is in the hands of the landlords, who have contracted to give the use of the refrigerator to the tenants. This seems to me to be an express obligation. It is not specific as to the quality of refrigeration, which does not seem to have been very good at any time since the tenants acquired the tenancy but if it ceased—as it did—to operate at all, the landlords seem to me to alter the character of

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the fixture and deprive it of its service for which the tenants were paying, in part, a rent.

If an agreement gives a tenant the use of something wholly in the occupation and control of the landlord, for example, a lift, it would, I think, be accepted that the landlord would be required to maintain the lift, especially if it were the only means of access to the demised premises. I recognize that a lift might vary in age and efficiency, but in order to give meaning to the words "the use of" and to fulfil them, it should at least be maintained so that it would take a tenant up and down, subject to temporary breakdown and reasonable stoppages for maintenance and repairs.

The substantial part of the refrigerator as far as its function is concerned is in the occupation and control of the landlord and without the refrigerator this flat, having no larder, is incomplete for ordinary domestic living. The refrigeration should be maintained, in my view, so as not to deprive the tenant of the use of the fixtures, but there must no doubt be room for varying standards of efficiency.

In so far as the use was given of "the fixtures and fittings "therein belonging to the landlord" and the refrigerator was not specifically mentioned, it may be that a similar construction should, on the face of it, be applied to all the fixtures and fittings so let. Having regard to the unusual and particular feature of the refrigerator (not being a complete fixture in the control of the tenants and the major part of the whole remaining in the landlord's control) I am not sure that that is a necessary construction, but clearly it could not apply to any of the fixtures and fittings referred to in clause 2 (iii) which expressly excludes them and places the obligation to maintain and repair them on the tenants.

The presence of hot water radiators or pipes in a flat, which "go with" the demised premises, are not, I think, quite in the same category as a refrigerator. Even if the premises are let "with the use of the hot water radiators" this may not, in itself, require a landlord to provide hot water. A central heating system is not used for many months in a year and it may be very much a matter of choice for what period it should be utilized. It is not as vital for the use of a flat as a refrigerator where no other reasonable place for keeping food is provided. But this question does not arise in this case and I would reserve any decision on it.

Apparently the landlords acquired this property from the previous landlord on or about October 1, 1956, and as they gave no evidence or explanation why the failure of the refrigerator coincided with the change of ownership it is a reasonable inference that the new landlords decided to discontinue the service. There was no offer of a reduction in rent, although the tenants were deprived of a facility for which they had contracted to pay in their inclusive rent.

The trial judge found a breach of contract in respect of the

refrigeration. I would not hold that he was wrong in so doing and there was no challenge to the amount awarded as damages. I would dismiss the appeal.

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Appeal allowed. Leave to appeal to House of Lords.

Solicitors: *Harewood & Co.; Syed A. Rafique.*

E. D.

[HOUSE OF LORDS.]

DIRECTOR OF PUBLIC PROSECUTIONS . APPELLANT;

AND

HEAD . . . . . RESPONDENT.

H. L. (E.)* 1958 *Jan.* 15, 16; *Mar.* 6.

Criminal Law—Mental deficiency—Carnal knowledge of mentally defective girl—Defence—Whether woman lawfully detained in institution—Whether prosecution must prove lawful detention at time of offence—Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28), *ss.* 1, 9, 56 (1) (*a*).

Mental Deficiency—Detention order—Validity—Order not supported by the medical certificates—Whether void or voidable.

Evidence — Documentary — Production from proper custody — Mental deficiency—Detention order.

Presumption—Rebuttable—Legality—Detention—Mental deficiency.

Burden of Proof—Criminal case—Offence against mental defective—Detention—Legality.

Void or Voidable—Administrative order—Mental deficiency—Detention order—Not supported by the medical certificates.

By section 56 (1) of the Mental Deficiency Act, 1913: "Any "person—(*a*) who unlawfully and carnally knows . . . any woman "or girl under care or treatment in an institution or certified house "or approved home, or whilst placed out on licence therefrom or "under guardianship under this Act . . . shall be guilty of a "misdemeanour. . . ."

The appellant was convicted of carnal knowledge of a mental defective contrary to section 56 (1) (*a*) of the Act. At the time of the alleged offences the woman concerned was on licence from an institution for defectives to which she had been sent as a "moral "defective," pursuant to an order made by the Secretary of State in July, 1947, in purported exercise of powers under the Act. This order was produced in evidence by the prosecution, as were also subsequent orders transferring her to other institutions and finally to the one from which she had been released on licence. At the trial the prosecution also produced the two medical certificates which were before the Secretary of State when he made the order and on which he had to be satisfied that she was a defective, but neither certificate contained any evidence on which it could be said that she was a "moral defective" within section 1 (1) (*d*) of the Act. The prosecution conceded that the order of 1947 was defective and that on an application for a writ of habeas corpus it could be successfully challenged. The Court of Criminal Appeal quashed

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW AND LORD DENNING.

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the conviction. On an appeal by the Crown to the House of Lords:—

Held (Viscount Simonds dissenting), that the decision of the Court of Criminal Appeal quashing the conviction should be upheld.

Per Lord Reid, Lord Tucker and Lord Somervell of Harrow. Proof that a woman was detained as an inmate in one of the specified institutions and that she was under care or treatment therein as a defective, or that she was out on licence from one of the places to which the system of licences under the Act applied, was prima facie evidence that she was a defective lawfully under care or treatment as such or on licence, but if it was shown (as in the present case) that on the face of the documents produced and received in evidence without objection, the detention was illegal, the presumption of defectiveness went and the prosecution must fail. If the original order was invalid it could not be cured by the continuation orders and a subsequent reclassification of the woman by placing her in a different category of defectiveness, coupled with evidence that she was at the material date a defective within that category.

Per Viscount Simonds: Section 56 does not impose on the prosecution the burden of proving that the person under care or treatment or placed out on licence was not only in fact under such care or treatment or so placed out, but also was lawfully detained.

Per Lord Denning. Here the original order of the Secretary of State was voidable and not void, being a wrong exercise of his jurisdiction and not a usurpation, and until it was quashed it must be regarded as good, so that it was sufficient to support the continuation orders made on the faith of it. The woman's detention was therefore lawful since the order, though voidable, had not been avoided.

By the majority. The prosecution should have in court, available for inspection by defending counsel, the relevant orders or other documents on which the detention was based.

Per Lord Somervell (all but Lord Denning agreeing). I am not satisfied that the original order was not void or that, if it was only voidable, a man should be sent to prison on the basis that it was a good order when the court knows it would be set aside if proper proceedings were taken.

The case was never argued on those lines below.

Decision of the Court of Criminal Appeal [1958] 1 Q.B. 132; [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426 affirmed.

Appeal from the Court of Criminal Appeal (Lord Goddard C.J., Donovan and Havers JJ.).

This was an appeal by the Crown from a decision of the Court of Criminal Appeal which had allowed an appeal by John Shortriggs Head against his conviction at the Carlisle Assizes on his trial before Hinchcliffe J. on an indictment charging him with having carnal knowledge of a mental defective on October 7, 1956. The woman was at the time on licence from Dovenby Hall Hospital at Cockermouth in Cumberland. He was charged under section 56 (1) (*a*) of the Mental Deficiency Act, 1913.

The facts are fully stated in the opinions of Lord Tucker and Lord Denning.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, *Rodger Winn* and *Alan Booth* for the Crown.

G. W. G. Jones for the respondent.

The only cases referred to in argument were: *Rex* v. *Cook* *; *Reg.* v. *Board of Control, Ex parte Rutty* †; *Smith* v. *East Elloe Rural District Council* ‡; *Stirland* v. *Director of Public Prosecutions* ‡‡ and *Richardson* v. *London County Council.* §

Their Lordships took time for consideration.

March 6. VISCOUNT SIMONDS. My Lords, the facts of this case are fully set out in the opinion of my noble and learned friend, Lord Tucker. I will not occupy time by stating them myself, though I am conscious that the few observations that I have to make are not easily intelligible without them. I do not doubt that questions of great importance are directly or indirectly raised by the judgment of the Court of Criminal Appeal in this case, but in accordance with the practice which has consistently been observed since the Court of Criminal Appeal was established they were not formulated for the consideration of the House. In the result I have for my part found it difficult to determine exactly what is the question for decision—and by that I mean, of course, the question which is at issue between the appellant and the respondent in this appeal. I should not think it desirable, particularly in a criminal case, to travel outside that issue.

The bald facts of the case are that the respondent was charged with having had carnal knowledge of a woman who was placed out on licence from an institution for mental defectives contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913. He was convicted, but upon appeal the conviction was quashed. It was quashed upon the ground that the woman was not lawfully detained in the institution. The Lord Chief Justice said [1] that where a man was prosecuted for this offence (now an offence against section 8 of the Sexual Offences Act, 1956), "evidence "must be given by the production of the relevant documents "that the woman in respect of whom the charge is made was at "the time of the offence lawfully subject to the Act." Donovan J. used similar language. The documents under which the woman was detained were in fact produced at the trial. I need say no more than that on the face of them they appeared to be defective. The Attorney-General in the Court of Criminal Appeal admitted that in appropriate proceedings they could be successfully challenged, e.g., upon a writ of habeas corpus. He did not recede from this admission before the House but contended that it was irrelevant whether or not in such proceedings they could be challenged. He urged that the relevant section of the Act was passed for the protection of a certain class of women, amongst

* [1954] 1 W.L.R. 125; [1954] 1 All E.R. 60.

† [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769.

‡ [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855.

‡‡ [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13.

§ [1957] 1 W.L.R. 751; [1957] 2 All E.R. 330.

[1] [1958] 1 Q.B. 132, 139–140; [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426.

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them women "under care or treatment in an institution . . . or "while placed out on licence therefrom." He conceded that in its context the expression "under care or treatment" meant under care or treatment as a mental defective, but contended that, if the woman was in fact under such care or treatment in an institution or placed out on licence therefrom, it was not open to the defendant to question the legality of the detention. He pointed out that the proviso gives adequate protection to a man who, being charged with the offence, proves that he did not know and had no reason to suppose that she was a defective.

My Lords, this House no less than other courts of law is traditionally jealous to safeguard the liberty of the subject; but I agree with the learned Attorney-General that such a consideration is irrelevant to the present case. Is it the man's liberty or the woman's that is at stake? Not his, unless a man is to be at liberty to have carnal knowledge of any woman who is under treatment in an institution on the chance that a defect may be found in the order of detention; nor hers, for she is not a party, nor are the proper authorities parties, to the proceedings, and her eventual liberty will be determined by other considerations beyond those of a defect in an order made many years ago.

I speak with diffidence knowing that I differ from the Court of Criminal Appeal and from the majority of your Lordships, but I cannot refrain from saying with what anxiety I regard the possibility that, as a result of this decision, whenever a man is charged with this offence, he can, though he knows that the woman is under care or treatment as a mental defective, demand to see all "the relevant documents" (whatever they may be) and, finding perchance a flaw in them, successfully plead that she was not lawfully detained and that he, therefore, has committed no offence. I must, I think, assume that any defect which would support a writ of habeas corpus would be available to him, and further, that the same result would follow whether the woman was, as in the present case, on the high road to recovery or was such a defective as to stand in particular need of the protection afforded by the Act.

I would therefore decline to read section 56 of the Act as imposing on the prosecution the burden of proving that the person under care or treatment in an institution or placed out on licence therefrom was not only in fact under such care or treatment or so placed out on licence but also was lawfully detained.

The Attorney-General supported his case by the plea that, if the prosecution had to prove lawful detention of an inmate of an institution, the burden of proof might be very heavy, and this plea was much debated. If upon its true construction the section imposes this burden, I respectfully doubt whether it is material that the burden is heavy or light. In the view which I take this question does not arise, but if it did, I should be content to adopt what my noble and learned friend, Lord Tucker, says about it.

and I would join in the reservations made by my noble and learned friend, Lord Somervell of Harrow.

One other point should be mentioned. It was not clear to me whether one of the questions at issue in this appeal was whether in a prosecution for this offence the Crown must prove that the woman was at the time of the offence a mental defective. I think that at one time the learned Attorney-General was inclined to accept that burden. But, if so, he was in my opinion wrong. I believe that all your Lordships take the same view. The appeal will, in accordance with your Lordships' opinion, be dismissed with costs.

LORD REID. My Lords, I have had the advantage of reading the speeches about to be delivered by my noble and learned friends. I agree with that of Lord Tucker and I would concur in the reservations to be made by Lord Somervell of Harrow.

LORD TUCKER. My Lords, on May 22, 1957, the respondent was convicted of two offences against section 56 (1) (*a*) of the Mental Deficiency Act, 1913, after a trial before Hinchcliffe J. and a jury at the Cumberland Assizes held at Carlisle. He appealed to the Court of Criminal Appeal who quashed his conviction on November 1, 1957. The Director of Public Prosecutions now appeals to this House pursuant to the certificate of the Attorney-General granted on November 11, 1957.

The indictment contained two counts alleging that the respondent on two occasions in October, 1956, had carnal knowledge of a girl named Elfreda Henderson, a mental defective on licence from an institution for mental defectives.

It will suffice to set out one of these counts, which reads as follows:—

"Statement of Offence

"Carnal knowledge of mental defective, contrary to section "56 (1) (*a*) of the Mental Deficiency Act, 1913.

"Particulars of Offence

"John Shortriggs Head on October 7, 1956, in the County of "Cumberland had carnal knowledge of Elfreda Henderson a "woman on licence from Dovenby Hall Hospital, an institution "for mental defectives."

The superintendent of Dovenby Hall gave evidence for the prosecution and produced and put in evidence certain documents relating to the girl Henderson for the purpose of proving that she was lawfully detained as a defective and duly let out on licence on the material date. The documents included an order made by the Home Secretary under section 9 of the Mental Deficiency Act, 1913, and dated July 2, 1947, for Henderson's transfer from an approved school, where she then was, to a certified institution, as defined in the Act, in Cornwall. Subsequent orders transferring her to other institutions and finally to Dovenby Hall were also produced. The licence permitting her to be absent was not

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put in evidence. Donovan J. in the Court of Criminal Appeal was mistaken in thinking it had been proved and received in evidence.

Counsel for the defence challenged the validity of the girl's detention and certification as a defective as disclosed by these documents. Hinchcliffe J. ruled that the Home Secretary's order of July 2, 1947, was conclusive and the defence could not go behind it and in his direction to the jury he told them as a matter of law that on the documents produced Henderson was properly certified as a defective and on the uncontradicted evidence of the superintendent, Dr. Ferguson, she was a mental defective. In substance, therefore, the only real issue left to the jury was as to the acts of carnal knowledge which were proved by the girl and not seriously challenged. Having been warned by the superintendent, when the girl had been out on licence on a previous occasion, that she was a patient on licence from the institution as a defective, a defence under the proviso to section 56 was not open to the respondent and he did not give evidence. He was accordingly convicted.

Amongst the documents put in evidence at the trial were the two medical certificates required by section 9 of the Act for the satisfaction of the Secretary of State before he could make a valid order for the girl's transfer to an institution at which she would be under compulsory detention as a defective. These certificates stated that she was a moral defective but neither of them showed that she required " care, supervision and control for the protec- " tion of others " which is, by section 1 of the Mental Deficiency Act, 1913, as amended by the Act of 1927, an essential requirement before any person can be classified as a moral defective. In the Court of Criminal Appeal (Lord Goddard C.J., Donovan and Havers JJ.) the Attorney-General admitted the invalidity of the original order of the Secretary of State, and the court, holding the resulting detention unlawful, quashed the conviction.

In the Court of Criminal Appeal two judgments were delivered, one by the Lord Chief Justice and one by Donovan J. The Lord Chief Justice stated the contention of the Crown as follows[2]: " The Attorney-General submitted that all that the " prosecution had to prove to establish a case in addition to the " fact of carnal knowledge having taken place was that the girl " was in fact in an institution for care or treatment, or that she " was out on licence from such an institution. He submitted " that the section did not require proof that the girl was a " defective."

Before your Lordships I understood the Attorney-General to say that the prosecution must prove that the girl in question was an inmate in one of the institutions named and receiving care and treatment therein or on licence therefrom and that at the time of intercourse she was a mental defective. I understood

[2] [1958] 1 Q.B. 132, 139.

this as meaning that proof of mental deficiency must be given in addition to and independently of the fact of lawful detention.

At the conclusion of his judgment the Lord Chief Justice said [3]: "So that there may be no doubt on the matter, I desire "to say that where a man is prosecuted for this offence, which is "now an offence against section 8 of the Sexual Offences Act, "1956, evidence must be given by the production of the relevant "documents that the woman in respect of whom the charge is "made was at the time of the offence lawfully subject to the "Act."

Donovan J. used these words [4]: "Accordingly, I think the "prosecution were right to produce the various documents "relating to the woman's detention, and to produce the licence. "Nor do I think that such a practice, which ought to be followed, "can lead to any great difficulty unless there are many of these "patients illegally detained, which I prefer not to suppose."

The Attorney-General submitted that these statements placed a burden on the prosecution which was not justified by the Act, and that they would tend to result in a trial within a trial of issues more suitable to proceedings by way of habeas corpus or certiorari or in actions for false imprisonment, and that the necessity for strict proof of documents made or facts having taken place many years ago would in some cases render prosecutions impossible.

My Lords, it will be apparent from what I have said, and indeed the Court of Criminal Appeal so stated, that this appeal raises questions of considerable importance with regard to the construction of section 56 of the Act and the matters essential for the prosecution to prove.

It may be convenient at this stage to set out section 56 (1) in full and to refer to certain other sections of the Act before stating what I consider to be the answer to the problems which have been raised: "Any person—(*a*) who unlawfully and carnally "knows, or attempts to have unlawful carnal knowledge of, any "woman or girl under care or treatment in an institution or "certified house or approved home, or whilst placed out on "licence therefrom or under guardianship under this Act; or "(*b*) who procures, or attempts to procure, any woman or girl "who is a defective to have unlawful carnal connexion, whether "within or without the King's dominions, with any person or "persons; or (*c*) who causes or encourages the prostitution, "whether within or without the King's dominions, of any woman "or girl who is a defective; or (*d*) who, being the owner or "occupier of any premises, or having or acting or assisting in the "management or control thereof, induces or knowingly suffers "any woman or girl who is a defective to resort to or be in or "upon such premises for the purpose of being unlawfully and "carnally known by any man, whether such carnal knowledge "is intended to be with any particular man or generally; or

[3] [1958] 1 Q.B. 132, 139–140. [4] Ibid. 142.

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" (*c*) who, with intent that any woman or girl who is a defective " should be unlawfully and carnally known by any man, whether " such carnal knowledge is intended to be with any particular " man or generally, takes or causes to be taken such woman or " girl out of the possession and against the will of her parent or " any other person having the lawful care or charge of her; shall " be guilty of a misdemeanour and shall be liable upon conviction " on indictment to be imprisoned, with or without hard labour, " for any term not exceeding two years unless he proves that he " did not know, and had no reason to suspect, that the woman or " girl was a defective."

Section 1, as amended, defines mental defectives and the provisions thereof relevant to the present case are as follows:— " (1) The following classes of persons who are mentally defective " shall be deemed to be defectives within the meaning of this " Act:—(*a*) Idiots " (who are defined); " (*b*) Imbeciles " (defined); " (*c*) Feeble-minded persons " (defined); " (*d*) Moral " defectives, that is to say, persons in whose case there exists " mental defectiveness coupled with strongly vicious or criminal " propensities and who require care, supervision and control for " the protection of others. (2) For the purposes of this section, " ' mental defectiveness ' means a condition of arrested or incom- " plete development of mind existing before the age of eighteen " years, whether arising from inherent causes or induced by " disease or injury."

Section 2 provides for defectives being dealt with under the Act by being sent to or placed in an institution or placed under guardianship.

Section 3 deals with sending a defective to an institution or placing him under guardianship by order of a judicial authority or under order of a court, or in the case of a defective detained in a prison or other specified place of a like nature by order of the Secretary of State.

Section 10 authorizes the detention of a defective sent to an institution under order, and of a defective placed under guardianship by any such order. And by subsection (2) provides that subject to regulations an order placing a defective under guardianship shall confer on the person named as guardian such powers as would have been exercisable if he had been the father of the defective and the defective had been under the age of 14.

Section 12 (2) enacts that subject to the foregoing provisions of the section a defective placed by his parent or guardian in an institution or under guardianship may be detained.

Section 30 places upon local health authorities the duty to ascertain what persons within their area are defectives subject to the Act (otherwise than under paragraph (*a*) of subsection (1) of section 2), and to make provision for them.

Section 49 applies to certified houses all the provisions of the Act relating to institutions and the patients therein.

Section 50 enables the Minister of Health to approve of certain

premises wherein defectives are received in certain circumstances and such premises are referred to as an approved home. Subsection (2), however, enacts that it shall not be lawful to receive or detain in an approved home any person ordered to be sent to an institution for defectives under an order of the judicial authority or a court or a Secretary of State.

Section 56 is in Part IV of the Act, which deals with offences and legal proceedings.

Section 52 is, I think, worth setting out. It reads: "If any "person, having been warned by a person appointed to "be guardian of a defective under this Act, or by a "person under whose charge a patient absent from an "institution or from a certified house has been placed, not to "supply intoxicants to or for the use of the person under his "guardianship or charge, knowingly supplies any intoxicants to "or for the use of that person, he shall be guilty of an offence "under this Act: Provided that a person shall not be guilty of "the offence of supplying intoxicants in contravention of the "warning if the person giving the warning refuses, when required "so to do, to produce the authority under which he acts." It will be observed that the last-mentioned section does not create the offence of knowingly supplying intoxicants to a defective, but of supplying intoxicants after warning to "a person" under guardianship or absent from an institution.

Returning to section 56, here also it will be noticed that nowhere is the simple offence of having carnal knowledge of a defective created, and in subsection (1) (*a*) the word "defective" does not appear. The Court of Criminal Appeal construed the words "under this Act" at the conclusion of subsection (1) (*a*) distributively as applying to the preceding words "under care "or treatment in an institution or certified house or approved "home, or whilst placed out on licence therefrom," and concluded that the subsection applies—to quote from the judgment of Donovan J.[5]—only to "a person who has been found to belong "to one of the four categories of defectives specified in section 1, "and who is, in consequence of an order made under the Act, "having care or treatment in an institution, or is out on licence "by virtue of regulations made under the Act."

My Lords, I think the presence of the words "or approved "home" negative this construction as there is no machinery anywhere in the Act for placing anyone in an approved home by order or in any other manner. In the present case, however, your Lordships are concerned only with the case of a person who had purported to be detained in, and let out on licence from, an institution under the provisions of the Act.

In my opinion, the subsection has been carefully framed for the protection of persons who are undergoing care or treatment as defectives in certain specified institutions, or are on licence or under guardianship under the provisions of the Act.

[5] [1958] 1 Q.B. 132, 141.

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The Lord Chief Justice observed that it would no doubt be presumed that prima facie a person in a certified institution was a defective within the Act. I respectfully agree with this view, which is, I think, reinforced by the words "under care or treatment" which in the context must mean under care or treatment as a defective within the meaning of the Act. In my view, on proof that a girl is detained as an inmate in one of the specified institutions and under care or treatment therein as a defective or is shown by the production of the licence to be out on licence from one of those places to which the system of licences under the Act is applicable, that is prima facie proof that she is a defective lawfully under care or treatment as such, and I think the Attorney-General—if I correctly understood him as previously stated—was assuming an unnecessary burden if he meant that it is incumbent on the prosecution in all cases under section 56 to satisfy a jury by medical evidence that the girl in question comes within one or other of the categories specified in section 1. I think this is to be presumed. But the foundation for the presumption, in the case of a person under detention or on licence, is the legality of the detention and the necessity for a licence to justify the patient's absence, and if it is shown and admitted, as in the present case, that on the face of the documents produced and received in evidence without objection the detention was illegal, the whole basis of the subsection and the presumption of defectiveness goes and the prosecution must fail. I do not think anything more than what I have stated above is required to establish a prima facie case, but it is right and proper that the prosecution should have in court and make available for inspection by defending counsel the relevant orders or other documents upon which the detention is based so that in a proper case, and subject to questions of admissibility in evidence, the presumption of legality may be rebutted.

My Lords, it remains only to state that I agree with the reasons of the Court of Criminal Appeal for rejecting the Crown's contention that even if the original order was invalid it had been cured by the continuation orders and a subsequent reclassification of the girl by the superintendent placing her in a different category of defectiveness, coupled with his evidence to the effect that she was at the material date a defective within that category.

For these reasons I would dismiss this appeal.

I desire to add that I have read the opinion about to be delivered by my noble and learned friend, Lord Somervell of Harrow, and that I agree with the views expressed therein.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion that has been given by my noble and learned friend, Lord Tucker, and have nothing I wish to add to it.

I have had the advantage of reading the opinion about to be given by my noble and learned friend, Lord Denning, and would like briefly to make my reservations. My noble friend thinks that

the Secretary of State's order of July 2, 1947, was voidable and not void.

I am not satisfied that the order was not void. On the wording of section 9 of the Mental Deficiency Act, 1913, I think the certificates may well be for this purpose part of the order to be looked at in order to see whether it is good on its face. If they are not part of the order it might, I think, be maintained that they afford no evidence on which the order made could validly have been based. In either case I would wish to reserve the question whether the order would not be void rather than voidable.

It is conceded that the court had material before it which would have led to the order being quashed on certiorari or other appropriate proceedings. The next question as it appears to me can be stated in this way. Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken? I doubt it. The case was never argued on these lines before the Court of Criminal Appeal.

The distinction between void and voidable is by no means a clear one, as a glance at the entry under "void" in Stroud's Judicial Dictionary shows. I am not satisfied that the question whether a man should go or not go to prison should depend upon the distinction.

I would dismiss the appeal for the reasons given by my noble and learned friend, Lord Tucker.

LORD DENNING. My Lords, the first point is whether it is necessary for the prosecution in such a case as this to prove that the woman was lawfully detained; and if it is necessary, how are they to prove it? The Lord Chief Justice gave this ruling on the point [6]: "So that there may be no doubt on the matter, I desire "to say that where a man is prosecuted for this offence, . . . "evidence must be given by the production of the relevant docu- "ments that the woman in respect of whom the charge is made "was at the time of the offence lawfully subject to the Act."

The Lord Chief Justice was, I think, only referring to the case of a woman detained under compulsion, not to a voluntary patient. In such a case, I think, his ruling is correct. The prosecution must prove that the woman is *lawfully* under care or treatment, and they can only do this by proving that she is *lawfully detained*: and they must prove that she is under care or treatment *as a defective*, not for any other illness. But they need not prove that she *is* a defective. Suffice it to prove that she is lawfully detained *as* a defective. That raises a presumption that she is a defective. The accused man is protected from any injustice by the proviso which gives him a defence if "he proves "that he did not know, and had no reason to suspect," that she was a defective. So also with a woman "placed out on licence," I think there must be in force a subsisting order for her detention.

[6] [1958] 1 Q.B. 132, 139–140.

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The medical superintendent cannot grant her a licence to be absent unless he has a right to compel her to stay: and she is only "on licence" so long as there is a right to bring her back; see regulations 95 to 97 and section 42.

The Attorney-General took exception to the ruling of the Lord Chief Justice. He submitted that it was not necessary for the prosecution to prove that the woman was *lawfully detained*. If there were such a burden on the prosecution, he foresaw great difficulty in discharging it. The prosecution would have to call the medical men who examined the woman many years ago when she was first certified as a defective, and also evidence that she was "found neglected," or whatever else was the particular ground on which she was "dealt with" under the Act. That would be a burden of such magnitude that the imposing of it would make the section a dead letter.

I do not think the difficulty is nearly so great as the Attorney-General fears. It is only necessary, as the Lord Chief Justice said, to produce the relevant documents. My noble and learned friend, Lord Tucker, says that it is not necessary even to go so far as that. It is sufficient to prove that the woman detained is an inmate of an institution—under care or treatment as a defective—and then rely on a presumption of legality without giving in evidence any of the relevant documents. I cannot bring myself to go as far as this. It seems to me to offend against a fundamental principle. No one in this country can be detained against his will except under the warrant of lawful authority; and when that warrant is required by law to be in writing, it must be produced on demand to the person detained and to any other person properly concerned to challenge the detention. When the legality of the detention has to be proved in a court of law, the document itself must be produced. It is the best evidence and nothing less will do. In *The Queen's Case*,[7] Abbott C.J., giving the opinion of the judges to this House, said that it "is a rule of "evidence as old as any part of the common law of England, "namely, that the contents of a written instrument, if it be in "existence, are to be proved by that instrument itself, and not by "parol evidence": and in *Strother* v. *Barr*[8] Best C.J. said that "great writers on the law of evidence say, if the best evidence "be kept back, it raises a suspicion that if produced, it would "falsify the secondary evidence on which the party has rested his "case." Whilst I readily acknowledge that that rule has been relaxed in modern times, it has never, so far as I know, been relaxed in the case of orders which deprive a person of his or her liberty. If the order is in existence, it ought to be produced. If it is kept back, it raises a suspicion that there is something wrong with it. In 1802 when a man was committed to the Fleet Prison for debt, it was held that, to prove that fact, the original warrant of commitment must be produced; see *Salte*

[7] (1820) 2 B. & B. 284, 289.
[8] (1828) 5 Bing. 136, 151.

v. *Thomas*.[9] And in 1847, when a question arose whether a prisoner in the Bridewell at Abingdon was in lawful custody, Maule J. ruled that the oral evidence of the governor was not sufficient; nor was the calendar signed by the clerk of assize; but it could only be proved by the record of his conviction at the assizes—see *Reg.* v. *Bourdon*.[10]

But this would put the prosecution in a great difficulty, says the Attorney-General. The documents do not prove themselves: and it may be next to impossible to prove them strictly. This is a criminal case and the Evidence Act, 1938, does not apply. Mr. Guthrie Jones says there is no such difficulty. It is sufficient to produce the original orders. I agree with him.

Consider for a moment how legality would be proved in habeas corpus proceedings. If the woman herself applied for a writ of habeas corpus, it would be sufficient for the medical superintendent of the hospital, in his return to the writ, to set out the order of detention and the continuation orders as a justification for her detention. He would not have to prove those orders by calling the makers of them or by proving the handwriting on them or anything of that sort; see *Leonard Watson's case*.[11] The production of those would suffice: see *Greene* v. *Home Secretary*.[12] If the orders disclosed on the face of them a ground sufficient in law for her detention, the court would hold her detention to be lawful (see Wilmot's Notes of Opinions and Judgments, pp. 106–108 (Opinion on Habeas Corpus)), unless she could show that the orders were forgeries or that there was no evidence on which the orders could be sustained, see the Habeas Corpus Act, 1816, *Bailey's* case[13], *Reg.* v. *Board of Control, Ex parte Rutty*.[14]

It is true, of course, that the procedure in habeas corpus proceedings is far removed from the present. But if the woman herself—seeking to challenge the legality of her detention in the proper way—can only call for *production* of the orders for her detention, it would seem strange if a third person, seeking to challenge the legality in his own interests, could call for strict proof of them.

The solution to the difficulty is, I think, this: the orders prove themselves by production of the originals from the proper custody. They are the modern successors of the old inquisitions in lunacy. The findings and orders made on such inquisitions were always receivable in evidence by the production of the original record from the proper custody without more ado. Lord Hardwicke so ruled in 1742 (see *Sergeson* v. *Sealey*[15]) and Lord Ellenborough in 1811 (see *Faulder* v. *Silk*[16]) and those cases were applied just over 50 years ago in *Van Grutten* v. *Foxwell*[17] (see *Hill* v.

[9] (1802) 3 B. & P. 188.
[10] (1847) 2 C. & K. 366.
[11] (1839) 9 A. & E. 731, 787–796.
[12] [1942] A.C. 284; 58 T.L.R. 53; [1941] 3 All E.R. 388.
[13] (1854) 3 E. & B. 607.
[14] [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769.
[15] (1742) 2 Atk. 412.
[16] (1811) 3 Camp. 126.
[17] [1897] A.C. 658, 660.

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Clifford [18]). The inquisition in lunacy has now been replaced by an inquiry by a justice of the peace, a master in lunacy or other public officer. Just as with the old inquisitions in lunacy, so also with these inquiries into defectiveness of mind. The orders made on them are receivable in evidence on production of the original from the proper custody without further proof except to identify the person who was the subject of the inquiry.

The reason why these orders are admissible is because they are in the nature of proceedings in rem. They affect the status of the individual and her capacity. They are made by a competent public officer whose duty it is to hold a judicial or quasi-judicial inquiry and to record his findings. If he finds that the woman is a defective, many public servants will be called upon to take action, some to detain her, others to take charge of her property. It is essential to the orderly and just conduct of business that all these public servants—and anyone else concerned with her affairs—should be able to act on the faith of the orders as they stand; and should not be put to the proof of the correctness of the findings therein—a task which would often be impossible after the lapse of time. They are therefore made admissible in evidence against all the world, see Starkie on Evidence, 3rd. ed. (1842), Vol. I, pp. 307–310. An interesting parallel is to be found in the orders made by the Home Secretary during the war for the detention of suspected persons. Lord Wright said: "The order made "by the Home Secretary in the terms of regulation 18B speaks "for itself. It is admissible as a public executive document to "show a good cause of the detention and needs no extrinsic justi- "fication"; see *Greene* v. *Home Secretary*.[19]

Applying this principle, it seems to me that the orders made by a competent authority under the Mental Deficiency Act, 1913, such as the order of a judicial authority under section 6, or of a Secretary of State under section 9, or the continuation orders of the Board of Control under section 11, are admissible in evidence on production of the originals from the proper custody and an identification of the party who is the subject of the order. If the originals are not available, certified copies are often made admissible by statute. Thus, in the case of an order made by a Secretary of State under section 9, a certified copy is admissible under the Documentary Evidence Act, 1868. In the case of the continuation orders, there is no need to produce the originals if the secretary to the board certifies under section 11 (5) that the initial order has been continued.

What, then, does an order of this kind prove when produced from the public custody? It is conclusive proof of its own existence, that is to say, that an order was made as the document says it was; and it is prima facie evidence (but not conclusive evidence) of the truth of the facts recited in it which are essential to its

[18] [1907] 2 Ch. 236, 244–245; 23 T.L.R. 601.

[19] [1942] A.C. 284, 306.

validity: and if uncontradicted, it ought to be regarded as sufficient evidence of those facts, see *Harvey* v. *Rex*,[20] *Hill* v. *Clifford*.[21]

The result is that in an ordinary case, in order to show that the woman is lawfully detained as a defective, all that the prosecution have to do is to call the medical superintendent to produce the original order for detention and the continuation orders, and in addition, if the woman has been placed out on licence, to prove that fact. That was done in this case and was held by the judge at the trial, Hinchcliffe J., to be sufficient. But it was upset by the Court of Criminal Appeal on the ground that, looking at the other documents which were also produced—but not proved—Miss Henderson was not lawfully detained at all. This brings me to the second point.

The Court of Criminal Appeal have held that Miss Henderson was unlawfully detained for more than 10 years and have severely criticized all those concerned in detaining her. The Attorney-General has challenged this finding. He admitted before your Lordships that the original order for her detention might have been quashed—if the appropriate application had been made for the purpose—but he contended that it stood until it was quashed and, accordingly, that the continuation orders and the licence were good. He cited Lord Radcliffe for his purpose: "Unless "the necessary proceedings are taken at law to establish the "cause of invalidity and to get it quashed or otherwise upset, it "will remain as effective for its ostensible purpose as the most "impeccable of orders"; see *Smith* v. *East Elloe Rural District Council*.[22] This contention of the Attorney-General was in effect, though not in terms, a contention that the original order was not absolutely *void*, but only *voidable*: and, as it had not been avoided before the continuation orders were made, these remained good. Even if the original order were quashed today, the continuation orders would still be good.

This is a point of the first importance which, by itself, would justify the Attorney-General in giving his certificate for an appeal to this House. I have thought it right, therefore, to consider it on principle. But first let me state the relevant facts. These all appear on the documents and this House is in as good a position to determine them as the Court of Criminal Appeal.

Miss Henderson was born on July 6, 1928, in Cumberland, and left school at 14. She then went out to work but when she was nearly 16 her mother left home. Some months passed. Her father found that she was beyond his control and brought her before the juvenile court as a refractory young person. The court ordered her to be sent to an approved school. She was at an approved school in Somerset for over two years. She then absconded and was brought back by the police. The sister in

[20] [1901] A.C. 601, 611; 17 T.L.R. 601.
[21] [1907] 2 Ch. 236, 244.
[22] [1956] A.C. 736, 769–770; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855.

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charge of the school said she was absolutely irresponsible and unfit to be at large. Thereupon, the question arose whether she ought not to be sent to an institution for defectives under section 9 of the Mental Deficiency Act, 1913, which says: "Where the Secretary of State is satisfied from the certificate of "two duly qualified medical practitioners that any person who is "in" an approved school "is a defective, the Secretary of State "may order that he be transferred therefrom and sent to an "institution for defectives. . ."

On June 10, 1947, she was examined by two medical men, one the certifying medical officer for Somerset, the other a medical practitioner in Bath. Each examined her separately and each certified that he had satisfied himself that she was a moral defective. Then on July 2, 1947, just before she was 19, the Secretary of State made this order: "Whereas, in pursuance of "section 9 of the Mental Deficiency Act, 1913, the above-named "Freda (properly Elfreda) Henderson has been duly certified to "be mentally defective within the meaning of the above-"mentioned Act as subsequently amended, I hereby order that "she be transferred from the school in which she is now detained "to the Convent of the Good Shepherd Certified Institution of "St. Anne's, Saltash, Cornwall. (Signed) J. Chuter Ede, One of "His Majesty's Principal Secretaries of State."

If that order is read with section 9 (as it should be) it means that the Secretary of State was satisfied from the certificate of the two doctors that Miss Henderson was a defective. This reference to the medical certificates means that they are to be read with the order as part of the record: see *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore.*[23] And "satisfied" in the Act means reasonably satisfied. If, on reading the medical certificates, no reasonable person would have been satisfied that she was a defective, the order is liable to be quashed.

What do the medical certificates show? Each doctor said he was satisfied that she was a moral defective but each stated insufficient facts to warrant this conclusion. One doctor referred to "her conduct," the other to "her behaviour" without going into details. One said she needed care and supervision "for her "own protection," but he did not go on to say that she needed it for the protection of others. The other said nothing about it. It is this defect which rendered the certificates insufficient. The Secretary of State ought not to have acted on them as they stood. He ought to have referred them back to the doctors for further consideration.

In fairness to the medical men, I would pause to say that it does not follow that their diagnosis was wrong. It is notoriously difficult to describe the characteristics of mental defectiveness. A doctor may well be able to diagnose it by his own observation of the patient's behaviour, but he may not be able to portray her behaviour adequately in words. The trouble with the two

[23] [1957] 1 Q.B. 524, 532; [1957] 2 W.L.R. 498; [1957] 2 All E.R. 796.

certificates may be, therefore, not in a faulty diagnosis, but in the bad expression of their reasons. The rest of the girl's history supports this view. Within a few days of going to the convent in Cornwall, she was found to be of such dangerous or violent propensities that the Board of Control ordered her to be removed to the Moss Side State Institution at Liverpool—a place specially set aside for serious cases of mental defectiveness. Whilst she was there continuation orders were made: and when she became of age, the statutory visitors held the important reconsideration of her case which the law requires. They reported that she was a moral defective and was a proper person to be detained. The statute gives a right of appeal from that decision but neither she nor her parents appealed. After she had been five years at Moss Side she had improved sufficiently to be sent to an ordinary institution. She was sent eventually to Dovenby Hall. In 1954, when she was 26, the medical superintendent of that hospital, Dr. Ferguson (who gave evidence at the trial), classified her as a "feeble-minded person" rather than a "moral defective," but she was still a defective within the Act, and the Board of Control made a continuation order. By October 31, 1955, she had improved so much that Dr. Ferguson granted her a licence to St. Catherine's College, Keswick. He did this so as to try to rehabilitate her. She worked at that college as one of the domestic staff. It was in 1956, whilst she was still out on licence, that the accused—in spite of explicit warnings—had intercourse with her. In October, 1957, she was discharged. Apparently she was then cured, for shortly afterwards she married another man.

On that history, I ask myself what effect did the initial mistake have on all that followed. Was it the cause of her detention over the next 10 years as the Court of Criminal Appeal seems to have thought? I should have said it was not. The chain of causation was broken at innumerable points just as it was in the celebrated case of *Harnett* v. *Bond*.[24] It was certainly broken on every continuation order. Under the statute the original order lasted only for one year and would then have expired unless a continuation order had been made. Before this was made, there had to be special reports on the girl by the statutory visitors and by the medical officer together with a certificate that she was still a proper person to be detained: and it was only after considering them all that the Board of Control made a continuation order. That first continuation order would itself have expired after 5 years unless another continuation order had been made after another investigation. And so on, from one continuation order to another, she was only detained as a result of an independent decision freshly made after the most careful reconsideration of her case. These continuation orders were not

[24] [1924] 2 K.B. 517, 538–542; 40 T.L.R. 653 (C.A.); [1925] A.C. 669, 682; 41 T.L.R. 509 (H.L.).

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made by automata with a rubber stamp. They were made by responsible people to whom Parliament had entrusted the task. On a just appraisal of the case, these continuation orders cannot be ignored in point of fact, but can they be ignored in point of law?

Mr. Guthrie Jones said that the original order was bad and that therefore the continuation orders were bad. They depended on the original order which was itself void. Nothing could save the continuation orders, he said, if the original order was bad.

This contention seems to me to raise the whole question of *void* or *voidable*: for if the original order was void, it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because you cannot continue a nullity. The licence to Miss Henderson would be a nullity. So would all the dealings with her property under section 64. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the 10 years during which she was unlawfully detained, since it could all be said to flow from his negligent act; see section 30 of the Mental Treatment Act, 1930.

But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it. The application would have to be made by the person aggrieved—Miss Henderson—and not by a stranger: and she would have to make it within 6 months unless the court extended the time. And being only voidable, the court would have a discretion whether to quash it or not. It would do so if justice demanded it, but not otherwise. Meanwhile the order would remain good and a support for all that had been done under it. See the principles discussed in *Dimes* v. *Grand Junction Canal*,[25] *McPherson* v. *McPherson*.[26] In this case, therefore, if the original order was only voidable, the continuation orders would be good. So would the licence. All dealings with her property would be valid. All the orders would be admissible in evidence (see *Leighton* v. *Leighton*,[27] Hubback on Evidence, pp. 590–1) and the Secretary of State would not be liable in damages—see *Everett* v. *Griffiths*.[28]

The vital question to my mind is therefore: Was the original order absolutely void or was it only voidable? If the order had been outside the jurisdiction of the Secretary of State altogether, it would have been a nullity and void, see *The Case of the Marshalsea*.[29] But that is not this case. The most that appears here is that the Secretary of State—acting within his jurisdiction—exercised that jurisdiction erroneously. That makes his

[25] (1852) 3 H.L.C. 759, 786.
[26] [1936] A.C. 177, 203–205; 52 T.L.R. 166.
[27] (1720) 1 Str. 308.
[28] [1921] 1 A.C. 631; 37 T.L.R. 481.
[29] (1612) 10 Co.Rep. 68b.

order voidable and not void. It is said that he made the order on no evidence or on insufficient materials. So be it. His error is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not, see *Rex* v. *Nat Bell Liquors Ltd.*[30] by Lord Sumner. If that error appears on the face of the record—as it is said to do here—it renders the order liable to be quashed on certiorari, but it does not make it a nullity, see *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[31] by Parker L.J. Unless and until it is so quashed, it is to be regarded as good. It is, moreover, sufficient to support all the continuation orders made on the faith of it. Even if the original order should be set aside, the continuation orders would remain good: for it is a general rule that when a voidable transaction is avoided, it does not invalidate intermediate transactions which were made on the basis that it was good, see *De Reneville* v. *De Reneville*[32] by Lord Greene M.R., and *Reg.* v. *Algar*[33] by Lord Goddard C.J. I would uphold therefore the contention of the Attorney-General that, whatever the position of the original order, the continuation orders were good.

Even if the woman applied for habeas corpus, she would be no better off, because the court, on seeing the continuation orders still standing, would not release her: just as it would not release her if it appeared that there would be danger in setting her at large; see *In re Shuttleworth.*[34]

Another consequence of the order being only voidable is this: that on a charge under section 56 (1) (*a*), there will be no occasion for a trial within a trial—a trial whether the woman could have got the order quashed—within a trial of the man for the offence. That would be a very undesirable state of affairs, but it will not arise if the order is to be regarded by the trial court as good, as I think it must and as, indeed, Hinchcliffe J. ruled in this present case, I think rightly.

It all goes to show how important it is to keep this distinction between void and voidable in mind, especially in the case of mental patients. There are many cases in the books where mistakes have been made by medical men in filling in the certificates leading to detention orders. Sometimes it happens through an oversight, sometimes through carelessness, sometimes through misapprehension as to the legal obligation. Very often it is a highly technical ground; see *Murray* v. *Murray*[35] by Greene M.R. If these orders were on such a ground to be absolutely void it would lead to much injustice in the law of divorce, the law of tort, and so forth: whereas if they are only voidable, there is no such injustice.

It is the failure to keep this distinction in mind which has led

[30] [1922] 2 A.C. 123, 151; 38 T.L.R. 541.
[31] [1957] 1 Q.B. 574, 588.
[32] [1948] P. 100, 112–112; 64 T.L.R. 82; [1948] 1 All E.R. 56.
[33] [1954] 1 Q.B. 279, 287; [1953] 3 W.L.R. 1007; [1953] 2 All E.R. 138.
[34] (1846) 9 Q.B. 651.
[35] [1941] P. 1, 8–9; 56 T.L.R. 955; [1940] 4 All E.R. 250.

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to the difficulties in the present case. Instead of considering whether the original order was void or voidable, the Court of Criminal Appeal considered whether it was valid or invalid, and having held it invalid, they held that the woman was unlawfully detained: whereas they should have held it was only voidable, and not having been avoided, the detention of Miss Henderson at the material time was lawful. In quashing the conviction therefore, they acted on a mistaken ground.

But that is not quite the end of the matter. There is another point. Is it right that the conviction should be restored? The decision of the Court of Criminal Appeal was founded on admissions made by the prosecution. I cannot think that the distinction between void and voidable was made clear to the court. I would not allow the prosecution to clarify it here at the expense of the accused so as to obtain a conviction. But I would allow them to clarify it in the public interest. When a man has been acquitted by an English court, it is altogether exceptional for the prosecution to be allowed to appeal from the acquittal. Parliament has only allowed it here so as to enable a ruling to be obtained on a point of law of exceptional public importance. When the Attorney-General comes to this House, seeking for such a ruling, I would myself try to give him an answer: and this I have done. But I would not on this account restore the conviction if it was not fair to do so, having regard to the course of proceedings in the court below.

On this ground I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions; Ludlow, Head & Walter.*

F. C.

[CHANCERY DIVISION.]

1957 *Dec.* 11, 12, 20.

Upjohn J.

OSTIME (INSPECTOR OF TAXES) *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

Revenue—Income tax—Double taxation relief—Life assurance—Mutual life assurance association in Australia—Branch office in United Kingdom — Assessments to income tax on life fund interest — Competence of assessments—"Industrial or commercial profits"—Whether taxable surpluses properly so described—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. I, Sched. D, rules applicable to Case III, r.* 3—*Income Tax Act,* 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 430—*Double Taxation Relief* (*Taxes on Income*) (*Australia*) *Order,* 1947 (*S.R. & O.* 1947, *No.* 806), *Schedule, art. II* (1) (i), (3); *art. III* (2), (3).

The taxpayer, a mutual provident society with its head office in Australia, carried on life assurance business there and, through a branch office in London, in the United Kingdom. For the years

1947–1948 to 1953–1954 inclusive it was assessed to United Kingdom income tax on sums which notionally were profits of its business of insurance, the assessments being made in respect of "life fund interest" under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, and section 430 of the Income Tax Act, 1952.[1] The taxpayer appealed and the special commissioners

[1] Income Tax Act, 1918, Sch. 1, Sch. D: "Case III. Tax in respect "of profits of an uncertain value and "of other income described in the "rules applicable to this Case . . . "r. 3: (1) Where an assurance company not having its head office in "the United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the company from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent provided in this rule, be deemed to be "profits comprised in this Schedule "and shall be charged under this "Case. (2) Such portion only of the "income from the investments of the "life assurance fund for the year "preceding the year of assessment "shall be so charged as bears the "same proportion to the total income "from those investments as the "amount of premiums received in "that year from policy holders resident in the United Kingdom and "from policy holders resident abroad "whose proposals were made to the "company at or through its office or "agency in the United Kingdom "bears to the total amount of the "premiums received by the company. ". . . (3) Every such charge shall be "made by the special commissioners "as though the company under the "provisions of this Act had required "the proceedings relating to the "charge to be had and taken before "those commissioners. (4) Where a "company has already been charged "to tax, by deduction or otherwise, "in respect of its life assurance "business, to an amount equal to or "exceeding the charge under this "rule, no further charge shall be "made under this rule, and where a "company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced."

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Sched., art. II: "(1) In the present "agreement, unless the context otherwise requires . . . (i) the term "'industrial or commercial enterprise "or undertaking' includes an enterprise or undertaking engaged in . . . "the business of . . . insurance, "life insurance or dealing in investments, and the term 'industrial or "'commercial profits' includes profits "from such . . . business but does "not include income in the form of "dividends, interest, rents, royalties, "management charges, or remuneration for personal services. . . . "(3) In the application of the provisions of the present agreement by "one of the Contracting Governments any term not otherwise "defined shall, unless the context "otherwise requires, have the meaning which it has under the laws of "that Contracting Government relating to the taxes which are the "subject of the present agreement."

Art. III (2): "The industrial or "commercial profits of an Australian "enterprise shall not be subject to "United Kingdom tax unless the "enterprise is engaged in trade or "business in the United Kingdom "through a permanent establishment "situated therein. If it is so "engaged, tax may be imposed on "those profits by the United Kingdom, but only on so much of them "as is attributable to that permanent "establishment: Provided that "nothing in this paragraph shall "affect any provisions of the law of "the United Kingdom regarding the "imposition of excess profits tax and "national defence contribution in the "case of interconnected companies. "(3) Where an enterprise of one of "the territories is engaged in trade "or business in the other territory "through a permanent establishment "situated therein, there shall be "attributed to that permanent establishment the industrial or commercial profits which it might be "expected to derive in that other "territory if it were an independent "enterprise engaged in the same or "similar activities and its dealings "with the enterprise of which it is a "permanent establishment were dealings at arm's length with that "enterprise or an independent enterprise; and the profits so attributed "shall be deemed to be income "derived from sources in that other "territory. If the information available to the taxation authority concerned is inadequate to determine

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directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was capable of applying to notional profits of a mutual insurance society) profits attributable to the taxpayer's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the taxpayer being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The Crown contended on appeal that the taxpayer, being a mutual society, had no actual profits or sources of profit and that the order of 1947 did not deal with purely notional or conventional profits and, therefore, did not apply to the taxpayer:—

"the profits to be attributed to the "permanent establishment, nothing "in this paragraph shall affect the "application of the law of either "territory in relation to the liability "of the permanent establishment to "pay tax on an amount determined "by the exercise of a discretion or "the making of an estimate by the "taxation authority of that territory: "Provided that such discretion shall "be exercised or such estimate shall "be made, so far as the information "available to the taxation authority "permits, in accordance with the "principle stated in this paragraph."

Income Tax Act, 1952, s. 430: "(1) Where an assurance company "not having its head office in the "United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the com-"pany from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent pro-"vided in this section, be deemed to "be profits comprised in Schedule D "and shall be charged under Case "III thereof. (2) Such portion only "of the income from the investments "of the life assurance fund for the "year preceding the year of assess-"ment shall be so charged as bears "the same proportion to the total "income from those investments as "the amount of premiums received in "that year from policy holders "resident in the United Kingdom "and from policy holders resident "abroad whose proposals were "made to the company at or "through its office or agency in the "United Kingdom bears to the total "amount of the premiums received "by the company: Provided that in "the case of an assurance company "having its head office in any part "of Her Majesty's dominions outside "the United Kingdom, in India or in "the Republic of Ireland, the Com-"missioners of Inland Revenue may, "by regulation, substitute some basis "other than that prescribed in this "subsection for the purpose of ascer-"taining the portion of the income "from investments to be so charged "as being income derived from busi-"ness carried on in the United "Kingdom. (3) Every such charge "shall be made by the Special Com-"missioners as though the company "had, under this Act, required the "proceedings relating to the charge "to be had and taken before those "Commissioners. (4) Where a com-"pany has already been charged to "tax, by deduction or otherwise, in "respect of its life assurance busi-"ness, to an amount equal to or "exceeding the charge under this "section, no further charge shall be "made thereunder, and where a "company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced. (5) Where, by virtue of "this section, an assurance company "is charged under Case III of "Schedule D on a proportion of the "income from the investments of its "life assurance fund or on a basis "substituted therefor, the relief "under section 425 of this Act in "respect of expenses of management "shall be calculated by reference to "a like proportion of its total "expenses of management for the "year, estimated according to the "provisions of this Part of this Act. "(6) Subsection (3) of section 131 of "this Act (which provides that in-"come chargeable under Case III of "Schedule D may in certain cases be "assessed and charged in one sum) "shall not apply to tax in respect of "income to which subsection (1) of "this section applies."

Held, in upholding the determination of the commissioners and dismissing the appeal, that the taxpayer's taxable surpluses were properly described as "industrial or commercial profits" for the purposes of the order of 1947, which accordingly applied.

Inland Revenue Commissioners v. *Australian Mutual Provident Society* [1947] A.C. 605; [1947] 1 All E.R. 600 applied.

New York Life Insurance Co. v. *Styles* (1889) 14 App.Cas. 381; 5 T.L.R. 621 considered.

APPEAL from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated so far as material provided:

At a meeting of the commissioners held on July 23 and 24, 1956, the taxpayer, Australian Mutual Provident Society, appealed against assessments to income tax in the sum of £100,000 for each of the years 1947–53 inclusive and in the sum of £50,000 for the year 1953–54. The assessments were made in respect of "life fund interest" under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, in so far as they related to the years of assessment 1947–48 to 1951–52 inclusive and section 430 of the Income Tax Act, 1952, so far as they related to the years of assessment 1952–53 and 1953–54. The grounds of the appeal were that the assessments were not competent in law, having regard to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The taxpayer was a mutual provident society established in New South Wales, Australia, in 1849, incorporated there in 1857 and at the date of these proceedings governed by the Australian Mutual Provident Societies' Acts, 1910 and 1941, and at all material times carried on a life assurance business including the granting of annuities and was an assurance company to which the Assurance Companies Act, 1909, applied. It was a mutual society resident in Australia, its head office being in Sydney, New South Wales, and it carried on business in Australia and New Zealand and also in the United Kingdom through a branch office in King William Street, London. It was common ground that the taxpayer was not resident in the United Kingdom for income tax purposes, but its circumstances were exactly covered by rule 3 of Case III of Schedule D and for the years of assessment before 1946–47 it had been properly assessed to United Kingdom income tax under that rule, i.e., on a proportion of its income from the investments of its life assurance fund (excluding the annuity fund) which by virtue of rule 3 had been deemed to be profits comprised in Schedule D and chargeable under Case III. The taxpayer was granted dominion income tax relief under section 27 of the Finance Act, 1920. It was also common ground that from 1946–47 onwards, by virtue of section 51 of the Finance (No. 2) Act, 1945, and of the order of 1947 the taxpayer could no longer claim relief under section 27 of the Act of 1920.

The taxpayer contended:

(i) that by section 51 of the Act of 1945 (and section 347 of

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the Act of 1952) the order of 1947 had effect in relation to income tax so far as it provided for (a) charging income arising from sources in the United Kingdom to persons not resident therein; (b) determining the income to be attributed to those persons and their agencies, branches or establishments in the United Kingdom; and that those provisions had that effect notwithstanding anything in any enactment;

(ii) that by article III (2) of the order of 1947 where an Australian enterprise was engaged in trade or business in the United Kingdom through a permanent establishment situated therein, as was so in the present case, United Kingdom income tax might be imposed on only so much of its profits as was attributable to that permanent establishment and that, by article III (3) thereof, the amount of its profits to be attributed to such a permanent establishment was defined to be that amount of industrial or commercial profits which that permanent establishment might be expected to derive in the United Kingdom were it an independent enterprise engaged in activities the same as or similar to those in which the Australian enterprise was in fact engaged and its dealings with the Australian enterprise were at arm's length;

(iii) that rule 3 of Case III of Schedule D to the Act of 1918 (as was made clear by the speeches delivered in the House of Lords in *Inland Revenue Commissioners* v. *Australian Mutual Provident Society* [2]) and section 430 of the Act of 1952 were charging rules which imposed a charge of United Kingdom income tax not on the actual or estimated profits of a branch office through which a non-resident assurance company carried on business in the United Kingdom but on a purely notional or conventional figure;

(iv) that amounts computed for the purposes of the assessments according to rule 3 of Case III of Schedule D (and to section 430 of the Act of 1952) represented purely notional or conventional figures in accordance with those rules and bore no relation whatever to the amount of industrial or commercial profits which a permanent establishment might be expected to derive in the United Kingdom in the circumstances mentioned in article III (3) of the order of 1947, which latter amount was, by the combined effect of that order and of section 51 of the Finance (No. 2) Act, 1945 (section 347 of the Income Tax Act, 1952) the only amount on which income tax might be charged;

(v) that the taxpayer was a mutual society carrying on the trade or business of life assurance exclusively with its members so that the surplus arising from that trade or business did not yield any profit assessable to United Kingdom income tax and that, had its permanent establishment in the United Kingdom been an independent enterprise engaged in that same activity of carrying on the trade or business of life assurance exclusively with its members and dealing exclusively with the taxpayer, the

[2] [1947] A.C. 605; [1947] 1 All E.R. 600.

taxable profits which it might have been expected to derive from that mutual trade or business would have been nil;

(vi) that the assessments under appeal were not competent in law;

(vii) that the appeal should be allowed and the assessments discharged.

The Crown contended:

(i) that the order of 1947 did not remove or supersede the charge to United Kingdom income tax made by rule 3 of Case III of Schedule D (and section 430 of the Income Tax Act, 1952);

(ii) that, at the most, the order of 1947 laid down a condition which had to be satisfied before any charges on profits provided for by the Income Tax Acts might be imposed and put a limit on the extent to which thoses charges might be imposed.

(iii) that the taxpayer's circumstances were such that the conditions imposed by articles 3 (2) and 3 (3) of the order of 1947 were satisfied;

(iv) that the assessments under appeal were therefore competent in law;

(v) that the appeal should be dismissed and the assessments adjusted in accordance with the facts.

The commissioners decided as follows in paragraph 6 of the case:

(5) The taxpayer, being a mutual society, was prima facie not liable to income tax on the surplus arising from business done with its members. It had no profits or gains which fell to be assessed under Case I of Schedule D: (*Inland Revenue Commissioners* v. *Ayrshire Employers Mutual Insurance Association, Ltd.*[3]; *Faulconbridge* v. *National Employers' Mutual General Insurance Association, Ltd.*[4]). Rule 3 of Case III was a charging rule (*Inland Revenue Commissioners* v. *Australian Mutual Provident Society*[5]) which sought to charge an insurance company, not having its office in the United Kingdom, which carried on life assurance business, mutual or otherwise, through a branch or agency in the United Kingdom, a condition which it was admitted exactly fitted the taxpayer's present case. The charge was based not on the actual profits or on the commercial or industrial profits, if any, of the insurance company or its branch but on a notional sum deemed to be "profits," comprised in Schedule D and chargeable under Case III, arrived at by reference to a proportion of the income of the company from the investments of its life assurance fund (excluding the annuities fund, if any) wherever received. It was on that basis that the taxpayer had been assessed to United Kingdom tax for years before 1946–47. Section 51 of the Finance (No. 2) Act, 1945, authorized the arrangements comprised in [the order of 1947] in these terms ". . . the arrangements shall, notwithstanding "anything in any enactment, have effect . . ." The [order of

[3] (1946) 62 T.L.R. 317; [1946] 1 All E.R. 637.

[4] (1952) 33 T.C. 103.

[5] [1947] A.C. 605.

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1947] which was effective for 1946–47 (although the first year of assessment before the commissioners was 1947–48) provided in article 3 (2) [as already quoted in the case stated]. There again the conditions exactly fitted the taxpayer's case. The commissioners had therefore to find so much of the industrial or commercial profits of the taxpayer as were attributable to its London branch, and article 3 (3) showed how that was to be done. In the commissioners' opinion there was a clear conflict between the order of 1947 and r. 3 of Case III, which did not purport to deal with the industrial or commercial profits of the taxpayer within the meaning of article 3 (2) and (3), nor did it provide for the exercise of a discretion or the making of an estimate in accordance with the principles cited in article III (3). The order of 1947 must therefore prevail and the assessments, having been made under rule 3 of Case 3 and not under article III, were not competent and must be vacated.

(6) Apart from the foregoing, however, in the commissioners' opinion the taxpayer being a mutual provident society, there were no industrial or commercial profits attributable to the London branch which were assessable to United Kingdom income tax, and on that ground also the assessments were to be discharged.

The Crown appealed, and gave to the taxpayer notice in writing that it might contend, as an additional point, that the assessments were outside the order of 1947 because the sums charged to tax were received by the taxpayer as dividends, interest and rents, although they were notionally profits of insurance business.

John Pennycuick Q.C. and *A. S. Orr* for the Crown.
Heyworth Talbot Q.C. and *G. B. Graham* for the taxpayer.

Cases cited in argument not referred to in the judgment: *Inland Revenue Commissioners* v. *Ayrshire Employers Mutual Assurance Association, Ltd.*[6]; *Faulconbridge* v. *National Employers' Mutual General Insurance Association Ltd.*[7]

Upjohn J. This is an appeal by way of case stated from a decision of the Special Commissioners of Income Tax making assessments to income tax on the taxpayer, the Australian Mutual Provident Society, for the years 1947–1948 to 1953–1954 inclusive. For the five earlier years the assessments are made under rule 3 of Case III of Schedule D of the Income Tax Act, 1918, and for the last two years under section 430 of the Income Tax Act, 1952. There is no substantial difference between the two Acts for the purposes of this appeal, and the case has been argued before me on the relevant provisions of the Act of 1918 to which alone I shall refer. The whole question is whether the assessments are correct having regard to the Double Taxation Relief

[6] (1946) 62 T.L.R. 317. [7] (1952) 33 T.C. 103.

(Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947, No. 806), which I shall call the Relief Order.

The relevant facts can be stated in one sentence. The taxpayer is a mutual life insurance society, and has for many years carried on that business (inter alia) from its head office at Sydney in New South Wales where it was incorporated, and in other parts of the world, notably in the United Kingdom where it operates through a branch office in London.

For the purposes of English income tax the taxpayer's life insurance business is treated as a separate business from other classes of insurance business (see rule 15 of the Rules Applicable to Cases I and II of Schedule D), and its income from investments is taxed under rule 3 of the rules applicable to Case III of Schedule D which I must read [His Lordship read rule 3 and continued:] The necessary calculations have been made pursuant to the provisions of this rule, and the assessments made accordingly.

Counsel for the taxpayer, with his usual admirable candour, admitted in argument that, apart from authority, there would be much to be said for the view that this rule is, in terms, taxing not the life assurance business of the taxpayer at all but its investment income, and if that be right it is clear from the Relief Order, which I shall read a little later, that the assessments were rightly made, for the Relief Order expressly excludes from its operation income from investments—see article II (1) (*i*).

However, it is not in dispute that an assessment under rule 3 is in law an assessment on profits of the business of life insurance. That was decided by the House of Lords in 1947 in *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*,[1] in litigation between the Crown and this taxpayer.

In that case the question arose how income received from securities which were exempt from income tax should be treated in an assessment under rule 3. It seems that in the lower courts both parties proceeded on the footing that tax under rule 3 was a tax on investment income, but there were different views how the rule should be applied. In the House of Lords, however, during the argument it was asked by Viscount Simon[2] why the existence of tax-exempt income affected the application of rule 3, and he added "does the mere fact that it is included as an item in the computation of the profits charged under rule 3 amount to charging it with tax?" It is quite clear from the speeches when judgment was delivered that in the opinion of their Lordships the tax exigible under rule 3 was not a tax on investment income at all but a tax on profits of the business, although measured by investment income.

It is, of course, a very familiar part of the system of taxation in this country that profits of a particular year of assessment may be and, indeed, usually are, taxed by some yardstick other

[1] [1947] A.C. 605; [1947] 1 All E.R. 600.

[2] [1947] A.C. 605, 611.

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than the profits of that particular year—for example, as in the old days by reference to an average of three years' profits or as now by reference to a period which may and probably does lie wholly outside the year of assessment. Both parties are agreed that the effect of the speeches in the House of Lords was as I have stated. I do not propose, therefore, to refer to them in any detail, but to content myself with one paragraph from the speech of Lord Wright. Speaking of rule 3 he said[3]: "The "charge was a tax on the investment income only as a machinery "to tax the general profits of the British business, and as a "manner of measuring the charge by an arbitrary figure derived "from a percentage of the investment income." This assessment is on a notional or conventional sum, but nevertheless is an assessment on the profits of the business.

The real difficulty that arises in this case, however, is that as the House of Lords itself decided many years ago in *New York Life Insurance Company* v. *Styles*,[4] a mutual society, that is a society that does business only with its members, does not make profits; its trading surplus accrues to the property of the members, but it is not legally correct to look on the trading surplus as profits of the trade for income tax purposes. This aspect of the matter does not seem to have been discussed in the House of Lords in 1947. Nevertheless it seems quite plain that apart from the Relief Order a mutual society would be taxable under rule 3, for the rule is clear that income of investments is "deemed to be "profits comprised in this Schedule," and it is always competent for an Act of Parliament to say that for the purpose of income tax a surplus which arises, although not profits, is "deemed to be" so.

I turn then to the Relief Order. Article I (1) of the Schedule to the Order reads: "The taxes which are the subject of the "present agreement are . . . (*b*) in the United Kingdom: the "income tax (including sur-tax), the excess profits tax, and the "national defence contribution (hereinafter referred to as "'United Kingdom tax')." Then I must read some of the definitions in article II (1) of the Schedule: "(1) In the present "agreement, unless the context otherwise requires . . . (*h*) the "terms 'United Kingdom enterprise' and 'Australian enterprise' "mean respectively an industrial or commercial enterprise or "undertaking carried on by a United Kingdom resident and an "industrial or commercial enterprise or undertaking carried on by "an Australian resident; and the terms 'enterprise of one the "'territories' and 'enterprise of the other territory' mean a "United Kingdom enterprise or an Australian enterprise, as the "context requires. (*i*)"—and this is the important definition—"The term 'industrial or commercial enterprise or undertaking' "includes an enterprise or undertaking engaged in mining, agri-"cultural or pastoral activities, or in the business of banking,

[3] [1947] A.C. 605, 611, 622.

[4] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

" insurance, life insurance or dealing in investments, and the " term ' industrial or commercial profits ' includes profits from " such activities or business but does not include income in the " form of dividends, interest, rents, royalties, management " charges or remuneration for personal services. (*j*) The term " ' permanent establishment,' when used with respect to an inter- " prise of one of the territories, means a branch or other fixed " place of business and includes a management, factory, mine, or " agricultural or pastoral property, but does not include an agency " in the other territory unless the agent has, and habitually " exercises, authority to conclude contracts on behalf of such " enterprise otherwise than at prices fixed by the enterprise or " regularly fills orders on its behalf from a stock of goods or " merchandise in that other territory . . ." I need not read the provisos. Paragraph 3: " In the application of the provisions " of the present agreement by one of the Contracting Govern- " ments any term not otherwise defined shall, unless the context " otherwise requires, have the meaning which it has under the " laws of that Contracting Government relating to the taxes " which are the subject of the present agreement."

Article III, paragraph 2: " The industrial or commercial " profits of an Australian enterprise shall not be subject to " United Kingdom tax unless the enterprise is engaged in trade " or business in the United Kingdom through a permanent estab- " lishment situated therein. If it is so engaged, tax may be " imposed on those profits by the United Kingdom, but only on " so much of them as is attributable to that permanent estab- " lishment: Provided that nothing in this paragraph shall affect " any provisions of the law of the United Kingdom regarding " the imposition of excess profits tax and national defence contri- " bution in the case of inter-connected companies." Paragraph 3: " Where an enterprise of one of the territories is engaged in " trade or business in the other territory through a permanent " establishment situated therein, there shall be attributed to " that permanent establishment the industrial or commercial " profits which it might be expected to derive in that other " territory if it were an independent enterprise engaged in the " same or similar activities and its dealings with the enterprise " of which it is a permanent establishment were dealings at arm's " length with that enterprise or an independent enterprise; and " the profits so attributed shall be deemed to be income derived " from sources in that other territory . . ."

Before the commissioners the Crown put forward an argument which proceeded on the footing that the Relief Order was capable of applying to notional profits of a mutual insurance society, but for the reasons which are to be found set out in paragraph 5 of the case it was said that in fact the Relief Order did not affect tax under rule 3. That argument did not appeal to the commissioners who decided the case in favour of the respondent society, and Mr. Pennycuick for the Crown has not felt able before me to challenge

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the correctness of their decision on that footing by any argument. So I have heard no argument at all on the case as presented to the commissioners, and therefore I do not propose to deal with their decision except to say that it was plainly reached after very careful and detailed reasoning, and on the footing stated I am content to accept their unchallenged reasoning and conclusion stated in paragraph 6 (5) of the case as my own.

Before me counsel for the Crown has raised a wholly new point not suggested before the commissioners which must now be briefly stated. He submits that the " industrial or commercial profits " referred to in article II (1) (*i*) is incapable of referring to anything but real profits arising from an actual source of profit, whereas the respondent society, being a mutual society, has no actual profit nor any actual source of profit, and so the Relief Order does not apply to it. He says that the Relief Order is not dealing with purely notional or conventional profits which have no existence in law but have only a purely fictional existence for the purposes of rule 3.

It is submitted that " industrial or commercial profits " is defined in article II (1) (*i*), and therefore article II (3) has no application, whence it must follow that that phrase must be given its natural and ordinary meaning. That being so, it is said that the phrase cannot include purely notional or fictitious profits, but can only refer to real or actual profits, and there being none in law the Relief Order has no application.

Counsel for the Crown further submitted that article II is only dealing with profits taxable under Case I of Schedule D, and has no reference to notional profits taxed under Case III. But if it be accepted, as it must, in my judgment, in the light of the decision of the House of Lords, that tax under Case III is a tax on the profits of the business, I cannot see anything in the Relief Order which distinguishes between taxation under different Cases.

This is a difficult case. In the first place I do not think that " industrial or commercial profits " can really be said to be " otherwise defined " for the purposes of article II (3) by article II (1) (*i*). It is a curious definition, if it can be called such, which says " industrial or commercial profits " *includes* (omitting irrelevant words) profits from such business (i.e., business of life assurance) but does not include (inter alia) investment income. I do not think a clause so phrased (as so many Acts of Parliament now are) can properly be said to be a definition clause except in relation to those matters expressly stated to be included or expressly excluded. A large area not expressly defined is left. " Profits " is nowhere defined, and one is left in the dark as to whether deemed profits are within the inclusion; certainly in terms they are not excluded by the exclusion of investment income.

My approach to the Relief Order is that its whole object is to relieve from double taxation, and that therefore one is looking to those profits or surpluses which by the law of Australia or the

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United Kingdom (as the case may be) are made the subject of taxation. Article II (3) seems designed to that very end. It seems to me that when considering United Kingdom tax one must look to " profits " which are taxed by the United Kingdom, and if the United Kingdom taxation laws (as interpreted by the House of Lords) tax a trading surplus by deeming it to be a profit although in law it is not, so then that trading surplus is by article II (3) a profit within article II (1) (*i*).

In other words, if I may respectfully paraphrase the House of Lords' decision, rule 3 is taxing the trading surplus of the respondent society in this country by deeming that surplus to be profits. Those deemed profits are measured by a yardstick which, indeed, has but little relation to its actual trading surplus in this country, but nevertheless the actual yardstick, as I have already pointed out, matters not. However, the essential fact is that by statute the society is deemed to make taxable trading profits of its business. That seems to me to make the society's taxable surplus " profits " within the intendment of article II (3), and not to be excluded by any partial definition in article II (1) (*i*). I, therefore, reach the conclusion that these taxable surpluses of the respondent society are properly described as " industrial or com- " mercial profits " for the purposes of the Relief Order.

When that conclusion is reached then the decision of the commissioners becomes dead in point, and, as I have already said, the consequence is not seriously challenged by Mr. Pennycuick.

The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Bell, Brodrick & Gray.*

K. R. A. H.

[COURT OF APPEAL.]

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Lord Evershed M.R., Romer and Ormerod L.JJ.

Contract—Representation—Representation of opinion—Implied representation of reasonable grounds therefor—Sales particulars—Reversion on death of annuitant—Annuitant " believed to have no " aggregable estate "—Statement as to material fact by well-known solicitors to induce purchase—No reasonable supporting grounds—Vendor's means of knowledge superior to purchaser's.

The sale particulars prepared for the vendor of an absolute reversion in a trust fund on the death of an annuitant contained the statement that the annuitant was " believed to have no aggreg- " able estate." That statement of belief was made honestly by solicitors for the vendor, but they had no reasonable grounds for so believing. The purchaser, having relied on this representation, sought rescission:—

Held, that he was entitled to rescind on the ground of an innocent misrepresentation since, as (1) the statement was one obviously

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and vitally affecting the subject-matter being offered, and (2) the vendor was in a far stronger position—to put it at its lowest—than the purchaser to ascertain the relevant facts, there must be imported into the representation the further representation that he, being competently advised, had reasonable grounds supporting that belief.

Smith v. *Land and House Property Corporation* (1884) 28 Ch.D. 7 applied.

Decision of Upjohn J. affirmed.

Appeal from Upjohn J.

The following statement of the facts is taken substantially from the judgment of Lord Evershed M.R.

Lot 11, in a sale by auction held on February 17, 1955, was described in the sale particulars as follows: "Lot 11. The absolute reversion receivable on the decease of a lady aged 69 (born December 30, 1885) to the whole of a trust fund now represented by £8,000 2½ per cent. consols, of estimated value £5,210. *This sum has been set aside to pay an annuity of £200 per annum to the lady mentioned above. The trustee is the Public Trustee. Estate duty will be payable on the death of the annuitant who is believed to have no aggregable estate.*" By additional conditions of sale as to lot 11 it was stated first that the reversion was derived under a will dated March 13, 1916, and that the probate of the will was to constitute the root of title. The conditions continued: "2. The vendor sells as the trustee in bankruptcy of the beneficial owner. 3. The reversion is sold subject to all death and other duties which may be or become payable in respect thereof. The above information regarding duty so payable is believed to be correct, but the vendor accepts no responsibility as to what duties will in fact become payable nor as to the amount which will become payable and no compensation shall be paid or allowed in respect of any error as to duties." Condition 4 stated where completion was to take place. Condition 5 was that the particulars of the investment were as provided by the Public Trustee Office on a particular date, and were "believed to be correct and the reversion is sold subject to such variation as may occur therein before completion of sale. The vendor accepts no responsibility for the estimated value of the investment." Condition 6 related to expenses and condition 7 to requisitions on title. Condition 8 stated that the sale was subject to a reserved price. Condition 9 provided: "These additional conditions shall prevail notwithstanding anything inconsistent with or contrary thereto in the general conditions which (in so far as they are not varied by these conditions) shall apply to the sale of this lot." There followed in heavy leaded type. "Solicitors as to lot 11—Messrs. Oscar Mason & Co., Cliffords Inn, Fleet Street, E.C.4."

Ernest Brown entered into a contract for purchase of the reversion at the sum of £2,825, but by January, 1956, the contract had not been completed and he sought to rescind, stating that he had been misled by the representation which he said was

to be found in the part of the particulars printed in italics, that is, the words " who is believed to have no aggregable estate." The vendor, the defendant, repudiated the claim and by a counterclaim sought to enforce the contract.

At the trial of the action before Upjohn J. it appeared that the statement in the particulars had been made by a managing clerk of the solicitors named in the particulars, who normally acted as a litigation clerk. He had made it without any comprehension of the meaning of the words " no aggregable estate," or of their significance to a would-be purchaser. The grounds on which the belief were expressed were inquiries addressed to the bankrupt, a Mrs. Heath, who was a half-sister of the annuitant but was not, apparently, on friendly terms with her, the bankrupt's mother and, at her suggestion, another lady, a Mrs. Gould, whose relationship with the persons concerned was not at any time made clear. In addition, a communication was addressed to the annuitant, Mrs. Ritchie, herself. None of these sources of information was productive. Mrs. Ritchie passed the letter to her brother, who told the inquirer that it was none of his business. Mrs. Gould said that she had had no direct contact with Mrs. Ritchie for some time, but she said that Mrs. Ritchie spent some part of her time at Nice. Mrs. Heath added very little, though both she and Mrs. Gould indicated that they did not think that Mrs. Ritchie would be likely to leave very much.

Upjohn J. acquitted the defendant and his agents and representatives of dishonesty, a ground which had been emphasized in the statement of claim, but he held that the plaintiff was entitled to relief on the basis of an innocent material misrepresentation on which he had acted.

The defendant appealed.

I. J. Lindner Q.C. and *T. Michael Eastham* for the defendant.

C. Montgomery White Q.C. and *E. I. Goulding* for the plaintiff.

In addition to the case referred to in the judgments, the following were cited in argument: *Derry* v. *Peek* [1]; *Nocton* v. *Ashburton (Lord)* [2]; *Swinfen* v. *Chelmsford (Lord)* [3]; *London Chartered Bank of Australia* v. *Lemprière* [4]; *Bisset* v. *Wilkinson* [5]; *The Moorcock*.[6]

LORD EVERSHED M.R. The present action and appeal arise out of a sale at auction on February 17, 1955, of a certain property, an absolute reversion in a trust fund. Because I think much in the case depends upon the exact nature of the subject-matter of the sale as stated in the particulars, I shall take time to read what was described as " Lot 11 " more or less fully.

[1] (1889) 14 App.Cas. 337; 5 T.L.R. 625.
[2] [1914] A.C. 932; 30 T.L.R. 602.
[3] (1860) 5 H. & N. 890.
[4] (1873) L.R. 4 P.C. 572.
[5] [1927] A.C. 177; 42 T.L.R. 727.
[6] (1889) 14 P.D. 64; 5 T.L.R. 316.

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[His Lordship read the particulars set out above, and having stated the facts, continued:] At an early stage in this appeal the question arose whether, on the pleadings, if fraud was rejected, it remained open to the plaintiff to proceed on the ground of innocent misrepresentation; and we came to the conclusion that he was so entitled. No question now arises as to dishonesty, so that we must now consider the case on the footing that it is open to the plaintiff to proceed on the basis of innocent misrepresentation.

In order that he may succeed on such a ground it is, of course, necessary that three things should be established. He must, first, show that the language relied upon does import or contain a representation of some material fact. Second, he must show that the representation is untrue, and, third, he must show that the plaintiff in entering into the contract was induced so to do in reliance upon it. The judge concluded all those three matters in the plaintiff's favour, and he therefore gave to the plaintiff the necessary relief in the action and dismissed the counterclaim.

I will say at once that, although Mr. Lindner has put all the points forcibly and attractively before us, in my judgment there is no ground shown for this court to disturb the judge's conclusions. I will, therefore, deal, though I hope at not too great length, with each of the three essential points in turn.

The first is, to my mind, the most significant and perhaps the most difficult: is there here a representation of a material fact? The essential words are those which I have already read more than once—"who"—that is the annuitant—"is believed to have "no aggregable estate." At first sight, therefore, this is a statement of an opinion; but, of course, a statement of opinion is always to this extent a statement of fact, that it is an assertion that the vendor does in fact hold the opinion which he states. But, if that was all there was in the matter, plainly the defendant would succeed on the judge's finding; for the judge has held that there was here no dishonesty on the part of the defendant or his agent; in other words, he has held that the defendant through his agent did believe that the annuitant had no aggregable estate. The question therefore arises: is that all that these few words import?

Upon that there is some considerable guidance for the court in *Smith* v. *Land and House Property Corporation*,[1] a decision of the Court of Appeal. The contract in that case was one for the sale of an hotel at Walton-on-the-Naze, which at that time, according to what is said in the report, was apparently regarded as being in the last stages of decay. The question which arose there emerged from a reference in the particulars to the effect that the tenant of the hotel was regarded by the vendor as a most desirable tenant. It turned out in fact that those words were singularly inappropriate to him, since he was one who was habitually in arrear with his rent, and the business he was able

[1] (1884) 28 Ch.D. 7.

to do in the decaying town was regarded as quite inadequate to support that or indeed any rent for the hotel. Those are matters of fact, however, peculiar to *Smith's* case.[1] For present purposes the guidance I seek to get is to be found in the language of Bowen L.J., who said[2]: "In considering whether there was a "misrepresentation, I will first deal with the argument that the "particulars only contain a statement of opinion about the "tenant. It is material to observe that it is often fallaciously "assumed that a statement of opinion cannot involve the state-"ment of a fact. In a case where the facts are equally well "known to both parties, what one of them says to the other is "frequently nothing but an expression of opinion. The statement "of such opinion is in a sense a statement of a fact, about the "condition of the man's own mind, but only of an irrelevant "fact, for it is of no consequence what the opinion is. But if "the facts are not equally known to both sides, then a statement "of opinion by the one who knows the facts best involves very "often a statement of a material fact, for he impliedly states "that he knows facts which justify his opinion." It is that last sentence which is particularly pregnant for present purposes.

I observe two things; first that the Lord Justice is not laying down a universal rule. His language is: "a statement of "opinion . . . involves very often a statement of a material "fact." Second, he observes that for that possibility to arise one party must know the facts better than the other. Observe that he is not saying that one party must know all the facts; it suffices for the application of the principle if it appears that between the two parties one is better equipped with information or the means of information than the other.

It is very often said, and truly said, that each case must depend upon its own facts; and I apprehend that the real question for the court is to say, on the basis of the facts and the context of this case, whether this is an instance in which the representation that the vendor has reasonable grounds for his belief ought to be imported. Mr. Lindner argued that to hold, as the judge did, affirmatively on that point was to lay down the principle that wherever it is stated that one party entertains a particular belief then it must follow that there is a representation that he has grounds reasonably supporting his belief. But I lay down no such general proposition. The question here is whether in this case and in the context of these particulars concerning lot 11 such a representation of reasonable grounds to support the belief ought to emerge; and, as the judge held, I think that in this case the answer is in the affirmative.

First, it is to be noted that the subject-matter of the sale was a reversion to a sum of consols under a will. Anybody seeking to buy such a property must obviously first consider when the subject-matter is likely to come to hand. The age, therefore,

[1] 28 Ch.D. 7.

[2] Ibid. 15.

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of the annuitant on the determination of whose life the reversion falls in is of vital importance. But I should have thought it of no less importance that the purchaser wants to know how much will be left of the capital fund when duties have been paid at the death of the annuitant. Therefore it is of the utmost importance to a purchaser to know (if he can find out, which he may or may not be able to do) whether the impost of estate duty will be limited to the appropriate rate for the sum of the reversion alone or whether the rate will be affected by the circumstance that the annuitant has other considerable means, disposable capital of his or her own, which for duty purposes will be aggregated with the amount passing, namely, the sum providing the annuity. Therefore the statement "who is believed to have no "aggregable estate" is one obviously and vitally affecting the subject-matter being offered. As the judge pointed out, anybody who has any experience in dealing with properties of this kind must be very much alive to that point.

The next thing to notice, I think, about the particulars is the item at the end: "Solicitors as to lot 11—Messrs. Oscar Mason "& Co."—a well-known firm of solicitors of standing and repute.

What would be the effect of this language upon the mind of a possible purchaser? Clearly, I should have thought, it would flow from the language used and would be intended to be understood by a reader of the particulars that persons who knew the significance of this matter and who were experienced and competent to look into it were expressing a belief founded upon substantial and reasonable grounds. As between the vendor and the prospective purchaser it is quite plain that this is a case within the category stated by Bowen L.J., namely, a case where the vendor's knowledge or means of knowledge is far superior to that of the purchaser. The purchaser can know nothing whatever which could guide him on this point. He does not know the lady's name and he knows nothing about the will except its date. He has, when he reads this, no possible means of knowing whether the annuitant is a woman of means or is not a woman of means. It is, no doubt, possible that a purchaser might find out. I suppose he might communicate with the Public Trustee, just as in *Smith's* case [3] the purchaser might have made inquiries about the desirability of the tenant; but in this case it is far less likely even than in *Smith's* case [3] that, if a purchaser had the time and opportunity of inquiring, he could have found the answer. The Public Trustee would probably have been unable to tell him anything. It is very doubtful whether the will in question could have been successfully identified. On the other hand, by virtue of the bankruptcy, the vendor is the beneficial owner of the reversion. He, therefore, has available to him a considerable amount of fact quite unknown to the purchaser; and available to him obviously also would be means of information

[3] 28 Ch.D. 7.

and of inquiry. He could inquire of the annuitant or of other persons about the circumstances relevant to this matter of aggregable estate. I observe that this was a sale subject to a reserve price. A purchaser would note that and would obviously assume that the reserve price would have been fixed with due regard to this matter of aggregability.

I am, therefore, entirely of the same opinion as was the judge, that this is a case in which the representation was not merely confined to the fact that the vendor entertained the belief but also, inescapably, there goes with it the further representation that he, being competently advised, had reasonable grounds for supporting that belief.

The judge put the matter thus in his judgment. He first of all observed that, if the purchaser is not entitled to suppose that the vendor is in possession of facts which enable him to express an opinion which is based upon reasonable grounds that would, he thought (and I agree with him) make business dealings, certainly in this class of business, almost impossible. "It must "be remembered," he said, "that in this case the purchaser "going to the auction had no means whatever of finding out "anything about the annuitant's means. When the contract "was signed, the purchaser did not even know the name of the "annuitant. On the other hand the vendor must be expected to "be in possession of facts unavailable to the purchaser and the "purchaser is entitled to suppose that he is in possession of facts "which enable him to express an opinion which is based upon "reasonable grounds. As I have already said, if that is not so, "business relationships become quite impossible. It may be "different where the facts upon which the opinion is expressed "are equally available to both parties. Then the opinion may "be no more than an expression of opinion, but where the "opinion is expressed on facts assumed to be available to the "vendor, which certainly are not available to the purchaser, and "that opinion is expressed to induce the contract, in my judg-"ment the purchaser is entitled to expect that the opinion is "expressed on reasonable grounds." The judge, using that general language in relation to this case, is reflecting the language of Bowen L.J., which he then proceeds to quote in the next paragraph. I am, therefore, satisfied that this relevant language does involve the representation that there were reasonable grounds for the belief, and certainly that was a representation of a most material fact.

The next question, then, is: was that representation true? Upon that, Mr. Lindner has not argued, if he will allow me to say so, with very great strenuousness, and, indeed, I think he would have had difficulty in doing so. The grounds upon which the belief was expressed were set out in summary by the judge in his judgment. [His Lordship referred to the inquiries made by the managing clerk summarized above, commenting that the information that the annuitant spent some part of her time at

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Nice was somewhat significant and since the amount of the annuity was £200 sterling per annum it might have been thought that that at any rate carried a certain element of caution with it. His Lordship continued:] The question then arises whether that information was such as to justify a reasonable person, who had any awareness of the significance of the matter, asserting as an inducement to a possible purchaser that the annuitant was believed to have no aggregable estate? I think the question has only to be put to be answered. It is quite plain that that very meagre information formed no basis whatever upon which a responsible person could put forward that view as an inducement for somebody to come and buy the reversion.

The inquiry was made, as one would expect, by a representative of the firm of Oscar Mason & Co., whose concern in the matter as solicitors was stated in heavy leaded type in the particulars. The judge was obviously somewhat troubled by the extraordinary fact that any responsible member of a well-established firm of solicitors could possibly have asserted a belief upon such flimsy grounds. That was a consideration which was in his mind when he had to consider on the question of costs the justification of the allegation of fraud, including that of recklessness; but the judge had the advantage of seeing the managing clerk concerned and he was satisfied that the managing clerk, though in this respect, unhappily, quite inept, was none the less honest. He was inept because this subject-matter was far outside the ordinary scope of his professional duties, he being a litigation clerk; and it became quite manifest that he himself had no comprehension at all, when he started dealing with this matter, of the meaning of the words "aggregable estate" and certainly never comprehended at any stage the importance of the alleged belief to a would-be purchaser of a reversion.

At this stage I will consider, shortly, another point raised by Mr. Lindner. From what I have said it will be appreciated that the inquiries were made by, and indeed the whole of the preparation of these particulars was in the hands of, the firm of solicitors whose name I have mentioned. The defendant, the trustee in bankruptcy, very naturally and very properly left the matter to the solicitors to do the work for him. The draft form of particulars sent by the auctioneers was amended by the solicitors and returned to them; and the trustee in bankruptcy naturally and properly relied upon it. But Mr. Lindner put forward the argument that this question of belief and grounds of belief in a context such as this has a subjective quality about it; so that, even if it were wholly unreasonable for the solicitors concerned to have put forward a belief about there being no aggregability, it was quite otherwise in the case of the trustee in bankruptcy, who was said to be an accountant. It was said that it would suffice for the accountant, the vendor, to say: "I made no "inquiries myself. I relied, as I submit I am entitled to do, "on a competent firm of solicitors, and, I having so relied and

" they having done this draft for me, I reasonably, accepted it." I am bound to say, after hearing the argument, that I am still, for my part, quite unable to apprehend it at all. The defendant, the trustee in bankruptcy, is the vendor who asserts the belief. He did not give evidence; there was no reason why he should; but the evidence in his case proved that the belief was put forward founded upon inquiries made by the solicitors which produced results quite incapable reasonably of supporting the belief. The defendant accepted and ratified what had been done by his agents, as he was entitled to do; but he must abide by the consequences. All that they put forward he must be treated as having put forward himself.

The extravagance of the argument, if I may so describe it, is revealed by this. I put to Mr. Lindner the suggestion that if his argument was right it would follow that if the solicitors, having made an inquiry, were then informed that the annuitant was in fact possessed of a quarter of a million pounds of her own money but, owing to some mental aberration on their part, the solicitors thought that it did not matter and was not aggregable, still, apparently, the accountant, the trustee in bankruptcy, would be able to say that he reasonably entertained the belief put forward by way of inducement merely because the solicitors asserted it. I think the proposition, so illustrated, has really only to be stated to be rejected.

There remains the third necessary condition essential to the plaintiff's case, namely that he relied upon the representation which I hold was implicit and was untrue. Upon that, we have not really been troubled with any argument at all. The judge heard the plaintiff and was quite satisfied that the plaintiff did in fact rely upon this representation. That, therefore, is the end of the matter.

Some other subsidiary points were indicated; but, in my judgment, none of them contained any substance. It was said that the implied representation as to grounds of belief was in some sense subsidiary; from which it was sought to say that, once the belief put forward was held to be honest, however incredibly, that was the end of the matter. I can find no basis in authority or good sense for that view, and I reject it.

Another point was made on condition 3 of the conditions of sale. That condition stated, among other things, that " the " vendor accepts no responsibility as to what duties will in fact " become payable nor as to the amount which will become " payable." It was suggested that somehow or other that so qualified the effect of the preceding representation as to make it ineffective for the purposes of this action. I am quite unable to accept that argument. I observe that condition 3, for one thing, repeats the representation, for it says: " The above information " regarding duty so payable is believed to be correct." What condition 3 is concerned with is to say that, whatever be the position today, when this lady dies, which may be 10 or 15 years

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hence, the vendor is not himself to be responsible at all for or in respect of the payment of any duty. In other words, the condition seems to me to deal with an entirely different point and cannot, in my judgment, in the least qualify the representation which I hold was earlier made as an inducement and, in fact, relied upon by the plaintiff.

[His Lordship then considered the question of costs, a matter which does not call for report, and concluded:] For the reasons which I have given, I think the appeal fails and must be dismissed.

Romer L.J. I entirely agree with everything my Lord has said. In the course of the passage from Upjohn J.'s judgment which the Master of the Rolls has read, the judge, after pointing out that the statement of belief in the particulars that the annuitant was believed to have no aggregable estate was made with a view to inducing the contract, expressed the view that the plaintiff as purchaser was entitled to expect that the opinion was founded on reasonable grounds. It appears to me that that is the real point in this case, namely whether the judge was right or whether he was wrong in that view. Mr. Lindner has submitted that he was wrong, but I am abundantly satisfied that he was perfectly right. In the first place, one must remember that the plaintiff knew practically nothing whatever about the subject-matter of this sale, or the title from which it derived, or the circumstances which affected its value. All he knew about it was that which was stated in the particulars, that it was a reversionary interest then represented by a sum of £8,000 consols receivable on the death of a lady aged 69, that the reversion derived under a will dated March 13, 1916, which was proved in December, 1917, and that the trustee of that will was the Public Trustee. That really is all that he knew. Short of writing to the vendor's solicitors, who are named in the particulars, and persuading them to help him in ascertaining further particulars, I cannot see that he was in a position to do anything whatever for himself. It would be of little use even to have written to the Public Trustee, because he could not inform the Public Trustee anything about the will under which this reversion derived except its date and the date of its probate. It might be, such is the efficiency of the Public Trustee's office, that that might be sufficient, after a great deal of research, to discover who the testator was and the terms of the will and everything else; but short of that, as my Lord has pointed out, the purchaser was helpless in this matter. On the other hand, the vendor, who has to be identified for this purpose, as I think, with the bankrupt herself, the owner of the reversion, was in a far stronger position —to put it at its lowest—than was the purchaser to ascertain all relevant facts bearing upon this reversion, and more particularly bearing upon its value and what it was likely to bring in on the death of the annuitant.

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That being so, I should have thought that it was fairly obvious that the statement purporting to come, as it did come, from the vendor's solicitors, and expressing a belief vital in relation to this legal transaction, inevitably would suggest to the purchaser that the opinion was being expressed upon reasonable grounds; for it was a matter which everybody concerned, and especially a solicitor, must know would vitally affect the value of the reversion which the purchaser was proposing to buy, in that a matter which obviously affects the value of a reversion more than anything else is whether the value of it will be reduced because of the principle of aggregation when it falls in.

For my part, accordingly, even in the absence of authority, I should have thought, on the facts of this particular case, that it was abundantly clear that the judge was right when he said that the purchaser was entitled to expect that the opinion or belief was expressed upon reasonable grounds, and I should have come to that conclusion if there had been no authority on the matter at all. But, in fact, there is the authority to which the Master of the Rolls and the judge referred, namely, *Smith* v. *Land and House Property Corporation*,[4] and in particular the judgment of Bowen L.J. which, when applied to this particular case (and we are only dealing with the facts of this particular case) supports beyond doubt the conclusion at which the judge arrived and with which I entirely agree.

None of the other points which were addressed to us and relied upon in this appeal appear, if I may respectfully say so, to have very much substance in them; and there is nothing that I can add to what Lord Evershed M.R. has said with regard to them. I entirely agree with the conclusions at which he has arrived. I agree that the appeal should be dismissed.

ORMEROD L.J. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor: *Oscar Mason & Co.; Charles H. Wright & Brown.*

E. D.

[4] 28 Ch.D. 7.

[COURT OF APPEAL.]

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[1957 C. 2761.]

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Eliz. 2, *c.* 74), *s.* 8—*Copyright Royalty System* (*Records*) *Regulations*, 1957 (*S.I.* 1957, *No.* 866), *para.* 1.

The H. Co. manufactured and sold to the N. Co., who were manufacturers of milk chocolate, a number of gramophone records of a work which was "musical" within the meaning of the Copyright Act, 1956, and the copyright of which belonged to the plaintiffs. The recording was made on a thin film of cellulose acetate adapted for mounting on cardboard discs which were supplied by the N. Co. and bore matter advertising their chocolate, the price charged to the N. Co. being fourpence per record. The N. Co. advertised the records for sale to the public at the price of 1s. 6d. each, but with a stipulation to the effect that intending purchasers must in respect of each record send in addition three wrappers from sixpenny packets of their milk chocolate. The company made a profit on each transaction. The wrappers when received were worthless and were thrown away.

By a motion, which was treated by consent as the trial of the action, the plaintiffs sought to restrain the two companies from manufacturing and selling the records on the ground that the transactions involved breaches of copyright in that the H. Co. did not intend to sell the records "by retail," or to supply them for the purpose of their being sold "by retail" by another person, within the meaning of section 8 of the Copyright Act, 1956.[1] Upjohn J. gave judgment for the plaintiffs. On appeal:—

Held, (Romer L.J. dissenting), that the transaction constituted a sale by retail such as to satisfy the requirement of the section; as (1) the distinguishing characteristic of a retail sale was a sale to the consuming customer as opposed to a sale to the trade; (2) the transaction was a genuine sale at an ascertained money price, since the effect of the condition requiring the sending of the wrappers was merely to limit the class of purchasers to those who so qualified themselves; and (3) the money price being ascertained, the manufacturers were enabled to give the appropriate notices of their intention to manufacture as required by the relevant regulations.[2]

[1] Copyright Act, 1956, s. 8: "(1) "The copyright in a musical work is "not infringed by a person (in this "section referred to as 'the manu-"'facturer') who makes a record of "the work or an adaptation thereof in "the United Kingdom, if—(*a*) records "of the work, or, as the case may be, "of a similar adaptation of the work, "have previously been made in, or "imported into, the United Kingdom "for the purposes of retail sale, and "were so made or imported by, or "with the licence of, the owner of the "copyright in the work; (*b*) before "making the record, the manufacturer "gave to the owner of the copyright "the prescribed notice of his inten-"tion to make it; (*c*) the manufac-"turer intends to sell the record by "retail, or to supply it for the pur-"pose of its being sold by retail by "another person, or intends to use it "for making other records which are "to be so sold or supplied; and (*d*) in "the case of a record which is sold "by retail, the manufacturer pays to "the owner of the copyright, in the "prescribed manner and at the pre-"scribed time, a royalty of an amount "ascertained in accordance with the "following provisions of this section. "(2) Subject to the following provi-"sions of this section, the royalty "mentioned in paragraph (*d*) of the "preceding subsection shall be of an "amount equal to 6¼ per cent. of the "ordinary retail selling price of the "record, calculated in the prescribed "manner: Provided that, if the "amount so calculated includes a "fraction of a farthing, that fraction "shall be reckoned as one farthing, "and if, apart from this proviso, the "amount of the royalty would be "less than three-farthings, the "amount thereof shall be three-"farthings."

[2] The Copyright Royalty System (Records) Regulations, 1957: "1 (1) "The notice required by subsections "(1) and (5) of section 8 of the Act "shall contain the following par-"ticulars . . . (*f*) the ordinary retail

Per Romer L.J. I am unable to see how there can be an "ordinary retail selling price" (within the meaning of section 8 (2)) in the absence of an ordinary retail sale. The sales were not ordinary retail sales; they did not, therefore, constitute sales "by "retail" of the character envisaged and required by section 8.

Observation of Lord Dunedin in *Turpin* v. *Middlesbrough Assessment Committee* [1931] A.C. 470 at p. 473; 47 T.L.R. 308 applied.

APPEAL from Upjohn J.

The Hardy Record Manufacturing Co. Ltd., the second defendants, made gramophone records consisting of thin films of cellulose acetate. They entered into an agreement with the first defendants, the Nestlé Co. Ltd., who were manufacturers of milk chocolate, to supply them with a number of records of a dance tune called "Rockin' Shoes," the copyright of which was vested in the first plaintiffs, Chappell and Co. Ltd., as sole licensees and in the second plaintiffs, the Winneton Music Corporation as owners. The price to Nestlé of the records was fourpence; they were mounted on cardboard discs supplied by Nestlé containing advertising matter. Nestlé sold the records to the public at the price of 1s. 6d., subject to a condition that the purchaser must also send three wrappers for their sixpenny milk chocolate bars. These wrappers were of no value in themselves and were thrown away when received. Nestlé made a profit on each sale, but the purpose of the scheme was to advertise and promote the sale of their milk chocolate.

The Hardy company gave notice of their intention to manufacture, in accordance with section 8 (1) (*b*) of the Copyright Act, 1956, stating 1s. 6d. to be the ordinary retail selling price, and offered to pay royalties, which the plaintiffs refused. In the action the plaintiffs alleged that these transactions constituted a breach of copyright, as they did not involve a sale "by retail" within the meaning of the section. An interlocutory motion for an injunction was treated, by consent, as the trial of the action. At the hearing of the motion Upjohn J. gave judgment for the plaintiffs. The defendants appealed.

Guy Aldous Q.C. and *John Whitford* for the first defendants.
John Cope for the second defendants.
K. E. Shelley Q.C. and *P. Stuart Bevan* for the plaintiffs.

The following cases cited in argument are not referred to in

"selling price (as hereinafter defined) "of the records, or, where it is in- "tended to reproduce the work on "more than one type of record, the "ordinary retail selling price of each "type of record the manufacturer in- "tends to make and the amount of the "royalty payable on each record. . . . "3: The ordinary retail selling "price of any record shall be calcu- "lated at the marked or catalogued "selling price of single records to the "public, or if there is no such marked "or catalogued selling price, at the "highest price at which single records "are ordinarily to be sold to the "public, exclusive of purchase tax in "either case."

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the judgments: *Simpson* v. *Connolly*[3]; *Savill Bros. Ltd.* v. *Bethell*.[4]

Cur. adv. vult.

Mar. 19. JENKINS L.J. I will ask Ormerod L.J. to deliver the first judgment.

ORMEROD L.J. This is an appeal from an order of Upjohn J. made on November 14, 1957, that the defendant be restrained from infringing the copyright in a musical work entitled " Rockin' " Shoes " or any other musical work of which the plaintiffs are the owners of the copyright or under which they have been granted an exclusive licence. The matter came before the judge on a consent order that the motion originally launched by Chappell & Co. Ltd., the exclusive licensees, should be treated as the trial of the action, and the owners of the copyright, the Winneton Music Corporation, were allowed to be joined as plaintiffs. By consent of the parties the action was tried on the evidence filed on the motion. There were no pleadings and no issues arose on the facts. The sole question was, and is, the construction to be put upon the words " retail sale " in section 8 of the Copyright Act, 1956.

It will be useful before setting out the facts to read the relevant parts of the section in question. [His Lordship read section 8, subsections (1) and (2) and continued:] From this it will be seen that the copyright in a musical work is not infringed by a person making a record thereof provided the conditions set out in the section are fulfilled. In this case, apart from a question on the notice, with which I will deal later, the only condition which it is claimed has not been fulfilled is the one set out in (1) (*c*), namely, that the manufacturers intended to sell the record by retail or to supply it for the purpose of being so sold. It is not disputed that the manufacturers knew how Nestlé's intended to deal with the records, and supplied them for that purpose.

The facts are that the Hardy Record Manufacturing Co. Ltd., whom I shall refer to as the manufacturers, make records by a new process which is so inexpensive as to enable them to be sold wholesale for 4d. each. They are one-sided records made on a thin film of cellulose acetate, and are designed to be played at 78 revolutions per minute. Nestlé's the well-known suppliers of milk chocolate and other similar products, entered into an agreement with the manufacturers to purchase a quantity of recordings of a piece of dance music called " Rockin' Shoes," the copyright of which was vested in the plaintiffs. They caused to be supplied to the manufacturers the necessary cards on which the records could be mounted. On the cards was printed, amongst other matters, a notice that this and other records could

[3] [1953] 1 W.L.R. 911; [1953] 2 All E.R. 474.

[4] [1902] 2 Ch. 523.

be obtained by sending to Nestlé's for each record a postal order for 1s. 6d., together with three wrappers for Nestlé's 6d. milk chocolate bars. It was agreed by Nestlé's that the object of selling records in this way was to advertise their milk chocolate. Nonetheless, they stated, and it was not disputed, that the price of 1s. 6d. enabled them to make a reasonable profit on the sale of a record. The judge held that sales of records such as this were not retail sales within the meaning of the section, and granted an injunction to the plaintiffs.

Mr. Aldous on behalf of the appellants contended that the words in question in the statute should be given their normal meaning, and that "sale by retail" meant a sale to the consuming customer in contrast to a wholesale sale which is a sale to the trade. He further contended, as a matter of construction, that under the general law a work once published is free to the public. The Copyright Acts restrict that freedom and impose penalties for infringement, and should therefore be construed so as not to restrict the public more than necessary. He cited *Boosey* v. *Whight*,[1] which established that there was no copyright in recorded music (in that case the perforated sheets for an "Aeolian" organ) and submitted that the section of the Copyright Act, 1911, which restricted the freedom of performance of recorded music, and section 8 of the Act of 1956 which replaced it, should not in consequence be given an interpretation more restrictive than was strictly necessary. He cited a number of authorities in support of this submission, including *Walsh* v. *Secretary of State for India*,[2] *David* v. *De Silva*,[3] and, to show that the principle was applied more rigidly if penal consequences were involved, *L. C. C.* v. *Aylesbury Dairy Co. Ltd.*[4] and *Rex* v. *Chapman*.[5]

It was further contended that even if, as the judge appears to have held, a sale by retail meant a cash sale, that is, a sale where the consideration was wholly in money, the sale of a record under the conditions set out above was in fact a cash sale.

Mr. Shelley on behalf of the respondents contended in the first place that, as the effect of section 8 was to make an exception to the grant of the broad right of copyright, it should in consequence be construed narrowly. He further contended that a sale by retail meant a sale in the ordinary way of a trader's business, and that the section did not contemplate a transaction such as this, which was for the purpose of advertising Nestlé's goods, and in respect of which other conditions had to be fulfilled by the purchaser in addition to the payment of the price. It was submitted that the use in section 8 (2) of the term "ordinary "retail selling price" as a basis for calculating the royalty to be paid necessarily implied that the sale "by retail" in subsection 1 (*c*) should be an "ordinary" retail sale. The contrast

[1] [1900] 1 Ch. 122; 16 T.L.R. 82.
[2] (1863) 10 H.L.Cas. 367.
[3] [1934] A.C. 106; 50 T.L.R. 165.
[4] [1898] 1 Q.B. 106.
[5] [1931] 2 K.B. 606; 47 T.L.R. 620.

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contemplated in the section, submitted Mr. Shelley, was not the contrast between wholesale and retail, but between selling by retail on the one hand and methods of distribution which might have some of the indicia of a sale on the other, and the transaction in question came within the latter classification.

Whichever way the transaction is regarded, it is not disputed that it was a sale. *G. J. Dawson (Clapham) Ltd.* v. *H. & C. Dutfield*,[6] and indeed a number of earlier authorities, establish beyond doubt the proposition that a transaction is none the less a sale because part of the consideration consists of the exchange of other goods.

There seems to be little authority as to the definition of "retail." In *Turpin* v. *Middlesbrough Assessment Committee*[7] Viscount Dunedin said: "It may be that in strictness the words "'retail trade or business' are only applied with complete "accuracy to cases of selling goods; or it may be that they may "properly be applied to all trades and business which deal "directly with the 'consuming' customer." The question under consideration there was whether a garage and motor repair depot was an industrial hereditament within section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, but it would certainly appear that Lord Dunedin regarded dealing with the consuming customer as a necessary ingredient of "retail trade."

For my part, after a careful consideration of the words of the section and of Mr. Shelley's submissions, I can find no sufficient ground for the meaning which he seeks to attribute to the word "retail." The distinction appears to me to be between a sale to the trade on the one hand, and to the public, or, as Lord Dunedin put it, to the consuming customer on the other. A retail sale may take place in a number of ways. The commonest way no doubt is by a sale in a shop over the counter. But it may, and frequently does, take place by means of the post and other similar means. Again a retail sale may be for cash or for credit, or may be in part exchange of other goods, as is frequently so in the case of motor cars.

It was suggested at one stage of the argument that a sale could not be by retail if there were conditions or restrictions attached to it. This would exclude from the definition sales by a co-operative society or by any dealer who sought to limit in any way the number or class of his customers.

How then does the transaction in question fall short of being a sale by retail? It was admitted on behalf of the plaintiffs that, if Nestlé's had offered the record for sale as it was except for the condition attached of sending three chocolate wrappers, the transaction would have been within the terms of the section. It is necessary to consider, therefore, the effect of the condition. It is agreed that the wrappers were of no value, but the plaintiffs submitted that they were part of the purchase price of the record.

[6] [1936] 2 All E.R. 232.

[7] [1931] A.C. 470, 473; 37 T.L.R. 308.

The defendants took the view, on the other hand, that the object of the condition was to limit the class of purchasers so that the only people who could purchase the records were those who had qualified to be members of the class by sending the necessary wrappers. This latter view appears to me to be the correct one, and in these circumstances I find it difficult to see why this should not be a sale by retail just as much as it would be if no condition were attached.

It was argued that Nestlé's might alter the terms of the sale by increasing the number of wrappers required and reducing the price to one that would bear no relation to the cost of the record. That, of course, is not this case, and it might be that under such circumstances the transaction might be held not to be a genuine sale. But in any event the proviso to section 8 (2) sets out the minimum royalty to be paid, so that it may well be that in such circumstances the owner of the copyright would suffer no undue hardship.

It was further argued that, although Nestlé's were selling the records at a reasonable profit, the real advantage to them was the profit they made, or expected to make, on the sale of their usual products as a result of what was admittedly an advertising campaign. This argument appears to have found favour with the judge, who says, after dealing with the value to Nestlé's of the chocolate wrappers: "This bears no resemblance at all to the "transaction to which, in my judgment, the section is pointing, "that is, an ordinary retail sale with an ordinary selling price." I cannot agree with this view. The motive for making the sale does not appear to be relevant, nor does the fact that the seller hopes to obtain some benefit from the transaction other than the actual profit on the sale.

A further argument put forward by the plaintiffs was that this transaction could not be a retail sale within the meaning of section 8, as it was impossible to comply with the provisions of section 8 (1) (*b*) that the manufacturer should, before making the record, give to the owners of the copyright a prescribed notice of his intention to make it. The particulars required in the notice are set out in paragraph 1 (1) of the Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957, No. 866), made in pursuance of powers contained in the Act, subparagraph (*f*) of which is as follows. Paragraph 1 (1) of the Order reads: "The notice "required by subsections (1) and (5) of section 8 of the Act shall "contain the following particulars," and in (*f*) the particulars are as follows: "The ordinary retail selling price (as hereinafter "defined) of the records, or, where it is intended to reproduce "the work on more than one type of record, the ordinary retail "selling price of each type of record the manufacturer intends "to make and the amount of the royalty payable on each record."

Then in paragraph 3 it is provided that "The ordinary retail "selling price of any record shall be calculated at the marked or "catalogued selling price of single records to the public, or if

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" there is no such marked or catalogued selling price, at the " highest price at which single records are ordinarily to be sold " to the public, exclusive of purchase tax in either case."

It is agreed that notice was given by the manufacturers, but the ordinary retail selling price was set out in the notice as the amount at which the records were to be sold without reference to the wrappers. The plaintiffs' submission was that, as the ordinary retail selling price could not be set out in the notice, the transaction could not be one within the section. If the view I have expressed above is the correct one, that the transaction was intended to be a sale of records for 1s. 6d. each, limited to persons who sent three wrappers in respect of each record, there does not appear to be any substance in this argument.

It follows from what I have said that, in my view, taking the ordinary meaning of the words used in the section, the transactions contemplated by Nestlé's were sales by retail, and the defendants were entitled to make and sell the records in accordance with the provisions of section 8 (1) of the Copyright Act. In the circumstances, it is unnecessary to consider whether the words of the section should be given a broad or a narrow construction in accordance with the respective contentions of the parties. I would allow the appeal.

JENKINS L.J. The substantial question in this appeal is whether the second defendants, Hardy Record Manufacturing Co. Ltd., in making gramophone records of the musical work " Rockin' " Shoes " and supplying them to the first defendants, the Nestlé Co. Ltd., for the purpose of their being disposed of by the first defendants in the manner I am about to describe, were, as regards any given record so made and disposed of, making and supplying the record " for the purpose of its being sold by retail by another " person " within the meaning of section 8 (1) (*c*) of the Copyright Act, 1956. If, as the judge held, that question should be answered in the negative, the second defendants are not entitled to the benefit of the exception provided by section 8 and must, accordingly, be held, in accordance with the judge's decision, to have infringed the copyright in the work (of which the second plaintiffs are the owners and the first plaintiffs the exclusive licensees) by making the records in question under sections 1 (2) and 2 (5) (*a*) of the Act; and the first defendants must likewise be held to have infringed such copyright by distributing the infringing records under section 5 (3).

I need not repeat the facts at length. Briefly, the second defendants made records of " Rockin' Shoes " and other musical works by a novel and remarkably cheap process, in which the recording was made on a thin film of cellulose acetate adapted for mounting on a cardboard disc. The second defendants sold these records to the first defendants at 4d. each (the first defendants providing the cardboard mounts, and the first defendants advertised them for sale at 1s. 6d. each, but with a stipulation to the

effect that intending purchasers must, in respect of each record, send to the first defendants in addition to the 1s. 6d., three wrappers from 2 oz. (6d.) packets of Nestlé's milk chocolate. The price of 1s. 6d., after providing for the costs of the records and 4½d. purchase tax, left the first defendants with 9½d. per record, which sufficed to cover the cost of the cardboard mountings, postage and the like, and leave some profit. The wrappers are, in themselves, completely worthless, and are thrown away when received.

In these circumstances, is the transaction between the first defendants and any person to whom they supply a record on the terms above stated, a sale by retail within the meaning of section 8?

The Act contains no definition of "sale by retail," and one is thus thrown back upon the ordinary meaning of the words, which I take to be sale to persons buying for their own use or consumption as distinct from persons buying for resale in the course of trade. Some support is to be found for this meaning in the passage from the speech of Lord Dunedin in *Turpin's* case,[8] to which Ormerod L.J. has already referred.

Mr. Shelley, for the plaintiffs, relied upon the reference in section 8 (2) to "the ordinary retail selling price of the record" as the figure on which the royalty is to be calculated as showing that the sale by retail contemplated in section 8 (1) (*c*) is to be an ordinary sale by retail, or, in other words, a sale by retail in the ordinary course of the business of selling records by retail. The so-called sales by retail of records in the present case did not, in his submission, answer this description, inasmuch as they were not sales in the ordinary course of the business of selling records by retail to customers paying a stipulated money price without any superadded condition or consideration to be performed or provided by such customers. Here each sale was subject to the condition that the purchaser should not only pay the money price of 1s. 6d. per record, but should produce his three Nestlé's chocolate wrappers. Mr. Shelley said, in effect, that this is not a retail sale in the ordinary course of the business of selling records by retail, but is a sale of records for a cash consideration plus the performance by the purchaser of a special condition designed to promote the sale of Nestlé's chocolate.

I cannot myself regard the reference in section 8 (2) to the ordinary retail selling price as limiting the meaning of section 8 (1) (*c*) in the way suggested by Mr. Shelley, and in this connexion I would observe that by the joint effect of section 8 (2) and paragraph 3 of Statutory Instrument, 1957, No. 866, made under the section, the meaning relevant to the present case of the words "ordinary retail selling price" is simply "the highest price at "which single records are ordinarily to be sold to the public, "exclusive of purchase tax. . . ." To bring a given case within section 8 of the Act, first, the sale of the record which it is

[8] [1931] A.C. 470, 473.

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intended to effect must, no doubt, be sales by retail (that is to say, sales to members of the public for their own use as distinct from persons buying for resale in the way of trade); secondly, such sales, to make them sales at all as distinct from gifts, must be sales at a price; thirdly, the price must, as I think (although Mr. Aldous, for the defendants, was disposed to argue the contrary), consist of a sum of money or, at all events, of valuable consideration to which a precise equivalent in terms of money can be assigned. This last requirement appears to me to be impliedly demanded by the provisions in regard to the calculation of the ordinary retail price of the record, and the computation of royalties thereon contained in section 8 (2) of the Act and paragraph 3 of Statutory Instrument, 1957, No. 866, made under the section.

Given fulfilment of these three requirements, it seems to me that section 8 applies, and that there is no justification for assigning to subsection (1) (*c*) the limited meaning suggested by Mr. Shelley, which would confine its application to retail sales in the ordinary course of the business of selling records by retail, and might have the effect of excluding transactions which, apart from that limitation, would undoubtedly rank as sales by retail in the commonly accepted sense of that expression.

The questions to be answered in the present case are accordingly these, and I append to each of them the answer which, in my view, should be given to it: First, if sales at all, were the sales of records effected by the Nestlé Co. in the way above described sales by retail within the meaning of section 8 (1) (*c*)? In my view this question must undoubtedly be answered in the affirmative. The offer was clearly directed to such members of the public as might wish to acquire the records for their own use, and could not be of the slightest interest to persons requiring records for resale in the way of trade.

Secondly, were these transactions sales as distinct from gifts? Here, again, the answer must, I think, clearly be in the affirmative. The cash price of 1s. 6d. per record, according to the evidence, left the Nestlé Co. with some profit, and each purchaser of a record did at all events undoubtedly pay that amount, whether the condition as to the delivery of the three chocolate wrappers should or should not be regarded as importing some addition to the price over and above the cash payment of 1s. 6d.

Thirdly, did the price paid for each record consist of a sum of money or, at all events, of valuable consideration to which a precise equivalent in terms of money could be assigned?

This seems to me to be the difficult point in the case. The transaction has been described and analysed in various ways in the course of the argument. Mr. Aldous was prepared, if necessary, to contend that it was a sale for 1s. 6d. in cash plus three wholly valueless chocolate wrappers which, being wholly valueless, could be ignored. This attractively simple proposition appears to me to be far removed from the realities of the case. On the other side it was argued that the transaction was a sale for a price

consisting of 1s. 6d. in cash, plus the benefit resulting to the Nestlé Co. from the purchase by somebody of three sixpenny packets of their chocolate evidenced by the three empty wrappers. Apart from the difficulty that the wrappers produced by any given purchaser need not necessarily represent chocolate bought by him, I do not think that this view of the effect of the condition requiring the production of three wrappers is maintainable, nor, as I understand the argument, was it sought to be maintained to the extent of allocating some part of the price of the chocolate to the price of the record. Whoever bought the chocolate represented by the three wrappers must be taken to have bought it at the ordinary retail price of 6d. per packet. That price, no doubt, includes some element of net profit to the Nestlé Co., but it is a price wholly attributable to and exhausted by the purchase of the chocolate. Moreover, whoever bought the chocolate would presumably have bought it from a retailer and not from the Nestlé Co. itself. Accordingly, I do not think that the cash price of 1s. 6d. per record can be treated as increased by the amount of the net profit accruing to Nestlé's in respect of the sale of the chocolate represented by the three empty wrappers or any part of that amount.

A simplified form of the bargain (more favourable to the plaintiffs' contention than the actual bargain involved) might be thus expressed: In consideration of your buying three packets of our chocolate at the ordinary retail price of 6d. each, and evidencing such purchase by sending us the three empty wrappers we, the Nestlé Co., will sell you a record from our list at the price of 1s. 6d. If the bargain was in that form, I think that it would be difficult to maintain that the price of the record was not simply 1s. 6d. (which admittedly showed a profit to the Nestlé Co.) but 1s. 6d. plus some part of the price of the chocolate. A fortiori I think that it is still more difficult to do so where, as in the present case, the bargain does not require the intending purchaser of a record to buy chocolate but merely to produce empty chocolate wrappers.

But, say the plaintiffs, the stipulation as to the production of three empty wrappers was undoubtedly of the first importance to the Nestlé Co. and, indeed, the whole essence of their scheme, which was to encourage the purchase of their chocolate by persons wishful of obtaining the necessary qualification in wrappers to enable them to buy a record or records. I agree; but does it follow that the imponderable value to the Nestlé Co. of the stipulation, admittedly capable of estimation, if at all, only after the advertising campaign based on the "record offer" had run its course, should be apportioned amongst the individual transactions so as to make the price of the record in each case not merely 1s. 6d. but 1s. 6d. plus "x"? I think not.

In my judgment, the delivery of three Nestlé chocolate wrappers required by the terms of this offer should be looked upon as a condition qualifying the person delivering them to buy a record

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at the price of 1s. 6d. and not as an addition to the price of an unascertained and unascertainable amount representing some minute fraction of the advantage which the Nestlé Co. hoped to derive, in the form of increased sales of their chocolate, from the advertising campaign as a whole. In other words, I think that the effect of the offer was that anyone acquiring three empty wrappers as evidence of the purchase of three packets of Nestlé's chocolate became entitled to buy a record at the price of 1s. 6d. upon payment of that price and production of the three empty wrappers to show that they had been duly acquired.

The judge in substance accepted the submissions made on behalf of the plaintiffs. I can best state his conclusion, and the reasoning on which it was based, by making the following quotation from his judgment: "That is the matter I have to consider: "can this be regarded as a retail sale for the purposes of the "section?

"It seems to me that the section is directed to retail sales in "the ordinary course of business, that is to say, a sale for cash, "a money price. That is what a sale is ordinarily defined to be, "and the section is contemplating a sale for a money price.

"Can this transaction be so regarded? Now what does the "purchaser have to do? He cannot get the record on tendering "1s. 6d. He has either to purchase three bars of Nestlé's choco- "late, or, as was suggested, spend a rather profitless or "unpleasant time scavenging in his neighbours' dustbins to see if "he can find any wrappers that have been abandoned by them; "but that is what he has to do. It does not seem to me that it is "proper to describe that as a cash purchase. What is the value "to the vendor, Nestlé's? It is very great indeed, because it is "all part of an advertising campaign, and I confess I listened "with some amazement to the argument which said that really "the existence of the wrappers in the letter containing the postal "order for 1s. 6d. could really be ignored because they were "worthless. That is not the transaction at all. In fact, Nestlé's "are making a nice profit on charging 1s. 6d. for the record, but "that is not the subject of this scheme at all; admittedly not. "Mr. Rainer was perfectly frank and fair about it. The whole "object, of course, is to promote sales of Nestlé's milk chocolate. "The price of 1s. 6d. is quite a minor consideration. It may be a "shilling one day or may be two shillings another; so that it is "not the point. The vital part of this transaction is to get in "three wrappers, and that represents a great deal of value to "Nestlé's, because it is evidence of an advertising campaign "pushing up their sales. That is the value to them. This bears "no resemblance at all to the transaction to which, in my judg- "ment, the section is pointing, that is, an ordinary retail sale "with an ordinary retail selling price. I think it is quite wrong to "suppose that the retail selling price here is 1s. 6d. The pur- "chaser has to purchase three bars of chocolate, and that is the "real value of this transaction to Nestlé's.

" In my judgment, therefore, this transaction cannot properly " be described as a transaction of retail sale and falls outside the " section."

For the reasons I have endeavoured to state, I am unable to accept the view that the cash price of 1s. 6d. per record should be treated as increased by some unascertainable amount on account of the stipulation requiring the delivery of three empty wrappers. If that view were right it would, as I think, follow that the resulting price of 1s. 6d. plus " x " would be a price incapable of statement as a sum of money and accordingly that the transaction would fail to satisfy the third of the three conditions I have postulated as necessary to qualify it for inclusion in section 8. But if, as I think, the price should be looked on as 1s. 6d. per record with a limitation of the offer of records at that price to such members of the public as should deliver three empty chocolate wrappers in respect of each record bought, then I cannot see that the transaction, undoubtedly a sale, is prevented from being a sale by retail within the meaning of section 8 by the circumstance that the class of potential purchasers is limited to those who comply with the condition as to the delivery of wrappers. Section 8 (1) (*c*) refers to the selling of the record " by retail " simpliciter, with no superadded requirement to the effect that the sales referred to must be retail sales in the ordinary course of business. If a shopkeeper acquires a limited stock of some cheap and novel line of goods and offers them for sale at a price showing a profit, but nevertheless an apparently advantageous price from the customer's point of view, with an intimation that they will be sold only to customers who produce evidence of the purchase at his shop since a specified date of other goods to some prescribed minimum value, I cannot see that his sales to consuming, or in other words retail, customers of the special line of goods are prevented from being sales by retail by the circumstance that they are limited to those customers who comply with the condition regarding the purchase of other goods. Nor do I see any justification for the view that in such a case the price charged for the special line of goods should be treated as increased by some part of the price paid for other goods purchased in order to comply with the condition. In this imaginary case the shopkeeper no doubt gets a collateral advantage in the shape of the enhanced sales of other goods he effects or hopes to effect to customers seeking to comply with the condition and thus qualify themselves as purchasers of goods of the special line, just as in the actual case before the court the Nestlé company get a collateral advantage in the shape of the enhanced sales of chocolate resulting or hoped to result through the purchase of Nestlé's chocolate by persons wishing to acquire the wrappers necessary to qualify them as purchaser of records. But this collateral advantage does not in the actual case form part of the price of the record any more than it would in the imaginary case form part of the price of goods of the special line.

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The plaintiffs' real complaint in the present case appears to me to be that 1s. 6d. per record is too cheap a price, yielding too small a royalty, and is not in fact the true price, because the Nestlé Co. can afford to let the records go cheap for the sake of the collateral advantage they get in the shape of increased sales of their chocolate. But any retailer of goods may get some collateral advantage from their sale without any such special arrangements as I have assumed in the case of my imaginary shopkeeper. For example, a novel and attractive line of goods may bring in customers who will buy other things as well, and may be stocked by a retailer with that very object in view rather than the actual profit he hopes to make from the sale of the goods themselves. As to the cheapness of the price of 1s. 6d. per record, this according to the evidence is made possible by the new and exceedingly cheap method of manufacture used by the Hardy Co. Moreover, according to the evidence this price shows the Nestlé company a profit, and I see no sufficient reason for regarding it otherwise than as the true price. It is moreover to be observed that the plaintiffs have no right to insist on the records being sold at any particular price or at a price showing a profit. If the Nestlé Co. had sold the records at 1s. 6d. or even less than that without any condition as to the production of wrappers, the plaintiffs admittedly would have had no ground for complaint, even though the records might be accompanied by matter advertising Nestlé's chocolate.

The view I have formed to the effect that 1s. 6d. is to be regarded as the price of a record, without any addition in respect of the condition as to wrappers, disposes of the plaintiffs' subsidiary argument to the effect that the prescribed notice given by the Hardy Co. pursuant to section 8 (1) (*b*) of the Act and paragraph 1 (1) of statutory instrument 1957, No. 866, was defective, in that it did not and could not specify the ordinary retail selling price as required by paragraph 1 (1) (*f*) of the statutory instrument.

I should add that I likewise reject an argument raised on paragraph 3 of the statutory instrument which defines "The "ordinary retail selling price of a record" in these terms: "The "ordinary retail selling price of any record shall be calculated "at the marked or catalogued selling price of single records to the "public, or if there is no such marked or catalogued selling price, at "the highest price at which single records are ordinarily to be "sold to the public, exclusive of purchase tax in either case." The point taken here (in addition to the objection that 1s. 6d. was not the true price) was to the effect that the Nestlé Co.'s sales of records were not sales to the public, because of the condition as to wrappers. I see no sufficient reason for holding that this condition prevented such sales from being sales to "the public." I think "the public" in this context is used as meaning members of the public purchasing records for their own use as distinct from traders purchasing for re-sale. Nor can

I regard it as right to treat that paragraph as qualifying the simple reference to sales by retail contained in section 8 (1) (*c*) of the Act itself.

For these reasons I would allow this appeal.

ROMER L.J. It is with regret and diffidence that I feel constrained to differ from the judgments of my brethren on this appeal, but for my part I have reached the conclusion that the decision of Upjohn J. was correct and should be upheld. I can state my reasons for this view very shortly, because they are substantially the same as those expressed by the judge in his judgment.

The question is whether the sale by the Nestlé Co. of the records in question in this case can properly be regarded as sales "by retail" within the meaning of that phrase as used in section 8 (1) of the Copyright Act, 1956. The subsection has been read and I will not read it again, but I respectfully agree with, and adopt, the following passage in the judgment of the judge: "Referring back," he said, "to section 8 it is at once "apparent that the emphasis in the section (and in this it differs "from section 19 of the earlier Act) is upon 'retail sale.' In "paragraph (*a*) it is a necessary condition precedent, in fact "satisfied in this case, that records must have been imported or "made for the purpose of retail sale. Passing over paragraph "(*b*) which, as I have said, is satisfied subject to a point I shall "mention in a moment, paragraph (*c*) again stresses the retail "sale aspect of the matter because he has to state, if he is to "satisfy the section, that 'the manfacturer intends to sell the "'record by retail, or to supply it for the purpose of its being "'sold by retail by another person.' Then in (*d*) again there "is the reference that in the case of a record which is sold by "retail the manufacturer has to pay a royalty and, finally, in "subsection (2) there is a reference to the ordinary retail selling "price. It seems quite clear, therefore, that the question I have "to determine is whether this transaction can properly be "described as a retail sale, or whether it is the manufacturer's "intention to sell the record by retail."

In some sense it is quite true to say that the sale of the records by the Nestlé Co. is a sale by retail; for it is not a sale by wholesale but is a sale direct to the consumer, namely, the public. It appears to me, however, that the retail sales envisaged by the section are ordinary retail sales for cash, across the counter or in response to written orders, such as characterize, I suppose, the vast majority of purchases of gramophone records by members of the public. The reason why, in my opinion, it is ordinary retail sales, and those alone, which are within the contemplation of the section is that under subsection (2) of section 8 the royalty payable to the owner of the copyright is a percentage of "the "ordinary retail selling price of the record"; and I am unable to see how there can be an ordinary retail selling price in the

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absence of an ordinary retail sale. The issue, therefore, as it seems to me, is narrowed down to the question whether the sales by the Nestlé Co. Ltd. are ordinary retail sales.

The judge came to the conclusion that they are not, and I agree with him. It is quite true that the three chocolate wrappers which have to accompany each application for a record are intrinsically valueless and that the only money price which the customer has to send with his application is the sum of 1s. 6d. That sum, however, is not the only price which the customer has in fact to pay for the record; for he or one of his family or friends has to pay for three bars of the Nestlé Co.'s chocolate as well. This represents a profit to the company on each sale of a record in addition to the 1s. 6d. which they receive in cash. "The vital "part of this transaction," said the judge, "is to get in three "wrappers and that represents a great deal of value to Nestlé's, "because it is evidence of an advertising campaign pushing up "their sales. That is the value to them. This bears no resem- "blance at all to the transaction to which, in my judgment, the "section is pointing, that is, an ordinary retail sale with an "ordinary retail selling price. I think it is quite wrong to suppose "that the retail selling price here is 1s. 6d. The purchaser has to "purchase three bars of chocolate and that is the real value of "this transaction to Nestlé's."

I am in agreement with those views of the judge. I cannot help thinking that the owner of the copyright was entitled, under section 8, to a royalty assessed upon the full purchase price of each record sold by retail. Under Nestlé's method of selling them the copyright owner gets a royalty assessed upon the cash part only of each sale, and he gets nothing in respect of the consideration which, although indirect, passes from the customers and is received by the company; and the minimum royalty provision would, in many cases of transactions of this character, be no satisfactory substitute for the loss. The position would become still more unfavourable to the owner of the copyright if the company (which it might well do at any time) reduced the amount of cash payable by the customers and increased the number of the requisite wrappers.

In my judgment, the sales of the records in the manner in which they are carried out do not constitute sales "by retail" of the character envisaged and required by section 8 of the Act; and I would only add that it seems to me difficult, if not impossible, for the manufacturer to give, in relation to such sales, the particulars required by regulation 1 (*f*) of the statutory regulations.

I would, accordingly, dismiss the appeal.

Appeal allowed.
Leave to appeal.

Solicitors: *McKenna & Co.; Howe & Rake; Syrett & Sons.*

F. R. D.

[CHANCERY DIVISION.]

FRY *v.* INLAND REVENUE COMMISSIONERS.

1958
Mar. 5, 12.

Danckwerts J.

[1957 F. 1229.]

Revenue—Estate duty—Interest in expectancy—Deferred payment—Purchase by life tenant of interest in expectancy—Falling into possession—Whether estate duty payable on the purchase price or at the death of life tenant or not at all—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*a*), 7 (6), 22 (1) (*j*).

A testator died in 1918 and by his will settled his residuary estate upon trust to pay the income thereof to his daughter, N., during her life and after her death the capital to be held upon trusts for her issue and, in default of issue, for her brothers, the testator's four sons.

One of the four brothers, C., died in June, 1940, and his executors elected not to pay estate duty on his reversionary interest in his father's estate at once but to wait until the same fell into possession.

By an agreement dated June 22, 1954, N. purchased from the plaintiff, the surviving executor of C.'s will his reversionary share and the interests of her three other brothers in their father's residuary estate. The price paid for C.'s share was £39,750, based on an actuarial valuation on the footing that no estate duty would be payable under the testator's will on N.'s death, and the agreement provided for satisfaction of the purchase price by transfer of investments. N. was at the date of the agreement over 80 years old, a widow, and she had no children.

The plaintiff asked for a declaration by the summons as to whether a claim for estate duty on the value of the investments transferred to N. in respect of C.'s share should be made on the footing that his reversionary interest fell into possession in 1954 at the date of the agreement or whether estate duty would be payable on the value of that interest at N.'s death or whether no estate duty was or would ever be payable in respect thereof:—

Held, (1) that on the purchase by N. in 1954 of C.'s reversionary interest no interest in expectancy fell into possession, since she already had a life interest in the estate and by the purchase acquired the interests which would have taken effect in the event of her death without issue, but which conferred no right to possession at any earlier date than her death. Accordingly, no claim for duty could be made on the agreement under section 7 (6) of the Finance Act, 1894.[1]

[Reported by JENNIFER WEST, Barrister-at-Law.]

[1] Finance Act, 1894, s. 7 (6): "Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate, then—(*a*) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and (*b*) the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained."

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(2) That, since the interest in expectancy did not fall into possession on the purchase in 1954, it would fall into possession in the estate of N. on her death, and the value of the interest would have to be ascertained at that time in accordance with section 7 (6) of the Finance Act, 1894.

In re O'Connor's Estate [1931] I.R. 98 followed.

Quaere. Whether the birth of issue to N. should still be considered theoretically possible so as to cause a possible opening of the merger of the life interest with the reversionary interest, so that the interests in expectancy were not indefeasibly vested when those interests were purchased in 1954.

Ward v. *Van der Loeff* [1924] A.C. 653; 40 T.L.R. 493; *In re Deloitte* [1926] Ch. 56; *In re O'Connor's Estate* (supra) considered.

Adjourned summons.

The plaintiff to this summons was Sir Geoffrey Storrs Fry who was the sole surviving executor of Conrad Penrose Fry, who died on June 5, 1940, and whose will was proved on December 9, 1940: the questions raised by the summons were, inter alia, whether a claim for estate duty in respect of a reversionary interest to which Conrad Penrose Fry was entitled on his death arose on the sale by the plaintiff of that reversionary interest to the life tenant of the trust property, Norah Lilian Cooke-Hurle, or would arise on her death or had never arisen and would never arise at all. The facts appear from the judgment.

J. Pennycuick Q.C. and *R. Cozens-Hardy Horne* for the plaintiff.

R. O. Wilberforce Q.C. and *E. B. Stamp* for the Commissioners of Inland Revenue.

Cur. adv. vult.

March 12. Danckwerts J. read the following judgment: The question to be decided on this originating summons is the liability for estate duty in respect of a reversionary interest to which Conrad Penrose Fry was entitled at his death in 1940, and which has been purchased from his executor by the person entitled for her life to the income of the property.

The history starts with the will dated November 30, 1915, of Francis James Fry (hereinafter called " the testator "), who died on November 4, 1918. By that will the residuary estate was settled upon trust to pay the income thereof to the testator's daughter, Norah Lilian Cooke-Hurle during her life and after her death the capital was to be held upon trusts for her issue and, in default of issue, for her brothers, the testator's four sons. As Mrs. Cooke-Hurle is now over 86 years of age, is a widow, and has had no children, it is and has been for a great many years a certainty that the trusts in favour of the brothers must take effect on her death.

One of the four brothers, Conrad Penrose Fry, died on June 5, 1940. His executors elected not to pay estate duty on this reversionary interest in one quarter of the residuary estate of his father, but to postpone payment until that reversionary interest

should fall into possession. By an agreement dated June 22, 1954, Mrs. Cooke-Hurle (who was then 83 years of age) purchased from the plaintiff, the trustees of another deceased brother's will (who was also the assignee of the share of a third brother), and the trustees of a settlement made by the remaining brother, all the four reversionary shares in the father's residuary estate. The price paid for Conrad Penrose Fry's share was £39,750. This was based on an actuarial valuation made on the footing that no estate duty would be payable under the testator's will on Mrs. Cooke-Hurle's death. On the basis that Conrad Fry's interest, if sold to some other person, would be subject to estate duty on Mrs. Cooke-Hurle's death at a rate of 65 per cent., the actuary calculated that the value of the reversionary interest was £13,900 only.

The agreement provided for the satisfaction of the purchase price by the transfer of investments forming part of Mrs. Cooke-Hurle's free estate equivalent in value to the amount of the purchase price as valued on March 9, 1954.

There was no provision in the agreement in regard to merger, but upon the completion of the purchase the trustees of the testator's will transferred to Mrs. Cooke-Hurle all the investments comprised in the settled share of which she had been enjoying the income.

A claim for estate duty on the value of the investments transferred to Mrs. Cooke-Hurle in respect of Conrad Fry's share has been made by the Commissioners of Inland Revenue on the footing that his reversionary interest fell into possession in 1954 on the purchase by Mrs. Cooke-Hurle. An alternative claim is made that estate duty will be payable on the value of that interest on Mrs. Cooke-Hurle's death.

It is contended on behalf of the plaintiff that no estate duty is or ever will be payable in respect of Conrad Fry's reversionary interest, as that interest has not fallen and now can never fall into possession. The value on which estate duty is claimed is also contested.

The sections of the Finance Act, 1894, which affect the matter are as follows: Section 1 provides: "In the case of "every person dying after the commencement of this part of this "Act, there shall, save as hereinafter expressly provided, be "levied and paid, upon the principal value ascertained as herein- "after provided of all property, real or personal, settled or not "settled, which passes on the death of such person a duty, called "'estate duty' . . . ."

There is no dispute that on Conrad Fry's death his reversionary interest either "passed" or was caught by the terms of section 2 (1) (*a*) (as suggested by Lord Macnaghten in *Inland Revenue Commissioners* v. *Priestley*,[1] and by Hamilton L.J. in *In re Avery*.[2] [His Lordship read section 7 (6) and continued:]

[1] [1901] A.C. 208, 213; 17 T.L.R. 507.

[2] [1913] 1 Ch. 208, 217.

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By section 22 (1) (*j*) there is a definition: "The expression "'interest in expectancy' includes an estate in remainder or "reversion and every other future interest whether vested or con- "tingent, but does not include reversions expectant upon the "determination of leases."

There is no doubt that Conrad Fry had an interest in expectancy at the date of his death.

There is no definition of the words "fell into possession." The meaning must, therefore, be ascertained by regard to ordinary legal English. The definition offered by counsel for the executor is that an interest in expectancy falls into possession when the holder of the interest becomes entitled by virtue of the interest to present enjoyment of the property. It was contended, therefore, that on the purchase Mrs. Cooke-Hurle did not become entitled to present enjoyment of the property by virtue of the interest in expectancy because she had already present enjoyment by virtue of her life interest. This interest, it was said, was enlarged into absolute ownership as a result of the purchase, and the merger consequent thereon, and, therefore, the interest in expectancy can never fall into possession.

It seems to me desirable at the outset to consider the nature and effect of merger. But, first of all, though the liability to estate duty arose by reason of the death of Conrad Fry, was there any charge on the interest of Conrad or the property created thereby? No doubt the executors were accountable under section 8 (3) of the Act, but unless the property did not pass to the executor as such no charge would be created under section 9 (1). Although the interest of Conrad Fry was an equitable interest, it would appear to have been a legal asset (personal property), and, therefore, passed to the executor as such: see *Mutlow* v. *Mutlow*.[3] Accordingly, the matter is not complicated by any charge of duty upon the interest or the property.

In Challis, Real Property, 3rd ed., pp. 86 and 87, quoting Preston's Conveyancing, the rules in regard to merger are stated as follows: "A contingent remainder, not being in the eye of the "common law an estate, but only a possibility to have an estate "at a future time upon the happening of a contingency, did not "suffice to prevent merger, if interposed between two vested "estates, which were otherwise such that the one would merge "in the other.

"But there was in this respect an important distinction "between cases in which the two vested estates came to the same "hand subsequently to the creation of the contingent remainder, "and cases in which they came to the same hand eo instanti with "the creation of the contingent remainder. In the former case, "the merger was absolute, and thereby the contingent remainder "was for ever destroyed. But in the latter case, the merger was "not absolute, and the two estates united by it remained,

[3] (1859) 4 De G. & J. 539.

" according to the language in use, liable to open and let in the " contingent remainder, provided that it became vested during " what would have been the continuance of the precedent estate " if it had not been merged."

In the present case, the two interests plainly came to the same hand subsequently to the creation of the contingent remainder. Of course, the two interests were both equitable interests in personal property. But that is immaterial, as the same rules were applied in equity, except that where merger was possible, equity applied the intention of the parties, and, if their intention was not expressed, assumed an intention to cause merger, if this were beneficial: *In re Fletcher, Reading* v. *Fletcher*.[4]

Since the Judicature Act, 1873, s. 25 (4) (now the Law of Property Act, 1925, s. 185), the rules of equity are applied in any case. I suppose counsel for the executor would say that it was in the interests of the parties to effect merger, if this would defeat a claim for estate duty. But I apprehend that this would not eliminate the possibility of the two interests reopening to let in a contingent remainder or other interest in expectancy.

In the Irish case of *In re O'Connor's Estate*,[5] the interest of a man expectant on the death of his brother without issue was treated as not falling into possession for the purposes of duty until the brother died without issue, notwithstanding that the interest in expectancy on the earlier death of the owner of the expectancy in the lifetime of the other brother came to the latter (the tenant for life) as his heir-at-law, so that he had both the interests. The Irish court seems to have treated the interest in expectancy as a contingent interest, though it may be more accurate to regard it as a vested interest liable to be divested by the birth of issue of the tenant for life.

In the Irish case the tenant for life was a man, and a man is always treated by the law as capable of having issue until his death. Is the position of a woman any different? It is true that the Chancery Division permits trustees to dispose of property in the course of administration without regard to the possibility of the birth of children to a woman who is past the normal limit of childbearing. But this practice has not been applied in cases where some rule of law is involved, for instance, the rule against perpetuities: *Ward* v. *Van der Loeff*,[6] or the rules restricting accumulations: *In re Deloitte*.[7]

Of course, the trustees of the testator's will were perfectly safe in handing over the investments forming the trust fund to Mrs. Cooke-Hurle in 1954, as she was then 83, and there was no possibility of her having any issue in fact. Ought I to regard birth of issue as still theoretically possible so as to cause a possible opening of the merger, so that the interests in expectancy of the brothers were not indefeasibly vested when these interests were purchased in 1954? And, if not, does the impossibility of

[4] [1917] 1 Ch. 339.
[5] [1931] I.R. 98.
[6] [1924] A.C. 653; 40 T.L.R. 493.
[7] [1926] Ch. 56.

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Fry v. Inland Revenue Commissioners.

Danckwerts J.

the birth of issue make any difference to the situation? If the possible defeasance by the birth of issue has disappeared, at what particular moment of time did it disappear? The final impossibility of issue varies with individuals and with circumstances. On the other hand, it was possible to say with certainty in 1954 that there could no longer then be any chance of issue. These seem to me to be difficult questions, but I do not find it necessary to answer them.

As is apparent from the rules which I have mentioned previously, the theory of the merger of estates is a highly artificial idea. I am not satisfied that such theoretical and obsolescent rules ought to be allowed to decide liability to estate duty. The facts are that Mrs. Cooke-Hurle had a life interest in the income of the fund; when she purchased the interests in expectancy of her brothers in 1954, she also acquired the interests which would take effect in the event of her death without issue, but would confer no right to possession at any earlier date than her death. It is true that (on the footing that the birth of issue of Mrs. Cooke-Hurle was no longer a possibility) after the purchase no one but Mrs. Cooke-Hurle had any interest in the trust fund, and so the trustees handed over the investments comprising the trust fund to her. I do not regard that as the same thing as the falling into possession of the interest in expectancy. If the interest in expectancy did not fall into possession on the purchase in 1954, it seems to me that it will fall into possession in the estate of Mrs. Cooke-Hurle on her death.

This accords with the result which was reached by the Irish court in *In re O'Connor's Estate*.[8] That case, of course, is not binding on this court, but it does show that such a result was considered by another court to be possible. To reject such a result seems to me to defeat the intention of section 7 (6) of the Finance Act, 1894, and to abuse the indulgence conferred by that subsection.

The difficulties of valuation which may arise on Mrs. Cooke-Hurle's death were commented upon in argument. I am afraid that these will have to be faced when the time for payment arises. The value of the interest when it falls into possession will have to be ascertained at that time in accordance with the provisions of the Act. This must depend upon the circumstances at that date. I am not prepared, and I am not compelled, to express any opinion in advance of the event.

Declaration accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills for Osborne, Ward, Vassall, Abbot & Co., Bristol; Solicitor of Inland Revenue.*

[8] [1931] I.R. 98.

[PROBATE, ETC., DIVISION.]

PRESCOTT (*orse.* FELLOWES) *v.* FELLOWES.

1958
March 5, 14.

Stevenson J.

Husband and Wife—Settlement—Variation—Ante-nuptial settlement—Securities transferred to husband as "absolute gift"—Deed also providing for possibility of husband seeking membership of Lloyd's—Whether deed executed day before marriage "in consideration" thereof an ante-nuptial settlement—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

On the day before their marriage the husband and wife entered into a deed, called on its endorsement "Settlement in Marriage," whereby the wife agreed "in consideration of" the intended marriage to transfer to the husband "as an absolute gift unaffected by "anything hereinafter contained," securities to the value of some £15,000. The wife further agreed to provide the husband with the sum of £20,000, to be treated for all purposes as a loan to him, should he be suitably recommended for membership of Lloyd's subject to his being able to show assets to the value of £35,000.

The husband did not in fact pursue his plans to seek membership of Lloyd's, and the marriage was dissolved upon the petition of the wife, who applied to vary the provisions of the deed as being an ante-nuptial settlement, and to have transferred back to her the securities representing that £15,000, which the husband maintained he had treated as his own, and upon the basis of it being an absolute gift:—

Held, (1) that notwithstanding the use of the words "absolute "gift" in relation to the £15,000 the deed, which was to be looked at and treated as a whole, was nevertheless an ante-nuptial settlement;

(2) that the matter should be referred to the registrar to inquire as to what investments or securities now represented the £15,000, the application thereafter to be restored to the list.

APPLICATION by wife to vary the provisions of a deed dated June 19, 1953, and entered into on the day before the marriage, upon the ground that it was an ante-nuptial settlement within the meaning of section 25 of the Matrimonial Causes Act, 1950.

The applicant, who was the former wife and the petitioner in the divorce suit, contended that the deed of June 19, 1953, was an ante-nuptial settlement. This was denied by the respondent husband. The wife also sought to obtain an order for the transfer to her of securities representing the sum of £15,000, alternatively for payment to her of £15,000; but that application was modified at the hearing before Stevenson J. through her counsel, and she asked for an order for an inquiry before the registrar as to what investments or securities represented the sum of £15,000 at the date of the hearing.

The marriage took place on June 20, 1953. In May, 1954 (according to the evidence given at the hearing of the petition which was undefended), the husband deserted the wife. A decree nisi was pronounced on October 25, 1957, and that decree was made absolute on January 28, 1958. There were no children of the marriage.

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The husband was a squadron leader in the Royal Air Force and from the affidavits filed on this application it appeared that he had no resources except for his service pay. The wife's means were substantially greater than those of her husband and she was said to be substantially older. The parties were described in the certificate of their marriage merely as "of full "age."

As a result of discussions between the parties before the marriage took place, it was contemplated that the husband should resign from the Royal Air Force with a view to becoming an underwriting member of Lloyd's and that the wife should provide funds to enable him to do so and thereby acquire an income in the benefit of which the wife would, as a wife, presumably enjoy some share. As a result of such discussions and of negotiations between the solicitors for the parties, the deed, the nature and effect of which was in issue, came into existence. It was called on its endorsement, "Settlement on Marriage."

The body of the document recited that a marriage had been agreed upon and would shortly take place between the parties. The operative part read: "Now this deed witnesseth that in consideration of the said marriage it is hereby agreed as follows:— "1. Lady Prescott [being the then name of the wife] will "immediately after the solemnization of the said marriage trans- "fer to Squadron Leader Fellowes as an absolute gift unaffected "by anything hereinafter contained the securities short par- "ticulars of which are set out in the schedule hereto." The schedule in question included a reference to £22 in cash, the sum which the parties believed at the date of the Deed to be sufficient to bring the value of the securities specified in the schedule up to £15,000.

In its second clause, the deed contained a covenant by Lady Prescott with Squadron Leader Fellowes which provided, so far as material, that if at any time before December 31, 1955, Squadron Leader Fellowes shall produce written evidence from a recognized firm of Lloyd's underwriters that they were prepared to recommend him for membership of Lloyd's subject to his being able to show assets to the value of £35,000, and that all other conditions precedent to membership of Lloyd's had been fulfilled, then Lady Prescott would pay to Squadron Leader Fellowes the sum of £20,000, or transfer to him securities or other property or bonds all being, so far as possible, of a nature acceptable to Lloyd's for membership to a total value of £20,000. A proviso which followed limited Lady Prescott's obligation under the covenant to the value of her unencumbered cash securities and freehold and leasehold property at the time when she might be called upon to comply with the covenant.

Clause 4 of the deed provided that the sum of £20,000, or any property representing the same transferred by Lady Prescott to Squadron Leader Fellowes in pursuance of the covenant, should be for all purposes treated as a loan by Lady Prescott to Squadron

Leader Fellowes. It went on to provide for payment of interest at 5 per cent. per annum on the loan by Squadron Leader Fellowes to Lady Prescott if demanded by Lady Prescott on the usual quarter days, but if Squadron Leader Fellowes did not become a member of Lloyd's by March 31, 1956, or at any time ceased to be a member of Lloyd's, the loan was to be immediately repayable.

There were further provisions for securing the loan by an endowment policy of assurance on the life of Squadron Leader Fellowes, and there were various other events provided for in the deed which were not material to the present application.

The matter came before the judge upon the report of Mr. Registrar Kinsey dated February 13, 1958, extracts from which are contained in the judgment. The registrar's submissions, made "with great reluctance," were: "(1) If the deed . . . is not a "settlement the wife's application must be dismissed. (2) If the "deed is an ante-nuptial settlement, it cannot now be varied as "asked because the fund is not in possession, and there is no "power to order the husband to pay to the wife the value of the "securities, and if this is right, the application must be dis-"missed."

G. H. Crispin for the wife.

P. R. Hollins for the husband.

The following cases, in addition to those cited in the judgment, were referred to in argument: *Joss* v. *Joss* [1]; *Bosworthwick* v. *Bosworthwick* [2]; *Walpole* v. *Walpole and Goddard* [3]; *Attwood* v. *Attwood* [4]; *Hodgson Roberts* v. *Hodgson Roberts* [5]; *Hindley* v. *Hindley*.[6]

Cur. adv. vult.

STEVENSON J. stated the facts substantially as set out above and reading his judgment continued: The husband did not become a member of Lloyd's, and the terms of the deed relating to the provision of £20,000 by the wife did not come into effect and have to be considered in this case only so far as they throw any light on the question whether the document was an ante-nuptial settlement. The practical purpose of this application from the wife's point of view is, therefore, to recover £15,000 or the investment or investments representing that sum.

The registrar came to the conclusion that the deed in question was an ante-nuptial settlement. He says: "This deed has none "of the features of an ante-nuptial settlement. There are no "trustees and no provision is made for the payment of the income "from the fund to either spouse, or on the death of one spouse, "or as to the fund itself, on the death of either or both spouses, "as to children of the marriage. Clause 1 of the deed appears

[1] [1943] P. 18.
[2] [1927] P. 64; 62 T.L.R. 719.
[3] [1901] P. 196.
[4] [1903] P. 7.
[5] [1906] P. 142; 22 T.L.R. 395.
[6] [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653.

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" to constitute an absolute gift of securities (amounting to about " £15,000) to the husband immediately after the solemnization of " the marriage. The rest of the deed is inoperative."

After referring to certain authorities dealing with post-nuptial settlements [1] the registrar says: " Applying the tests laid down by " the authorities, it sems to me that the settlement in this case " provides for the financial benefit of the husband and probably " of the wife after the marriage." The registrar goes on to say that the provisions of clauses 1 and 2 of the deed, together with the affidavit evidence, make it abundantly clear that the motive of the settlement was to set up the husband as a member of Lloyd's, thus providing him with an income from which the wife would also derive some benefit. The husband could not approach Lloyd's on the basis that he had a rich wife. " The money and " securities had to be in his name." For these reasons the registrar comes to the conclusion and submits that the deed dated June 19, 1953, is an ante-nuptial settlement within the meaning of section 25 of the Matrimonial Causes Act, 1950.

Counsel for the husband has contended before me that the transfer of £15,000, or securities representing the same, was an absolute gift made before marriage, which cannot properly be regarded as an ante-nuptial settlement for the purpose of section 25.

It has been pointed out that the following words of the deed disclose a patent ambiguity: " Now this deed witnesseth that in " consideration of the said marriage it is hereby agreed as follows: " 1. Lady Prescott will immediately after the solemnization of " the marriage transfer to Squadron-Leader Fellowes as an " absolute gift unaffected by anything hereinafter contained the " securities short particulars of which are set out in the schedule " hereto." It is said that if the phrase " an absolute gift " is given its full meaning, it cannot be reconciled with the phrase " in consideration of the said marriage."

It was suggested in argument that the words in the deed " as an absolute gift " may have been inserted by the solicitor acting for the wife because he had in mind some advantage connected with stamp duty in using them. I have no means of determining this, and I have not taken it into account in forming my view as to the proper construction of this deed.

Looking at the deed as a whole, and having regard to the position of the parties when they entered into it as it appears from the language of the document and the affidavits before me, I have no doubt that it was a provision made by Lady Prescott in favour of the man whom she was intending to marry and made in his favour in the character of an intended husband. I have no doubt that it was in fact made in consideration of the marriage which was to take place on the day following the execution of the deed.

[1] The registrar referred to *Halpern* v. *Halpern*; *Parrington* v. *Parrington*, and *Princep* v. *Princep*, post.

To the extent to which the words "as an absolute gift "unaffected by anything hereinafter contained" exclude the concept of a transfer of property to the intended husband for a consideration passing from him to the intended wife, I think the words must be treated as having less than the full meaning they would bear if their ordinary connotation were given to them.

The cases of *Prinsep* v. *Prinsep*,[2] *Halpern* v. *Helpern*,[3] *Parrington* v. *Parrington*,[4] and *Smith* v. *Smith*,[5] have all been cited and carefully considered before me. They are all cases dealing with the question whether particular dispositions made after marriage were post-nuptial settlements falling within section 25 of the Matrimonial Causes Act, 1950. No case has been cited to me dealing with an ante-nuptial settlement.

I apprehend that where a financial provision is made between intending spouses before and expressed to be in consideration of marriage, the question whether it is an ante-nuptial settlement under section 25 of the Matrimonial Causes Act, 1950, is unlikely to be seriously contested, and I think that the relevance of the various authorities dealing with post-nuptial settlements in the present case is that they demonstrate that the word "settlement" in the section must be liberally construed and, also, the transfer of property to trustees who are to hold it for the benefit of the spouses or either of them is not an essential feature of a post-nuptial settlement. In my opinion it is not an essential feature of an ante-nuptial settlement for the purpose of section 25.

The provisions of clause 4 of the deed of June 19, 1953, did contemplate, in the events there set out, the making of periodical payments by the husband to the wife, and this I think gives further support to the view that this is an ante-nuptial settlement.

In the result I hold that the deed of June 19, 1953, is an ante-nuptial settlement within the meaning of section 25 and is correctly described in its endorsement as "Settlement on "Marriage." It is not in my opinion possible to sever clause 1 from the remander of the deed as I was invited to do.

I ought perhaps to mention that the evidence before me includes a letter from the wife's then solicitor to the husband's solicitor dated December 31, 1957, and correspondence between the wife's present solicitors and the Controller of Stamps from which it appears that the instrument of June 19, 1953, is not considered by the Controller of Stamps to fall within the "charge "of duty under 'settlements' in the first schedule of the Stamp "Act of 1891, because it does not contain trusts limiting the "use of the securities for any person in succession."

I mention this correspondence only to make clear that in

[2] [1929] P. 225; 45 T.L.R. 376.

[3] [1951] P. 204; [1951] 1 T.L.R. 534; [1951] 1 All E.R. 315.

[4] [1951] W.N. 534; [1951] 2 T.L.R. 918; [1951] 2 All E.R. 916.

[5] [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584; and see [1951] P. 204, 209.

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my view the Stamp Act, 1891, and the views of the Controller of Stamps as to the stamp duty attracted by the deed in question have no bearing on the question I have to decide and I have excluded such matters from my mind.

Dealing with the second part of the application, the registrar says in his report: "The husband in this case has realized the "securities and used the money and this does not seem to be "disputed. The securities therefore could not be transferred to "the wife as they do not exist, and there is no power under "section 25 to order the husband to make a cash payment even "if the money were in his possession." He therefore submits that the application should be dismissed.

By an affidavit sworn by the husband on December 18, 1957, the husband says: "In any event the money realized from the "securities transferred to me has been used by me for the pur-"pose of business other than Lloyd's. I treated the money as my own and I say I have every right to do so as the securities were transferred to me as an absolute gift." The husband does not specify the business "other than Lloyd's" for which he has used the money realized from the securities, and there is no evidence before me to indicate what is the present form of investment, if any, of these moneys; but the husband's affidavit is in my opinion consistent with this money being in the form of investments or an investment still under the husband's control.

In *Smith* v. *Smith*[6] Denning J., after dealing with the authorities to which I have already referred relating to post-nuptial settlements, said: "A wife is often free to assign her "interest under an ordinary marriage settlement or a separation "deed, but it is none the less a 'settlement.' If she should "assign her interest, the court might treat the proceeds in her "hands as representing the property; and a co-respondent, or "indeed any person, who takes an assignment from her with "notice that proceedings are pending as to the application of "the property, will find that the arm of the court is long enough "to reach the property in his hands."

In these circumstances, I direct an inquiry before the registrar as to what investments or securities now represent the assets transferred to the husband under clause 1 of the deed of June 19, 1953, and I direct that this application be restored to the list when this inquiry has been concluded.

Order accordingly.

Solicitors: *Culross & Co.; N. S. Caney, Putney.*

J. B. G.

[6] [1945] 1 All E.R. 584, 586; and see [1951] P. 204, 211.

[CHANCERY DIVISION.]

In re KNIGHT'S QUESTION.

1958
March 4.

[1957 K. No. 986.]

Harman J.

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17*—Title deeds—Whether property within meaning of section—Claim by husband against wife for possession of title deeds—Husband trustee with no beneficial interest—Whether maintainable under the section—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

A partnership, of which the husband was a member, purchased certain property, and part of the purchase price was provided by a bank by way of loan. In consideration of the loan, the title deeds were deposited with the bank by way of security. In due course the equity of redemption was conveyed to a limited company which paid off the loan. The bank then handed over the title deeds to the husband as trustee for the company and he placed them in a strong room at the matrimonial home. As a result of differences between the husband and the wife, the husband left home, and the wife stayed in possession. When the company's auditors asked for inspection of the title deeds it was discovered that the deeds were in the custody of the wife's solicitors as her agents. On a summons under section 17 of the Married Women's Property Act, 1882,[1] for the determination of whether the husband or the wife was entitled to the deeds:—

Held, (1) that title deeds were "property" within the meaning of the section; (2) that a dispute between the husband and the wife as to the possession of the deeds was a matter which could be litigated in a summons taken out under the section, although the husband was a mere trustee with no beneficial interest in the property.

ADJOURNED SUMMONS.

Certain freehold farm lands and premises known as the Hindringham Estate were purchased by a partnership of which the husband, George Coldham Knight, was a member. Part of the purchase price was provided by Barclays Bank Ltd. by way of loan; in consideration of the loan the partners deposited the title deeds of the Hindringham Estate with the bank as security. At a later date, the equity of redemption was conveyed by the partners to G. C. and F. C. Knight Ltd., a limited company, which paid off the loan. The bank, then having no lien on the deeds handed them over to the husband as trustee for the company, who deposited them in the strong room at the matrimonial

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

[1] Married Women's Property Act, 1882, s. 17: "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons . . . in a summary way to any judge of the High Court . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit. . . ."

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home. As a result of differences between the husband and his wife, the husband left the matrimonial home in January, 1957, leaving the wife in possession. In August, 1957, the auditors for the company asked for inspection of the title deeds, but it was discovered that these were not in the possession of the husband, nor were they in the strong room, but were with the wife's solicitors, as her agents. They refused to return them to the husband who issued this summons under the Married Women's Property Act, 1882, s. 17, for the determination of all questions between the husband and the wife with respect to the title or possession of the deeds or documents of title of the Hindringham Estate, and seeking an order for the return of the title deeds to him.

Stewart Newcombe for the applicant.
W. J. C. Tonge for the respondent.

No cases were cited in argument other than that referred to in the judgment.

HARMAN J. This is an unusual application under the Married Women's Property Act. Section 17, as is well known, provides a summary method of solving questions between husband and wife. The husband here applies for the determination of the question whether he or his wife is entitled to the title deeds of a freehold estate. He asks, if the question be determined in his favour, for an order upon the wife to deliver up the title deeds. It is not in dispute that these title deeds are at the present moment in the hands of the wife's solicitors as her agents; nor is it in dispute that the legal estate in the property is vested in the husband. The wife does not controvert any of the facts in evidence, nor does she set up any right or title, nor interest, on her own behalf; she merely says, in these proceedings anyhow, that the husband can have no relief, these being merely statutory proceedings and not an action.

It appears to be the fact that this property was bought by a partnership in which the husband was one of the partners, and, having been mortgaged for a large sum of money to the bank, the partners subsequently conveyed the equity of redemption to a limited company called G. C. & F. C. Knight, Ltd. That company, having paid off, or procured the payment off of, the balance of the mortgage the bank had no more lien on the deeds which had been deposited as security for the loan. There appears to have been no form of mortgage; but in August, 1956, the loan having been fully discharged, the bank handed the title deeds to the applicant, he having retained throughout the legal estate which had been conveyed to him in 1950 when he and his partner bought the property. He therefore has no equitable interest in the property now, the equity being entirely in the limited company. Nevertheless, rebus sic stantibus, he has a

right, as I see it, to retain the title deeds in virtue of his ownership of the legal estate, though the company might, I suppose, direct him to transfer the legal estate to some nominee of their own.

The husband, having thus obtained the title deeds from the bank, he put them in his strong-room in a house called " Stody " Lodge," the matrimonial home; that is at Melton Constable in Norfolk. He left that matrimonial home in January, 1957, when the marriage between himself and his wife broke up, and he left the deeds behind. During the year 1957 the company's auditors, in the ordinary course of their duties, wished to check the title deeds, and then it was discovered that they were no longer in this strong-room, nor in the possession or power of the husband. On inquiries being made they turned out to be, as I have said, in the hands of the wife's solicitors not under any claim of lien or right, but merely as her agents; so the deeds are in exactly the same position as if they were in the wife's possession.

The husband therefore launches this originating summons, and he says that it is competent for the court to entertain it under section 17 of the Act, which is a familiar section, but I must read a little of it. [His Lordship read from the section and continued:] The wife first contends that title deeds, which are the only matter in dispute here, are not themselves property; they are merely the indicia of title; they are very valuable, no doubt, as such, but not in themselves property; they are merely evidence of property, and therefore they do not come within the word " property." I reject that conclusion. It seems to me clear that title deeds are property, regarded as pieces of paper or parchment, as the case may be. They are things in which a person has a property, and they are themselves pieces of property. It is to be remembered that, before 1926, title deeds to real estate passed to the heir.

The common-law case to which my attention was drawn shows that in a common-law action for title deeds the jury could be, and would be, charged to give to the plaintiff, if he was successful, by way of damages the entire value of the estate, whereas the judgment goes on to say that that would be reduced to 40s. if the deeds were delivered up. That appears in *Loosemore* v. *Radford*.[1] It seems to me quite wrong to say that these bits of paper are not themselves property. It is quite true their value is that they show the title to land, but they are themselves, in my judgment, property and can be sued for as such.

The second defence which the wife puts forward is this: she says that this is not a case between husband and wife, but really between a trustee and a stranger to the trust, and that the husband here is not suing qua husband but qua the legal owner of the property, being a trustee and, admittedly, having no beneficial interest in it. She says the ownership of the property is not in dispute between him and her. By " the property " I mean here

[1] (1842) 9 M. & W. 657.

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Harman J.

the estate. She says that he has no beneficial interest in it, and she does not assert for this purpose that she has either. She says he is a mere trustee and that he cannot make use of this useful summary procedure to extract these deeds from her and thus get round the inability of a husband to sue his wife in tort. I think that the answer to that is to be found in the section itself, because the action may be about the title to, or the possession of, property, and therefore it does not matter, as I see it, for the purposes of the section whether what the husband or the wife wishes to establish against the other is title to something or possession of it. There is certainly a dispute here between the husband and the wife as to the possession of these deeds, and that seems to be a matter which, if the deeds are themselves, as I have held, property which falls fair and square within the words of the section, notwithstanding that the husband has no beneficial interest.

I therefore hold that it is competent to adjudicate upon this matter under the section, and upon that footing I can order that the wife do forthwith hand over to the husband the documents of title relating to the property, and it might be useful to have a schedule to the order in which will be set out the deeds which, admittedly, are in the respondent's solicitors' hands, and which are not in evidence before me.

The latest document touching the property, though not dealing with the legal estate, is a declaration of trust, apparently, showing the company's beneficial title, but that appears to be missing at the moment, and there will be no order that the wife hand that over, because it is not proved that she has it, or has had it, in her possession or power.

Order accordingly.

Solicitors: *Withers & Co.; Kenneth Brown, Baker, Baker.*

[HOUSE OF LORDS.]

H. L. (E.)*

1958

Feb. 3, 4, 5, 6, 10; *Mar.* 10.

ADAMASTOS SHIPPING CO. LTD. . . Appellants;

AND

ANGLO-SAXON PETROLEUM CO. LTD . . Respondents.

Shipping—Charterparty—Clause paramount—"This bill of lading" subject to Act—Whether clause meaningless—Hague Rules—"Loss "or damage arising . . . from unseaworthiness"—Meaning of "loss or damage"—Whether applicable to non-cargo carrying voyages—Whether applicable only to physical loss or damage—Carriage of Goods by Sea Act of United States, 1936, *ss.* 2, 3 (1),

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* *Present*: Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow.

H. L. (E.)

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4 (1) (2), 5 *and* 13—*Carriage of Goods by Sea Act*, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., Arts. II, III, rr.* 1, 8; *IV, rr.* 1, 2; *V.*
Contract—Construction—Repugnancy.
Shipping — Charterparty — Consecutive voyage charter — Extent and nature of owners' obligations to provide and maintain seaworthy vessel during "the voyage"—Continuing warranty of seaworthiness, perils of sea excepted—"Proceed with all convenient "despatch" — Vessel rendered unseaworthy by incompetence of staff—Owners vicariously liable for negligence of servants despite owners' exercise of due diligence in selection and appointment of staff—Delays—Whether claim for loss of services of vessel sustainable—Basis for assessment of damages.

A tanker was chartered by an oil company, under a charter expressed to remain in force for as many consecutive voyages as the vessel could tender for loading within a period of 18 months, to carry cargoes of oil all over the world at specified rates of freight per ton per voyage or a return cargo of fresh water at a lump sum. Clause 1 of the charterparty provided that the vessel "being tight, staunch and strong and every way fitted for the "voyage, and to be maintained in such condition during the "voyage, perils of the sea excepted, shall with all convenient "despatch sail and proceed to" a nominated port and there load a cargo of oil. The following clause was incorporated in the charterparty by a typed slip: "Paramount clause. This bill of lading "shall have effect subject to the Carriage of Goods by Sea Act of the "United States . . . 1936,[1] which shall be deemed to be incorporated

[1] (United States) Carriage of Goods by Sea Act [*Public—No.* 521—74*th Congress*]: "Be it enacted by "the Senate and House of Representatives of the United States of "America in Congress assembled, "That every bill of lading or similar "document of title which is evidence "of a contract for the carriage of "goods by sea to or from ports of "the United States, in foreign trade, "shall have effect subject to the provisions of this Act. . . .

"*Risks.* S. 2: Subject to the provisions of section 6, under every "contract of carriage of goods by sea, "the carrier in relation to the loading, handling, stowage, carriage, "custody, care, and discharge of "such goods, shall be subject to the "responsibilities and liabilities and "entitled to the rights and immunities hereinafter set forth.

"*Responsibilities and Liabilities.* "S. 3 (1): The carrier shall be "bound, before and at the beginning "of the voyage, to exercise due "diligence to—(*a*) Make the ship "seaworthy; (*b*) Properly man, equip, "and supply the ship; (*c*) Make the "holds, refrigerating and cooling "chambers, and all other parts of "the ship in which goods are carried, "fit and safe for their reception, "carriage and preservation. . . .

"(8) Any clause, covenant, or "agreement in a contract of carriage "relieving the carrier or the ship "from liability for loss or damage to "or in connexion with the goods, "arising from negligence, fault, or "failure in the duties and obligations "provided in this section, or lessening such liability otherwise than as "provided in this Act, shall be null "and void and of no effect. . . .

"*Rights and Immunities.* S. 4 "(1): Neither the carrier nor the ship "shall be liable for loss or damage "arising or resulting from unseaworthiness unless caused by want "of due diligence on the part of the "carrier to make the ship seaworthy, "and to secure that the ship is "properly manned, equipped, and "supplied, and to make the holds, "refrigerating and cool chambers, "and all other parts of the ship in "which goods are carried fit and safe "for their reception, carriage, and "preservation in accordance with the "provisions of paragraph (1) of section 3. Whenever loss or damage "has resulted from unseaworthiness, "the burden of proving the exercise "of due diligence shall be on the "carrier or other persons claiming "exemption under this section.

"(2) Neither the carrier nor the "ship shall be responsible for loss or "damage arising or resulting from— "(*a*) Act, neglect, or default of the "master, mariner, pilot, or the "servants of the carrier in the

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"herein, and nothing herein contained shall be deemed a surrender "by the carrier of any of its rights or immunities or an increase "of any of its responsibilities or liabilities under said Act. If "any term of this bill of lading be repugnant to said Act to any "extent, such terms shall be void to that extent, but no further." The owners, exercising due diligence, selected and appointed an engine-room staff, but that staff proved incompetent, and by reason of their incompetence (amounting to unseaworthiness) the vessel broke down on the first voyage to her loading port, and other similar incidents followed, with the result that the charterers lost the services of the vessel during 106 days. Invoking the United States Act, the owners claimed that their obligations as to seaworthiness were limited to the exercise of due diligence, as therein provided:—

Held that, on the true construction of the charterparty, the United States Act affected the rights and liabilities of the parties under the contract, despite the use of the words "This bill of "lading . . ." on the typed slip, which words, in accordance with the common meaning and intention of the parties, should be read as if they were "This charterparty . . ."; and that the words in section 5 of the Act "The provisions of the Act shall not be applic- "able to charterparties" must be rejected as being meaningless.

Held further (Lord Morton of Henryton and Lord Reid dissenting) that, notwithstanding the limitations to the applicability of the Act, its material provisions affected the rights and liabilities of the parties in connexion with (a) non-cargo carrying voyages as well as cargo carrying voyages, and (b) voyages other than those to and from United States ports, as well as such voyages.

The words "loss or damage" in section 4 of the Act relating to the immunity, refer not only to physical loss or damage to goods but also covered the charterers' loss in only being able to complete fewer voyages than they would otherwise have done.

G. H. Renton & Co. Ltd. v. *Palmyra Trading Corporation of Panama. The Caspiana* [1957] A.C. 149; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165, and *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa* (1937) 53 T.L.R. 650 considered.

Decision of the Court of Appeal [1957] 2 Q.B. 233; [1957] 2 W.L.R. 968; [1957] 2 All E.R. 311 reversed.

Appeal from the Court of Appeal (Denning, Parker and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal dated April 16, 1957, dismissing an appeal by the appellants, Adamastos Shipping Co. Ltd., and allowing a cross-appeal by the respondents, Anglo-Saxon Petroleum Co. Ltd., from an order of Devlin J. dated February 14, 1956. The matter came before Devlin J. on an interim award on liability for damages for breach of contract stated in the form of a special case under the Arbitration

"navigation or in the management "of the ship;

"S. 5: . . . The provisions of "this Act shall not be applicable to "charterparties; but if bills of lading "are issued in the case of a ship "under a charterparty, they shall "comply with the terms of this "Act. . . .

"S. 13: This Act shall apply to "all contracts for carriage of goods "by sea to or from ports of the "United States in foreign trade. . . ."

Act, 1950, by John Megaw Q.C., who had been appointed, by agreement between the parties, umpire under an arbitration clause in a charterparty between the appellants and the respondents dated May 25, 1950. By his order Devlin J. upheld the interim award of the umpire in favour of the respondents and answered certain questions of law in favour of the appellants and one question of law in favour of the respondents. The Court of Appeal similarly upheld the interim award of the umpire, but dealt with the questions of law arising thereunder differently from Devlin J. and, in particular, held that the Carriage of Goods by Sea Act, 1936, of the United States of America, had no application to the charterparty.

The facts are stated in the opinion of Viscount Simonds.

Ashton Roskill Q.C., *T. G. Roche Q.C.* and *Basil Eckersley* for the appellant company.

A. A. Mocatta Q.C. and *S. O. Olson* for the respondent company.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Leeds Shipping Co. Ltd.* v. *Duncan Fox & Co. Ltd.*[2]; *Minister of Food* v. *Reardon Smith Line Ltd.*[3]; *Goulandris Brothers* v. *B. Goldman & Sons Ltd.*[4]; *The Christel Vinnen*[5]; *Bruce* v. *Nicolopulo*[6] and *Barker* v. *M'Andrew.*[7]

Their Lordships took time for consideration.

March 6. VISCOUNT SIMONDS. My Lords, the question in this appeal is whether and to what extent the appellants are, upon the facts found in an interim award stated in the form of a special case, in breach of a charterparty made on May 25, 1950, between the appellants as disponent owners and the respondents as charterers. I will refer to them in this opinion as "owners" and "charterers." The Court of Appeal has held them to be in breach in respect of all the matters raised in the special case, overruling the decision of Devlin J., who in effect held them to be in breach in respect of one matter only. The question would, I think, be stated more accurately by asking whether upon the true construction of the charterparty the owners are by reason of its provisions exempt from any liability in respect of their acts or omissions for which they might otherwise be liable.

My Lords, by the charterparty the charterers agreed to charter the vessel the *Saxon Star* from the owners. The document was headed "Tank Vessel Voyage Charterparty," and in its original printed form contemplated performance thereunder of a single voyage. By clause 1 it was provided that the vessel "being tight

[2] (1932) 37 Com.Cas. 213.
[3] [1951] 2 T.L.R. 1158.
[4] [1958] 1 Q.B. 74; [1957] 3 W.L.R. 596; [1957] 3 All E.R. 100.
[5] [1924] P. 208; 40 T.L.R. 845.
[6] (1855) 11 Exch. 129.
[7] (1865) 18 C.B.N.S. 759.

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" staunch and strong, and every way fitted for the voyage and to " be maintained in such condition during the voyage, perils of " the sea excepted," should sail and proceed to one of a number of named ports to load a full and complete cargo of petroleum products as therein provided and that, being so loaded, she should proceed to one of two discharging ranges. There were, however, attached to the document a number of type-written clauses which made specific provision for loading and discharge otherwise than as permitted by clause 1. By clause 44 it was provided that the charterers were to have the option of performing any other voyage at their discretion within the limits of the Institute Warranties Clause of April 15, 1941, and by clause 43 it was provided that the charterparty was to remain in force for as many consecutive voyages as the vessel could tender for loading within a period of about 12 months from the date of her readiness to load on the first voyage. By an addendum of May 26, 1950, this period was extended for a further six months, making in all about 18 months.

Here, then, was a contract of practically worldwide scope covering a substantial period of time. I need only refer further to clause 52, which has been the cause of all the trouble in this case. It was as follows: " It is agreed that the Chamber of " Shipping War Risks Clauses, dated April, 1937, New Jason " Clause, Paramount Clause, and Both to Blame Collision " Clause, as attached, are to be incorporated in this charter- " party."

So much turns on the so-called paramount clause that I must set it out in full. It is in these terms: " Paramount clause. This " bill of lading shall have effect subject to the provisions of the " Carriage of Goods by Sea Act of the United States, approved " April 16, 1936, which shall be deemed to be incorporated herein, " and nothing herein contained shall be deemed a surrender by " the carrier of any of its rights or immunities or an increase of " any of its responsibilities or liabilities under said Act. If any " terms of this bill of lading be repugnant to said Act to any " extent, such term shall be void to that extent, but no further."

This clause provides that the provisions of the Carriage of Goods by Sea Act of the United States " shall be deemed to be " incorporated herein." " Herein " can only mean " in this " contract." The contract must therefore be read as if the provisions of the Act were written out therein and thereby gained such contractual force as a proper construction of the document admits. Much of the Act is quite irrelevant, a fact which need not surprise us since it was passed to comply with the Brussels Convention. It dealt first and last with bills of lading, and by section 5 expressly enacted that its provisions should not be applicable to charterparties, but that if bills of lading were issued in the case of a ship under a charterparty they should comply with the terms of the Act.

I am reluctant to burden your Lordships with many of its provisions, but it has been strenuously urged that the persistent

reference to bills of lading, carriage of goods and so on limits the possibility of adapting the clauses to the contractual relation of owner and charterer under a charterparty. I will therefore set out some of the provisions, hoping that I omit nothing which is deemed of importance.

The Act enacts: "That every bill of lading, or similar docu- "ment of title which is evidence of a contract for the carriage of "goods by sea to or from ports of the United States in foreign "trade, shall have effect subject to the provisions of this Act." Section 1 is a definition section, defining "carrier," "contract of "carriage," "goods," "ship," and "carriage of goods."

Section 2 provides that (subject as therein mentioned) under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Sections 3 and 4 (so far as material) are as follows:—

"*Responsibilities and Liabilities.* Section 3. (1) The carrier "shall be bound, before and at the beginning of the voyage, to "exercise due diligence to—(*a*) Make the ship seaworthy; (*b*) "Properly man, equip, and supply the ship; (*c*) Make the holds, "refrigerating and cooling chambers, and all other parts of the "ship in which goods are carried, fit and safe for their reception, "carriage, and preservation.

"*Rights and Immunities.* Section 4. (1) Neither the carrier "nor the ship shall be liable for loss or damage arising or "resulting from unseaworthiness unless caused by want of due "diligence on the part of the carrier to make the ship seaworthy, "and to secure that the ship is properly manned, equipped, and "supplied, and to make the holds, refrigerating and cool "chambers, and all other parts of the ship in which goods are "carried fit and safe for their reception, carriage, and preserva- "tion in accordance with the provisions of paragraph (1) of "section 3. Whenever loss or damage has resulted from unsea- "worthiness, the burden of proving the exercise of due diligence "shall be on the carrier or other persons claiming exemption "under this section. (2) Neither the carrier nor the ship shall "be responsible for loss or damage arising or resulting from— "(*a*) Act, neglect, or default of the master, mariner, pilot, or the "servants of the carrier in the navigation or in the management "of the ship; . . ."

I can now conveniently state the questions of law which it fell to the learned judge to answer, not in the first place, indeed, as stated in the special case but as subsequently agreed by the parties and assented to by him. They were: (1) Whether the United States Act (to which I have referred) affects the rights and liabilities of the parties under the charterparty? (2) If the answer to (1) is Yes, whether under the charterparty any material provisions of the Act affect the rights and liabilities of the parties in connexion

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with (a) non-cargo carrying voyages; (b) cargo carrying voyages other than those to or from ports in the U.S.A.? (3) Do the words "loss or damage" in section 4 (1) and/or section 4 (2) relate only to physical loss of or damage to the goods?

Upon the answers given to these questions depended the answers to the 10 questions set out in the special case. It will be clear to your Lordships, when I have briefly summarized the facts as found by the umpire, that the single issue is whether and how far the owners can escape liability to the charterers by reason of findings in their favour that they exercised due diligence in respect of those acts or omissions which might otherwise have rendered them liable.

The relevant facts are briefly these. During June and July, 1950, the vessel underwent special survey and repair at Baltimore. Officers and crew to man her were engaged at New York by the owners and on July 27, 1950, she sailed in ballast for Curaçao, there to load her first cargo under the charterparty. I note in passing that this was the only "non-cargo carrying" voyage with which your Lordships will be concerned. While the vessel was on passage to Curaçao her machinery was seriously damaged. She was taken in tow to San Juan, where repairs were carried out. She then resumed her voyage to Curaçao. Having there loaded a cargo of oil for carriage to Buenos Aires, she sailed on August 19, 1950, but on her passage her boilers began to leak. She therefore put in to Recife (Brazil) for repairs, and on completion of the repairs (which remedied the defects then existing in her machinery) resumed her voyage to Buenos Aires, where she duly arrived and discharged her cargo. On October 5 she sailed from Buenos Aires, picked up a cargo of fresh water from the river as ordered by the charterers, and having bunkered at Monte Video, proceeded again to Curaçao. On her passage there, there was continuous trouble with her machinery, and on her arrival repairs were carried out to enable her to go to the United States for much more extensive repairs. On November 30 she left Curaçao having loaded a further cargo of oil for discharge at Bayonne in New Jersey. Having discharged it she proceeded to Hoboken, also in New Jersey, where repairs were carried out and completed on February 9, 1951. On the next day she left Hoboken and in accordance with the charterers' orders proceeded to Aruba, where she again loaded. Nothing remains to be told of the remainder of the period covered by the charterparty.

I will now state in his own words the findings of the umpire on the vital questions of the seaworthiness of the vessel at various times and the diligence exercised by the owners. Your Lordships will note that only in one respect was there a finding that the owners had not exercised due diligence. The umpire found as follows:

"(1) On the vessel's departure from Baltimore on July 27, "1950, although she was seaworthy as regards her machinery, "she was not seaworthy in that the engine-room staff were

" incompetent; but due diligence had been exercised by the " owners in the selection and appointment of the engine-room " staff.

" (2) The damage to the machinery which was caused between " Baltimore and San Juan was caused by the incompetence of the " engine-room staff, which resulted in a series of negligent acts " and omissions.

" (3) On the vessel's departure from Curaçao on August 19, " 1950, the vessel was not seaworthy in respect of her machinery " and due diligence had not been exercised to make her sea- " worthy. The vessel, further, was not seaworthy in that the " engine-room staff were incompetent; but due diligence had been " exercised by the owners in that respect; and in that respect, " though not in respect of her machinery, reasonable and proper " steps had been taken to put the vessel in a seaworthy condition.

" (4) The damage to the machinery which was found at Recife " was caused by the unseaworthiness of the vessel at the start " of the voyage from Curaçao, which unseaworthiness was, in its " turn, caused as is set out in (2) above, the defects thus caused " not having been fully repaired at San Juan.

" (5) On the vessel's departure from Buenos Aires on " October 5, 1950, she was seaworthy in respect of her machinery; " but she was not seaworthy in that the engine-room staff were " incompetent; but due diligence had been exercised by the " owners in that respect, and all reasonable and proper steps had " been taken to put the vessel in a seaworthy condition both as " regards machinery and engine-room staff.

" (6) The damage to the machinery which occurred between " Buenos Aires and Curaçao was caused by the incompetence of " the engine-room staff, which resulted in a series of negligent " acts and omissions."

My Lords, I return to the questions of law which I have already set out.

Upon the first question a broadside attack was made upon the owners' claim to rely on the paramount clause. In the context of this charterparty, it was said, the clause is insensible and must be rejected. It opens with the words " This bill of lading," and it purports to incorporate the provisions of an Act of the United States which itself enacts that it shall not apply to charterparties. It is therefore ex facie inapplicable to this charterparty. My Lords, I must confess that this is to me an attractive approach and I would willingly adopt it. For it is not agreeable to find a business transaction of some importance carried through in a manner which Devlin J., as I think, too indulgently described as slapdash. But I do not think that I can do so. I can entertain no doubt that the parties, when they agreed by clause 52 of the charter that the " paramount clause . . . as attached " should be incorporated in their agreement, and proceeded physically to attach the clause which I have set out, had a common meaning and intention which compels me to regard the opening words

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"This bill of lading," as a conspicuous example of the maxim "falsa demonstratio non nocet cum de corpore constat." There can be no doubt what is the corpus. It is the charterparty to which the clause it attached. Nor, pursuing this main line of attack, can I be driven to a wholesale rejection of the clause because the Act, whose provisions are in turn deemed to be incorporated, itself enacts that its provisions shall not apply to charterparties. I cannot attribute to either party an intention to incorporate a provision which would nullify the total incorporation.

My Lords, I should have come to this conclusion without the aid of any external circumstance. But I am confirmed in it by the notorious fact, to which both the learned judge and the editors of the 16th edition of Scrutton on Charterparties refer, that the parties to a charterparty often wish to incorporate the Hague Rules in their agreement: and by that I do not mean, nor do they mean, that they wish to incorporate the ipsissima verba of those rules. They wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the rules subsists between carrier and shipper: in other words, they agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them.

Here, then, my Lords, is the agreement that the parties have made, an original printed document with sundry erasures and typed additions, a complex of attached clauses and an Act of the United States of America whose provisions are deemed to be incorporated. How shall it be construed? The same sort of problem has arisen before, and I agree with Devlin J. that the procedure should be followed here which was laid down in *Hamilton & Co.* v. *Mackie & Sons*,[1] and approved in this House in *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*[2] The learned judge cited the material passage from the judgment of Lord Esher and I need not repeat it. It is obvious that there is much in the Act which in relation to this charterparty is insensible, or, as I would rather say, inapplicable, and must be disregarded. But in regard to the matters with which the questions now to be answered are concerned there has been acute controversy.

First, the Act, being an Act of the United States, is geographically confined to its own jurisdictional limits. ". . . every bill of lading or similar document of title which is "evidence of a contract for the carriage of goods by sea to "or from ports of the United States, in foreign trade, shall "contain a statement that it shall have effect subject to the "provisions of this Act." Therefore, it is said, let it be granted that the incorporation of the Act is not altogether insensible, and that the statutory standard of obligation is contractually imported

[1] (1889) 5 T.L.R. 677. [2] [1912] A.C. 1.

into the charterparty. Yet why should it extend beyond the limits prescribed by the Act itself? Why should it apply to any other voyages than those to or from ports of the United States? I do not think that there is a clearer answer to this question than that given by the learned judge. The contract between the parties is of worldwide scope: the area of State jurisdiction is necessarily limited, and, because it is limited, the Act is given a restricted operation. No reason has been suggested, nor, as far as I am aware, could be suggested, why a similar restriction should be imported into the contract. On the contrary, to do so would from the commercial point of view make nonsense of it. I find it easy, therefore, as did the learned judge, to construe this contract as making the substituted standard of obligation coterminous with the enterprise.

The second and perhaps more difficult question relates to the non-cargo carrying voyages. The learned judge, though he felt the weight of the argument to the contrary, decided that to such voyages the express warranty of seaworthiness in clause 1 of the charterparty must apply. It is with great diffidence that I come to the opposite conclusion.

I do not want to anticipate what will presently be said about the nature of the loss or damage in respect of which obligations and annuities are created by the Act. I will merely assume that it is not confined to loss or damage to goods but extends also to the loss suffered by the charterers owing to the delay caused by unseaworthiness, the loss in fact alleged to have been suffered by the charterers in the present case. It is in this context that the question must be considered to what voyages the new immunity extends.

My Lords, it is, I think, permissible in a consideration of this commercial transaction to ask what possible difference it makes to the charterers whether the delay, to which their loss is due, occurs when the ship is in ballast or is loaded with a cargo of oil or of water. It matters not for this purpose whether the charterparty was for a single voyage, as the original document seemed to contemplate, or for a number of consecutive voyages. The contractual subject-matter was the whole period during which the vessel was under charter, and it is, in my opinion, to this whole period that the parties agreed that the statutory standard of obligation and immunity should relate. I think that the learned judge might have come to the same conclusion but for the fact that he thought that it might lead to an unreasonable and unnecessary burden being placed upon the owner. For it appeared to him that it would or might impose upon him an obligation under section 3 (1) (*c*) of the incorporated Act to exercise due diligence to " Make the holds, refrigerating and cooling chambers, " and all other parts of the ship in which goods are carried, fit " and safe for their reception, carriage, and preservation " even at a time when the vessel was leaving in ballast for her port of loading. I do not feel myself qualified, in the absence of any

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evidence, to say how serious a burden this would be. But I would, with great respect, doubt whether the obligation under section 3 (1) (*c*) arises until the vessel arrives at the port of loading, though it may be convenient substantially to perform it at an earlier stage. I do not, in any case, find in this consideration a sufficient counterweight to the fact that from a commercial point of view it is unlikely that owner and charterer will adopt a shifting standard of obligation between cargo carrying and non-cargo carrying voyages. It does not appear to me that the fact that voyage charterparties often contain a cesser clause offers a useful analogy.

Upon this part of the case it was further argued that non-cargo carrying voyages could not be brought within the scope of the diminished obligation because the Act is an Act dealing with the carriage of goods by sea under bills of lading, and in almost every section deals with obligations, liabilities, rights and immunities in respect of goods so carried. Therefore, it was said, the incorporated provisions could have no application to a voyage in which no goods were carried. But this seems to me merely to restate the problem in other words. The question remains what is the meaning and effect of a commercial agreement which contemplates voyages with or without cargo and introduces by reference to the United States Act a qualified standard of obligation. I have already stated my opinion and would only add that I find it difficult upon a broad consideration of the case to make any distinction between non-cargo carrying voyages and voyages to or from other than United States ports. A narrow interpretation would exclude, a generous one include, both of them in the substituted standard of obligation.

I conclude, therefore, this part of the case by saying that here also the owners are entitled to succeed in their appeal.

I come now to the question of loss or damage. Owing to the delay caused by the unseaworthiness of the vessel she was able to complete fewer voyages than she otherwise would have done within the period of the charter. The charterers, therefore, claimed damages in a very large sum, the claim being for the difference between the charter and market rates of freight on cargo carrying voyages which might have been performed within the 18 months if she had been continuously fit for service. I have stated the claim in the words of the learned judge. The question is whether the words " loss or damage " in section 4 (1) or section 4 (2) of the Act relate only to physical loss of, or damage to, goods.

This is a short point upon which I can only adopt the reasoning and conclusion of the learned judge. It is perhaps sufficient to say that there is nothing in section 4 (1) or section 4 (2) which expressly limits loss or damage to physical loss or damage to the goods, and that section 2 does not constrain me to put a narrower meaning on the words. There is no authority to the

contrary which is binding on your Lordships, and, though I naturally give great weight to anything that falls from Lord Maugham, his observation in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[3] was obiter and doubtfully relevant to the point now under consideration.

My Lords, this has not been an easy case to decide. Of that the difference of opinion in the courts below of learned judges well versed in this branch of the law is proof enough. Lord Bramwell in a phrase which the learned editors of Scrutton on Charterparties, 16th ed., at p. 186, have done well to preserve described a certain class of case as "cases where no principle of law is "involved, but only the meaning of careless and slovenly docu-"ments." This is such a case. No doubt there are rules or canons of construction applicable to careless and slovenly, as to other, documents. I have tried to apply them, resolute, on the one hand, to construe commercial agreements broadly and not to be astute to find defects in them or reject them as meaningless and, on the other, not to make a contract for the parties which they have not thought fit to make for themselves. Nor have I forgotten that it is only by sufficiently clear words that an exception to an obligation (whether arising at common law or under the contract itself) can be established, see *Glynn* v. *Margetson & Co.*,[4] *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*,[5] *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[6] *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*,[7] and *Golodetz* v. *Kersten, Hunik & Co.*,[8] the last-named case being a particularly interesting example of the way in which the court will strive to give a sensible effect to a commercial document. These, no doubt, are the familiar principles applied by the Court of Appeal from whose conclusions I reluctantly differ. I think that the point of difference lies in this, that, looking at the documents as a whole and bearing in mind what the learned judge described [9] as "a general practice, well known to those sitting and practising "in this court," I have no difficulty in seeing the broad purpose and intent of the parties. I must reject, if I can, the unattractive argument urged by the charterers through their counsel that the agreement to which they put their hands meant nothing at all. It is true that at a certain stage it was suggested that the paramount clause was intended to refer to bills of lading issued under the charterparty, but this suggestion has been rightly rejected for the conclusive reasons given by Parker L.J. If it did not mean that but did mean something, what did it mean? I think the parties intended, as I have already said, to introduce as a term governing their relationship as owners and charterers the limited measure of responsibility prescribed by the American Act. This

[3] [1942] A.C. 154, 175; 57 T.L.R. 485; [1941] 2 All E.R. 165.
[4] [1893] A.C. 351; 9 T.L.R. 437.
[5] [1908] A.C. 16; 24 T.L.R. 114.
[6] (1932) 147 L.T. 503.
[7] (1937) 53 T.L.R. 650.
[8] (1926) 24 Ll.L.Rep. 374.
[9] [1957] 2 Q.B. 233, 248; [1957] 2 W.L.R. 968; [1957] 2 All E.R. 311; reversing [1957] 2 W.L.R. 509; [1957] 1 All E.R. 673.

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seems to me so plain that I should properly be regarded as unduly astute if I turned my eye away from it. If this initial step is taken, it does not seem to me difficult to make commercial sense of the agreement, though I would not dissent from Parker L.J.'s description of it as a "jumble of provisions."

For the reasons that I have given I would answer the supplementary questions of law put to the learned judge as follows: (1) Yes. (2) (*a*) Yes. (2) (*b*) Yes. (3) No.

It follows, I think, that the question of law stated by the umpire in paragraph 56 of the special case, the opening words of which have been by agreement varied so as to run as follows: "Whether upon the facts as found and upon the true construc- "tion of the charterparty the owners are in breach of the "charterparty, and in so far as they are in breach are not pro- "tected from loss or damage of the kind claimed resulting there- "from," should be answered as follows: (1) to (3) No. (5) to (9) No. The fourth head of the question relates to the period following the vessel's departure from Curaçao on August 19 when (as it was found) she was not seaworthy in respect of her machinery and due diligence had not been exercised to make her seaworthy. The answer to (4) should therefore be Yes. The tenth head covers the voyage from Curaçao on August 19. An unqualified negative cannot, therefore, be given. It must be qualified by the extent to which the failure in convenient dispatch was due to the admitted breach to which I have referred. The answer to (11) is No.

Lord Morton of Henryton. My Lords, I have reached the same conclusion as the Court of Appeal, although I have reached that conclusion by a different line of reasoning. I find it convenient to refer to the appellants as "the owners" and to the respondents as "the charterers."

On May 25, 1950, the charterers chartered a tanker belonging to the owners, by a voyage charterparty to remain in force for as many consecutive voyages as the vessel could perform within a period of 18 months. The first voyage began on July 27, 1950, when the vessel left Baltimore in ballast to load her first cargo at Curaçao. On the way there her machinery broke down and she had to be taken in tow to San Juan, where certain repairs were effected. Other similar incidents occurred at different stages of her service, and the result was that she lost in all 106 days. The charterers claimed damages which they estimated at over £80,000, the claim being for the difference between the charter and market rates of freight on cargo carrying voyages which might have been performed within the 18 months if the vessel had been continuously fit for service.

The claim went to arbitration, and the umpire has made a series of findings to the effect that the breakdown of the vessel's machinery was due to the incompetence of the engine-room staff, and that the vessel was unseaworthy at various stages of her

voyages owing to such incompetence. He found, however, that due diligence had been exercised by the owners in the selection and appointment of their staff.

No question as to the amount of damages arises on this appeal, but it is clear that the owners are liable in damages to the charterers unless they are protected by clause 52 of the charterparty and a "paramount clause" which is thereby incorporated in the charterparty. These clauses are in the following terms:

"52. It is agreed that the Chamber of Shipping War Risks "Clauses dated April, 1937, New Jason Clause, Paramount "Clause, and Both to Blame Collision Clause, as attached, are "to be incorporated in this charterparty.

"*Paramount Clause.* This bill of lading shall have effect "subject to the provisions of the Carriage of Goods by Sea Act "of the United States approved April 16, 1936, which shall be "deemed to be incorporated herein, and nothing herein contained "shall be deemed a surrender by the carrier of any of its rights "or immunities or an increase of any of its responsibilities or "liabilities under said Act. If any term of this bill of lading be "repugnant to said Act to any extent, such item shall be void to "that extent but no further."

Four questions of construction arise upon these clauses, which were stated by Devlin J. as follows: "(1) Whether the United "States Carriage of Goods by Sea Act (hereinafter called 'the "'Act') affects the rights and liabilities of the parties under the "charterparty. (2) If the answer to (1) is 'Yes,' whether under "the charterparty any material provisions of the Act affect the "rights and liabilities of the parties in connexion with (*a*) non-"carrying voyages; (*b*) cargo-carrying voyages other than "those to or from ports in the United States of America. (3) Do "the words 'loss or damage' in section 4 (1) and/or section 4 (2) "of the Act relate only to physical loss of or damage to goods?"

The learned judge answered these questions as follows: (1) Yes. (2) (*a*) No. (2) (*b*) Yes. (3) No.

As the owners were claiming that the Act had the effect of exempting them from liability for the unseaworthiness of the ship, it is obvious that the answers to questions (1), (2) (*b*) and (3) were in favour of the owners, while the answer to (2) (*a*) was in favour of the charterers.

The Court of Appeal answered the first question in the negative, and accordingly the remaining questions did not arise. They held that the paramount clause could not sensibly be applied to this charterparty, since it was impossible to feel sure what provisions in the Act were to be treated as incorporated, and what was the effect of the incorporation.

My Lords, I must now approach the construction of the relevant documents and endeavour to answer the four questions already stated. In approaching this task I shall bear in mind, and strive to apply, three well-known principles of construction, to which reference was made in the course of the argument. The

first principle is stated by Lord Wright in *Hillas & Co. Ltd.* v. *Arcos Ltd.*[10] in words which have often been quoted: "Business men often record the most important agreements in "crude and summary fashion; modes of expression sufficient and "clear to them in the course of their business may appear to "those unfamiliar with the business far from complete or precise. "It is accordingly the duty of the court to construe such docu- "ments fairly and broadly, without being too astute or subtle in "finding defect; but, on the contrary, the court should seek to "apply the old maxim of English law, Verba ita sunt intelligenda "ut res magis valeat quam pereat." These observations were made in a case where the question was whether a contract had been made; but Mr. Roskill, for the owners, submitted that they were equally applicable to the construction of a concluded contract, and I agree.

Lord Wright then goes on to state the second well-known principle as follows[10]: "That maxim, however, does not mean that the "court is to make a contract for the parties, or to go outside the "words they have used, except in so far as there are appropriate "implications of law, as for instance, the implication of what is "just and reasonable to be ascertained by the court as matter of "machinery where the contractual intention is clear but the "contract is silent on some detail."

The third principle was stated by Lord Loreburn in *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[11]: "The law "imposes on shipowners a duty to provide a seaworthy ship and "to use reasonable care. They may contract themselves out of "those duties, but unless they prove such a contract the duties "remain; and such a contract is not proved by producing "language which may mean that and may mean something "different"; and he added[12]: "I am afraid it is useless to draw "the attention of commercial men to the risks they run by using "confused and perplexing language in their business documents. "Courts of law have no duty except to construe them when a "question arises; but it is often very difficult. And sometimes "what the parties really intended fails to be carried out because "ill-considered expressions find their way into a contract."

Approaching the first of the four questions already stated with these principles in mind, I answer it in the affirmative. The paramount clause is clearly incorporated in the charterparty, and I agree with Devlin J. that the opening words of the paramount clause must be treated as corrected so as to read: "This charter- "party shall have effect subject to," etc. The paramount clause has in fact become one of the clauses of the charterparty, by virtue of clause 52 thereof, and it does not make sense to begin a clause of a charterparty with the words "This bill of lading."

Turning to the provisions of the Act, I agree again with the learned judge that the words in section 5, "The provisions of the

[10] 147 L.T. 503, 514.
[11] [1908] A.C. 16, 19-20.
[12] Ibid. 20.

"Act shall not be applicable to charterparties" must be rejected as being meaningless. The clause paramount says that the provisions of the Act shall be deemed to be incorporated in the charterparty, but it is meaningless to incorporate in the charterparty a provision that the Act shall not apply to charterparties.

I now turn to question (2) (*a*). The only relevant voyage on which the vessel was not carrying cargo was the initial voyage from Baltimore to Curaçao, and the question is whether the material provisions of the Act apply to that voyage. My Lords, in agreement again with Devlin J. I would answer that question in the negative. The provisions upon which the owners particularly rely as exempting them from liability for the unseaworthiness of the vessel on that voyage are in section 4 (1) and (2) of the Act. This section is headed "Rights and Immunities." Section 4 (1) is as follows: "Neither the carrier nor the ship "shall be liable for loss or damage arising or resulting from "unseaworthiness unless caused by want of due diligence on the "part of the carrier to make the ship seaworthy, and to secure "that the ship is properly manned, equipped, and supplied, and "to make the holds, refrigerating and cool chambers, and all "other parts of the ship in which goods are carried fit and safe "for their reception, carriage, and preservation in accordance "with the provisions of paragraph (1) of section 3. Whenever "loss or damage has resulted from unseaworthiness, the burden "of proving the exercise of due diligence shall be on the carrier "or other persons claiming exemption under this section." The relevant part of subsection (2) is as follows: "Neither the "carrier nor the ship shall be responsible for loss or damage "arising or resulting from—(*a*) Act, neglect, or default of the "master, mariner, pilot, or the servants of the carrier in the "navigation or in the management of the ship;

My Lords, it is clear that, on the facts as found, these words would exempt the owners from liability in the case of the initial voyage if they applied to that voyage; but, in my opinion, section 4 only applies to a case in which the ship is being used for the carriage of goods. In order to make good this statement, I must refer to the earlier portions of the Act, which impose certain "responsibilities and liabilities" set out in section 3 and grant the "rights and immunities" granted by section 4. Sections 1 and 2 are in the following terms:

Section 1: "When used in this Act—(*a*) The term 'carrier' "includes the owner or the charterer who enters into a contract of "carriage with a shipper. (*b*) The term 'contract of carriage' "applies only to contracts of carriage covered by a bill of lading "or any similar document of title, in so far as such document "relates to the carriage of goods by sea, including any bill of "lading or similar document as aforesaid issued under or "pursuant to a charterparty from the moment at which such bill "of lading or any similar document of title regulates the relations "between a carrier and a holder of the same. (*c*) The term

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" ' goods ' includes goods, wares, merchandise, and articles of " every kind whatsoever, except live animals and cargo which by " the contract of carriage is stated as being carried on deck and is " so carried. (*d*) The term ' ship ' means any vessel *used for the* " *carriage of goods by sea.* (*e*) The term ' carriage of goods ' " covers the period from the time when the goods are loaded on " to the time when they are discharged from the ship."

Section 2 (Risks.): " Subject to the provisions of section 6 " (which are immaterial for the present purpose) " under every " contract of carriage of goods by sea, the carrier in relation to " the loading, handling, stowage, carriage, custody, care, and " discharge of such goods, shall be subject to the responsibilities " and liabilities and entitled to the rights and immunities herein- " after set forth."

By the paramount clause, the provisions just quoted are deemed to be incorporated in the charterparty. It is only by virtue of section 2 that the rights and immunities on which the owners rely can come into operation, since it is section 2 which confers these rights and immunities; and it is impossible to incorporate section 4 in the charterparty without also incorporating the section which provides that the " carrier " shall be entitled to the rights and immunities set forth in section 4.

Applying section 2 to the present charterparty, which is, of course, a contract for the carriage of goods by sea, the section only brings these rights and immunities into operation in regard to a period from the time when goods are loaded on to the time when they are discharged from the ship. That is the only period covered by the term " carriage of goods "—see section 1 (*e*)—and it is only under a contract of carriage of goods by sea, and *in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods* that the rights and immunities specified in clause 4 are conferred upon the owner by section 2. For these reasons, my Lords, in agreement with Devlin J. I would answer question (2) (*a*) in the negative, so that the owners are not protected in regard to the initial voyage from Baltimore to Curaçao. Mr. Roskill, for the owners, sought to rely upon the decision of a Divisional Court in *Golodetz* v. *Kersten, Hunik & Co.*[13] but that case is of no assistance to him for reasons which I shall state later. For the moment, I shall only point out that the words which I have quoted from sections 1 (*e*) and 2 are not " insensible " when applied to this charterparty, and they are not ambiguous words. They cannot be rewritten because they may appear to have a somewhat capricious result in limiting the protection of the owners to cargo carrying voyages.

Question (2) (*b*) gives rise to a more difficult question of construction, but, in my opinion, this question must also be answered against the owners. I turn to section 13 of the Act, the relevant portion whereof is as follows: " This Act shall apply to all

[13] 24 Ll.L.Rep. 374.

" contracts for carriage of goods by sea to or from ports of the " United States in foreign trade. As used in this Act the term " ' United States ' includes its districts, territories, and posses- " sions . . . The term ' foreign trade ' means the transportation " of goods between the ports of the United States and ports of " foreign countries. Nothing in this Act shall be held to apply " to contracts for carriage of goods by sea between any port of " the United States or its possessions, and any other port of " the United States or its possessions." Then follow some provisos which need not be set out. It will be observed that I have not referred to the preamble to the Act, either in considering question (2) (*a*) or in considering the present question. Mr. Mocatta, for the charterers, sought to gain assistance from the words of the preamble, which are as follows: " . . . any bill of " lading or similar document of title which is evidence of a con- " tract for the carriage of goods by sea from ports of the United " States, in foreign trade, shall contain a statement that it shall " have effect subject to the provisions of this Act." I do not, however, think it is legitimate to limit the scope of the provisions of the Act by the words just quoted, since it is the " provisions " of the Act," and nothing but the provisions of the Act, which are incorporated in the charterparty now under consideration.

Turning again to section 13, it may be said, on behalf of the owners, that the opening sentence of the section does not expressly exclude contracts for carriage of goods by sea to and from ports outside the United States. That is so, but I think that the section, on its more natural construction, is in fact intended to limit the application of the Act to contracts for carriage of goods to and from ports of the United States. If it was not intended to have this effect, it is difficult to see why it should appear in the Act at all. It is to be noted that the parties have not chosen to incorporate the Hague Rules, as they might have done. They have chosen to incorporate, by the paramount clause, the provisions of a United States Act. They must take these provisions as they find them, unless they are " insensible " if incorporated in the charterparty. An example of insensibility is provided by the words in section 5 of the Act, already quoted: " The provisions of the Act shall not be applicable to charter- " parties." But the words now under consideration are not insensible when read in conjunction with the provisions of the charterparty. The case might be otherwise if the only voyages permitted under the charterparty were voyages between, for instance, England and Abadan. This is not, however, the position, for the vessel started from Baltimore, U.S.A., and clause 49 provides: " Charterers have the option of ordering the vessel " to discharge at United States ports subject to owners securing " United States Maritime Commission approval and owners " undertake to do their utmost to secure this permission should " charterers desire to exercise their option."

The present case is, therefore, entirely different from *Golodetz*

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v. *Kersten, Hunik & Co.*[13] already mentioned. That case related to a bill of lading for the carriage of goods from Rotterdam to London. The parties had incorporated "all the terms provisions "and conditions of the Carriage of Goods by Sea Act, 1924, and "the Schedule thereto," but that Act was limited to voyages which did not include a voyage from Rotterdam to London. The court was thus faced with the same position as arose in the present case in regard to the words already quoted from section 5 of the Act, and all your Lordships are of opinion that these words must be rejected as insensible.

In answering question (2) (*b*) in the negative, as I do, I am differing, for the first time, from the conclusions of Devlin J. The learned judge points out that[14]: "There is a wide range of "ports in the charterparty and if the immunity were to relate "only to voyages to and from American ports, the effect of it "would be considerably cut down." That is quite true, but if the words used in the Act, and incorporated in the charterparty, mean that the immunity covers only voyages to and from United States ports, it is impossible either to strike them out or alter them. To do so would be to make a new contract for the parties.

Mr. Roskill relied upon the case of *Glynn* v. *Margetson & Co.*,[15] and especially upon the words of Lord Halsbury: "Look- "ing at the whole of the instrument, and seeing what one must "regard, for a reason which I will give in a moment, as its main "purpose, one must reject words, indeed whole provisions, if "they are inconsistent with what one assumes to be the main "purpose of the contract. The main purpose of the contract "was to take on board at one port and to deliver at another port "a perishable cargo." Lord Herschell, who delivered the only other speech in that case, did not express himself in such wide terms, but even if Lord Halsbury's words are given their full effect, they do not assist the shipowners in the present case, for three reasons. First, the provisions now under consideration are not "inconsistent with the main purpose of the contract." They are only inconsistent with protection being given to the shipowner in the case of voyages to or from ports outside the United States. The main object of the contract is not to provide protection for the owners on any voyage or voyages; it is to provide for the carriage of goods by sea. Secondly, Lord Halsbury said, immediately after the passage which I have already quoted[15]: "I do not think the learned counsel who argued this case on the "part of the appellants gave sufficient effect in the argument "which he addressed to your Lordships to the difference between "the ordinary and formal parts of the document which are to "be found in print and the written parts." In the case of *Glynn* v. *Margetson & Co.*[16] this House, in effect, rejected some of the words in a printed clause which were quite inconsistent with the main purpose of the contract. In the present case the words

[13] 24 Ll.L.Rep. 374.
[14] [1957] 2 Q.B. 233, 250.
[15] [1893] A.C. 351, 357.
[16] [1893] A.C. 351.

which are sought to be struck out were inserted into the contract by a special clause described as a "paramount clause." Thirdly, their Lordships were clearly influenced by the consideration that the goods to be carried were perishable.

What, then, is the result of my answering question (2) (*a*) and question (2) (*b*) in the negative? The only voyages under the charterparty which are relevant in the present case are (i) the voyage from Baltimore to Curaçao, which is not covered by the Act because it is not a cargo carrying voyage; and (ii) other voyages which are not covered by the Act because they are not voyages to or from United States ports. The result is that the paramount clause, incorporating the Act, gives the owners no protection in the circumstances of the present case, and it becomes irrelevant to consider question (3): whether "the words "'loss or damage' in section 4 (1) and/or section 4 (2) of the "Act relate only to physical loss of or damage to goods?"

I would add this in regard to questions (2) (*a*) and (2) (*b*). It may be that the parties intended to incorporate in the charterparty only sections 3 and 4 of the Act, and to incorporate them without the limitations imposed by sections 1 (*e*), 2 and 13, so that they would apply to all voyages within the scope of the charterparty. If this was the result which they wished to achieve, I can think of more than one simple way in which they could have achieved it; but, to my mind, they have failed to achieve it by the paramount clause, and your Lordships cannot help the owners to achieve it by redrafting the paramount clause and the Act so as to make a new contract for the parties.

Even if it is possible so to read the paramount clause and the Act as to apply sections 3 and 4 to all voyages, I would pray in aid the words of Lord Loreburn in *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[17] already quoted, and of Lord Wright in the *Petrofina* case[18]: "If it is sought to effect a reduction of "the overriding obligation to provide a seaworthy ship, whether "that is express or implied for this purpose does not matter, "by other express terms of the charterparty or contract of "affreightment, that result can only be achieved if perfectly "clear, effective, and precise words are used expressly stating that "limitation." Can it be said, my Lords, that in the present case the paramount clause, incorporating the Act, limits the obligation to provide a seaworthy ship in words which are "perfectly clear"? Or have the parties used language which (as Lord Loreburn put it) "may mean that and may mean some-"thing different"? If so, the owners must be held liable, even if your Lordships do not accept my construction of the relevant words.

For the reason which I have stated, I would answer questions (1) to (9) in paragraph 56 of the special case in the affirmative, and would uphold the award of the umpire, in paragraph 57, that

[17] [1908] A.C. 16, 19–20. [18] 53 T.L.R. 650, 653.

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the owners are liable to the charterers. This is the conclusion at which the Court of Appeal arrived, for different reasons.

Lord Reid. My Lords, clause 22 of the charterparty provides: "It is agreed that the Chamber of Shipping War Risks Clauses "dated April, 1937, New Jason Clause, Paramount Clause, and "Both to Blame Collision Clause, as attached, are to be incor- "porated in this charterparty." This case turns on the proper interpretation of the paramount clause which is thereby incorporated. The paramount clause begins: "This bill of lading shall "have effect subject to . . . ", and the first question is what is meant by "This bill of lading."

As it stands "This bill of lading" does not make sense, but no one suggests that the parties by mistake attached the wrong form of clause to the charterparty. They intended to attach this clause and they must have intended it to mean something. It was argued that it was meant to be a clause which the charterers were to be bound to include in any bill of lading, and that it was not meant to affect the charterparty itself. I can find no ground for this argument—particularly when I find that in both the New Jason Clause and the Both to Blame Collision Clause there are provisions introduced by the words: "The charterers shall pro- "cure that all bills of lading issued under this charterparty shall "contain the following clause." To give effect to this argument it would be necessary to read in at the beginning of the paramount clause these or similar words. This could only be done if there was some clear indication elsewhere that it must be done, and there is nothing anywhere to show that this was the intention.

If the paramount clause is to have any meaning or effect at all "This bill of lading" must be held to be a misnomer for "This "charterparty." I find nothing to raise any doubt that this was the intention, and the fact that clause 52 directs that the paramount clause is to be "incorporated" in the charterparty appears to me to be a clear pointer that its initial words must be so read. So reading them, the paramount clause provides: "This charter- "party shall have effect subject to the provisions of the Carriage "of Goods by Sea Act of the United States, approved April 16, "1936, which shall be deemed to be incorporated herein, and "nothing herein contained shall be deemed a surrender by the "carrier of any of its rights or immunities or an increase of any "of its responsibilities or liabilities under said Act. If any term "of this charterparty be repugnant to said Act to any extent such "term shall be void to that extent, but no further." This is a plain and unequivocal direction to incorporate in the charterparty "the provisions" of the United States Act so that, if any other term of the charterparty is to any extent repugnant "to said "Act," it shall be void to that extent but no further. I note that there must be repugnancy to the United States Act—not to some particular section of it.

The first difficulty arises from the provisions of section 5 of

the United States Act: "The provisions of the Act shall not be "applicable to charterparties; but if bills of lading are issued in "the case of a ship under a charterparty, they shall comply with "the terms of this Act." The Act only deals with bills of lading: it begins: "Be it enacted by the Senate and House of Represen- "tatives of the United States of America in Congress assembled, "that every bill of lading or similar document of title which is "evidence of a contract for the carriage of goods by sea to or "from ports of the United States, in foreign trade, shall have "effect subject to the provisions of this Act."

This case appears to me to raise in an acute form the question how far a court is entitled to go in disregarding words in a contract in order to discover the intention of the parties. It is difficult to see how anyone who had given any thought to the provisions of the United States Act could have drafted this paramount clause for inclusion in a charterparty: it must have been drafted for inclusion in a bill of lading where it would be quite appropriate. But it appears that for a considerable time a clause in substantially this form has been included in a number of charterparties. We do not know how this practice originated, and we do not know and are not entitled to guess just what the parties had in mind when they agreed to incorporate the clause in this charterparty. The intention of the parties can only be inferred from the words which they have used. Undoubtedly the charterparty must be read as a whole, and any term in it must be read in light of the general nature of the contract, of the fact that the contracting parties were business men, and of all relevant facts known to the parties when it was made. But in the end we must take the words which the parties have used, and interpret them.

As the parties have chosen to incorporate in a charterparty provisions which are designed to apply, and only to apply, to bills of lading, one must, I think, infer that they intended these provisions to be incorporated mutatis mutandis; and in order to see what this involves I would begin by trying to read references to bills of lading in the Act as if they were references to charterparties. That necessarily involves the rejection as insensible of the provisions of section 5 of the Act that its provisions shall not be applicable to charterparties, and I find little difficulty in taking that step.

Then there are a number of provisions in the Act which, from their very nature, can only apply to bills of lading, and which become meaningless if one tries to make them apply to a charterparty. It probably does not matter much whether or not one regards them as incorporated in the charterparty. Some of them might throw some light on other provisions which must be incorporated, but I am content to take the case on the footing that they are not incorporated. There are also sections of the Act which permit parties to agree to vary statutory rights and liabilities in certain cases, and permit the Government of the

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United States to modify the terms of the Act in certain circumstances. These, too, are meaningless if incorporated in this charterparty and I disregard them.

That leaves to be incorporated those parts of the Act which enact the rights and liabilities of carrier and shipper, and which are capable of being applied to a charterparty if one reads owner and charterer for carrier and shipper. That appears to me to be quite consistent with the second part of the paramount clause, which must mean that nothing in the charterparty shall be deemed a surrender by the carrier (the owner) of any of his rights or immunities or an increase of any of his responsibilities or liabilities under the Act. The question is what are the carrier's rights, immunities, responsibilities or liabilities under the Act which can apply to an owner vis-à-vis a charterer. The purpose of the paramount clause is to preserve them—not to extend them.

The first part of the Act which I have already quoted shows, as one might expect, that the Act only applies where there is carriage of goods to or from a port of the United States: and this is confirmed by section 13 which provides: "This Act shall apply "to all contracts for carriage of goods by sea to or from ports of "the United States in foreign trade." Accordingly, a carrier can have no rights or liabilities under the Act except in relation to a voyage to or from the United States, and, if this paramount clause had been incorporated in a bill of lading, a term in the bill of lading repugnant to the Hague Rules as embodied in the Act would not be repugnant to the Act if the goods were not being carried to or from the United States. One of the difficult questions in this case is whether a term of this charterparty, which is repugnant to a part of the Act capable of being applied to a charterparty, can be regarded as "repugnant to said Act" within the meaning of the paramount clause as regards a voyage which is neither to nor from a United States port. It must be borne in mind that the paramount clause expressly provides that if any term of the charterparty is repugnant to the Act to any extent it shall be void to that extent but no further. It was therefore expressly contemplated that a term in the charterparty might be invalidated to some extent but yet remain valid when the circumstances were not within the scope of the paramount clause. There are terms in the charterparty which would admittedly prevent the appellant from succeeding unless they are excluded by the paramount clause in the circumstances of this case.

Then section 2 of the Act provides, subject to an immaterial exception, "... under every contract of carriage of goods by sea, "the carrier in relation to the loading, handling, stowage, carri- "age, custody, care, and discharge of such goods, shall be subject "to the responsibilities and liabilities and entitled to the rights "and immunities hereinafter set forth"; and section 7 provides: "Nothing contained in this Act shall prevent a carrier or a shipper "from entering into any agreement, stipulation, condition, reser- "vation, or exemption as to the responsibility and liability of the

" carrier or the ship for the loss or damage to or in connection " with the custody and care and handling of goods prior to the " loading on and subsequent to the discharge from the ship on " which the goods are carried by sea." So it is plain that under the Act a carrier can have no rights or liabilities except in relation to a cargo carrying voyage. A second difficult question in this case is whether a term of this charterparty, which is repugnant to a part of the Act capable of being applied to a charterparty, can be regarded as " repugnant to said Act," within the meaning of the paramount clause as regards a voyage when no cargo is carried.

Sections 3 and 4 of the Act set out respectively the responsibilities and liabilities, and the rights and immunities of the carrier. Section 3 (1) provides: " The carrier shall be bound, " before and at the beginning of the voyage, to exercise due " diligence to—(*a*) Make the ship seaworthy; (*b*) Properly man, " equip, and supply the ship; (*c*) Make the holds, refrigerating " and cooling chambers and all other parts of the ship in which " goods are carried, fit and safe for their reception, carriage, and " preservation." The other provisions of the sections are either from their nature incapable of application to a charterparty or difficult to apply to a charterparty without considerable modification. The appellant admits that " at the beginning of the " voyage " in section 3 (1) must mean at the beginning of each voyage under this charterparty and not the beginning of the first voyage under it. Head (*c*) of section 3 (1) causes some difficulty for the appellant because, if this subsection is to apply to voyages when no cargo is carried, it would seem unreasonable that head (*c*) should apply to such voyages: on the other hand, it would apply when cargo was to be carried.

Section 4 provides: " (1) Neither the carrier nor the ship shall " be liable for loss or damage arising or resulting from unsea- " worthiness unless caused by want of due diligence on the part " of the carrier to make the ship seaworthy, and to secure that " the ship is properly manned, equipped, and supplied, and to " make the holds, refrigerating and cool chambers, and all other " parts of the ship in which goods are carried fit and safe for their " reception, carriage, and preservation in accordance with the " provisions of paragraph (1) of section 3. Whenever loss or " damage has resulted from unseaworthiness, the burden of " proving the exercise of due diligence shall be on the carrier " or other persons claiming exemption under this section. " (2) Neither the carrier nor the ship shall be responsible for loss " or damage arising or resulting from—(*a*) Act, neglect, or " default of the master, mariner, pilot, or the servants of the " carrier in the navigation or in the management of the ship . . ." and a number of other matters most of which are readily applicable to a charterparty.

I do not think that I misrepresent the case for the appellant in saying that it is that, in spite of the wording of the paramount

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clause, no part of the United States Act should be incorporated in this charterparty except those parts of sections 3 and 4 of the Act which are readily applicable to a charterparty, and that then the provisions so incorporated should be read in their new context without paying regard to the limited extent of the rights which they confer in their original context in the Act. In that way these provisions can be made to apply to voyages which are neither to nor from a United States port, and to voyages when no cargo is carried—voyages to which, in their original setting in the Act, these provisions could never have any possible application. The respondent, on the other hand, in addition to supporting the reasoning of the Court of Appeal, maintains that, if any part of the Act is to be incorporated, the paramount clause requires that every part of the Act which is capable of application to a charterparty must be incorporated so that the provisions on which the appellant relies will still be qualified by the other provisions of the Act to which I have referred and will, therefore, retain their original limited scope and not apply either to voyages which do not touch the United States or to voyages on which no cargo is carried.

The strength of the appellant's case lies in the fact that the method of construction which I have sought to follow produces a result which is commercially unreasonable. It is not credible that, if the parties had really applied their minds to the matter, they would have agreed that the owners should have one standard of duty for cargo carrying voyages to or from the United States and another for all other voyages. Indeed, I am prepared to assume that, if the defects of the paramount clause had been pointed out to the parties, they, or at least any reasonable business men in their position, would have agreed that the relevant provisions of the Hague Rules, as embodied in the United States Act, should apply to all voyages under this charterparty. But it is one thing to say that the parties would have agreed to this and another thing to say that they did agree to it.

We cannot tell what the parties had in mind and we may not inquire as to what was said in the course of negotiation. The parties may have intended—indeed they may have said—that the Hague Rules were to apply to all voyages under the charterparty: they may have chosen this ill-designed clause simply because it had been used before. But they may have been very vague in what they intended or what they said. In any case we are not concerned with what they may have intended or said. We are only concerned with interpreting the words which they chose to use in their contract. I do not think that we are entitled to assume that they must have had a clear intention and that it must have been a reasonable intention, then to find that the only reasonable intention would have been to apply the Hague Rules to all voyages, and to hold that, even if the words which they have used will not bear that construction, that intention must prevail. A court is often entitled to add to a written contract by implying a term if it is satisfied that any reasonable men

in the position of the parties would have agreed to it if their attention had been directed to the point and that the term should be implied. But that is supplementing the words which the parties have used—not contradicting them. It might be the law that a court should be entitled to amend the parties' contract if satisfied that no reasonable men could have meant what it says and also satisfied as to what they must have intended to do if, being reasonable men, they had directed their attention to the point. Perhaps that should be the law. But, so far as I am aware, there is no authority for a court having that power. Here the parties made an express provision which is, in my view, incapable of bearing the construction for which the appellant contends and therefore to give effect to that contention would involve contradicting what the parties have said in their contract and making a new contract for them.

There are many cases where a court must disregard words, including whole terms, which the parties have put in their contract. But those are cases where there is something in the contract itself which makes that course necessary. For example, the words may be inconsistent with the main object of the contract. In *Glynn* v. *Margetson & Co.* [19] a printed clause would have allowed the ship to proceed to and stay at any port within a very wide range in carrying oranges from Malaga to Liverpool. A deviation by the ship caused damage to this perishable cargo and the owners were held liable. Lord Halsbury said [20]: "One must reject words, indeed whole provisions, if "they are inconsistent with what one assumes to be the main "purpose of the contract." And Lord Herschell L.C. said [21]: "Where general words are used in a printed form which are "obviously intended to apply, so far as they are applicable, to "the circumstances of a particular contract, which particular "contract is to be embodied in or introduced into that printed "form, I think you are justified in looking at the main object "and intent of the contract and in limiting the general words "used, having in view that object and intent." I do not think that this principle so applied helps either party. The object of the contract in *Glynn's* case [22] was obvious from the contract itself, but here, if a limited application is given to the Hague Rules, I can see no conflict with either the general object of the charterparty or any express term in it. The conflict is only with what one might have expected reasonable people to do. I should perhaps note that an explanation of *Glynn's* case [22] was given by Jenkins L.J. and approved in this House in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*[23]

Then there are numerous cases where two parts of a contract appear to contradict each other. I shall only cite two cases which seem to me to be relevant here. In *Elderslie Steamship*

[19] [1893] A.C. 351.
[20] Ibid. 357.
[21] Ibid. 355.
[22] Ibid. 351.
[23] [1957] A.C. 149; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957.

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Co. Ltd. v. *Borthwick* [24] Lord Macnaghten said: "The clause "which has been called the large print clause seems to me to "be perfectly clear. The small print clause is equally clear. "For my part I am unable to reconcile the two clauses. In such "a case as this an ambiguous document is no protection. It is "a wholesome rule that a shipowner who wishes to escape the "liability which might attach to him for sending an unseaworthy "vessel to sea must say so in plain words." And in *Nelson "Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[25] Lord Loreburn L.C. said: "I think the clause, taken as a whole, so "ill thought out and expressed that it is not possible to feel "sure what the parties intended to stipulate. The law imposes "on shipowners a duty to provide a seaworthy ship and to use "reasonable care. They may contract themselves out of those "duties, but unless they prove such a contract the duties remain; "and such a contract is not proved by producing language which "may mean that and may mean something different. As Lord "Macnaghten said in *Elderslie Steamship Co. Ltd.* v. *Borth-"wick* [26] 'an ambiguous document is no protection.'"

A third class of case is where a term is meaningless or so vague as to be insensible. In *G. Scammell & Nephew Ltd.* v. *Ouston* [27] Lord Wright said: "The object of the court is to do "justice between the parties, and the court will do its best, if "satisfied that there was an ascertainable and determinate "intention to contract, to give effect to that intention, looking at "substance and not mere form. It will not be deterred by mere "difficulties of interpretation. Difficulty is not synonymous "with ambiguity so long as any definite meaning can be "extracted. But the test of intention is to be found in the "words used. If these words, considered however broadly and "untechnically and with due regard to all the just implications, "fail to evince any definite meaning on which the court can "safely act, the court has no choice but to say that there is "no contract." In *Nicolene Ltd.* v. *Simmonds* [28] that principle was applied so as to strike out of a contract a term so vague or ambiguous that no ascertainable meaning could be given to it, and to leave the rest of the contract valid.

The Court of Appeal have followed the last class of case and have held that no effect at all should be given to the paramount clause. Denning L.J. (as he then was) said [29]: "If we reject the "obvious contradictions and inconsistencies, and seek to apply "the rest of the Hague Rules in their ordinary meaning, we are "left with such incongruous results that no one can suppose that "the parties ever intended to produce them. If we reject the

[24] [1905] A.C. 93, 96; 21 T.L.R. 277.
[25] [1908] A.C. 16, 19-20.
[26] [1905] A.C. 93, 96.
[27] [1941] A.C. 251, 268; 57 T.L.R. 280; [1941] 1 All E.R. 14.
[28] [1953] 1 Q.B. 543; [1953] 2 W.L.R. 717; [1953] 1 All E.R. 822.
[29] [1957] 2 Q.B. 233, 269.

" contradictions, inconsistencies and incongruities, and put some-
" thing in their stead, we shall be making for the parties a con-
" tract which we may think is reasonable but to which they have
" never subscribed, because it would bear no relation to the
" written words. And I have good reason for thinking that we
" might differ from the judge, and between ourselves, as to what
" would be reasonable. This all leads me to the conclusion that
" this paramount clause cannot sensibly be applied to this charter-
" party. It must be rejected as insensible in this setting." Parker L.J. said [30]: " What provisions are to be treated as " incorporated? This charter is, as I have said, for successive " charterparty voyages and worldwide in its scope. It is clearly " not possible to select those provisions which the court thinks " reasonable to apply in all the circumstances. That would be to " make a new contract between the parties. The only safe " method of exclusion would be to reject only those provisions " or parts of provisions which would be insensible. But, if this " is done, one is left with such a jumble of provisions that it is, " in my judgment, quite impossible to feel sure what the parties " intended. Accordingly, I feel constrained to reject the whole " of the paramount clause as insensible." Sellers L.J. said [31]: " On the other hand, to give the clause effect as the shipowners " submit requires even more imagination and a drastic elimina-
" tion or substitution of all words which offend against the
" applicability of the clause to a charterparty. It seems to me
" that this would be doing what the parties did not do themselves,
" and would be giving to provisions a certainty and a clarity
" which they do not possess. Where the court can be certain
" of the contractual intention, then matters which conflict with
" the intention may be disregarded as insensible, but if very little
" seems to fit in with the accepted provisions of a contract and
" a position of uncertainty and doubt arises—as I think it does
" here—it would be passing out of the realm of construction if
" one proceeded to cull or create contractual terms out of the
" muddled material."

I have sympathy with their view particularly in view of the principle restated by Lord Wright M.R. in the *Petrofina* case [32]: " If it is sought to effect a reduction of the overriding obligation to " provide a seaworthy ship, whether that is express or implied " for this purpose does not matter, by other express terms of the " charterparty or contract of affreightment, that result can only " be achieved if perfectly clear, effective, and precise words are " used expressly stating that limitation." But I am unable to go all the way with them because I think that, whatever be the position with regard to voyages not within the scope of the United States Act, the paramount clause has at least applied the Hague Rules with sufficient clarity to cargo carrying voyages to or from the United States. There might well have been such voyages

[30] [1957] 2 Q.B. 233, 269, 271–272.
[31] Ibid. 275.
[32] 53 T.L.R. 650, 653.

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under this charterparty and the charterers' claims might have arisen solely in respect of such voyages. If they had I do not think that a court could have refused to the owners the protection of this clause on the ground that in other circumstances which had not arisen the clause might be insensible. But it so happens that no claim arises in this case in respect of a cargo carrying voyage to or from the United States, and therefore I reach the same result as the Court of Appeal but in a different way.

It may appear to some to be "legalistic" to hold that a contract means something which no reasonable business man could have intended. But, if a court is precluded from remaking a contract and is only entitled to construe the words which the parties have used, and the parties choose to use such an ill-designed clause as this, a court may have to tell them that they have produced a very unreasonable result. I would dismiss this appeal.

Lord Keith of Avonholm. My Lords, it has been accepted, I think rightly, by all the learned judges who have considered this case, as also by your Lordships, that the words "this bill of "lading" in the paramount clause must be read as "this "charterparty." It would seem to follow that the United States Carriage of Goods by Sea Act must be read for the purposes of this charterparty as if the words in section 5, "The provisions of "the Act shall not be applicable to charterparties" were deleted. The parties have incorporated the Act contractually into their contract of charterparty, and to say that the provisions of the Act shall not apply to their charterparty would render the incorporation nugatory and make no sense of what was intended to be a "paramount clause" in their contract. It is, of course, possible to read a clause in a contract as senseless and read it out of the contract altogether, but in commercial contracts that is a course that the court should be slow to adopt. As stated by Lord Wright in *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[33] it is "the "duty of the court to construe such documents fairly and broadly, "without being too astute or subtle in finding defects; but, on the "contrary, the court should seek to apply the old maxim of "English law, Verba ita sunt intelligenda ut res magis valeat "quam pereat."

Turning to the document incorporated by the paramount clause, namely, the United State Act, one finds, as was to be expected, that it applies only to contracts of carriage of goods by sea covered by a bill of lading or similar document of title, and the outlook of the various sections of the Act is necessarily on such contracts. To give any effect to the contractually incorporated document it must be construed, so far as possible, with reference to a charterparty and not a bill of lading. This is necessarily involved in the step that has already been taken of regarding as inapplicable the words, "The provisions of the Act "shall not be applicable to charterparties." The next step, in

[33] 147 L.T. 503, 514.

my opinion, is to read "contract of carriage" as meaning a contract between a carrier and a charterer and not one between a carrier and a shipper. A charterparty is one form of contract for the carriage of goods by sea. The proper approach in a case of this kind in construing an incorporated document has been laid down by this House in *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*,[34] and in *Hamilton & Co.* v. *Mackie & Sons*,[35] approved in the former case. There may be slight differences in the approach adopted by Lord Esher in *Hamilton & Co.* v. *Mackie & Sons* [35] and that adopted by Lord Gorell and Lord Robson in *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*,[36] but they come, I think, very much to the same thing and achieve the same result. Lord Esher would read in the whole terms of the incorporated document and then treat any term which was inconsistent with the incorporating document as insensible and to be disregarded. Lord Gorell and Lord Robson approach the matter, I think, from the standpoint of reading in so much of the incorporated document as is not inconsistent with the subject-matter of the incorporating document. Lord Robson states the rule [37] "that the terms of the charterparty when incorporated or written "into the bill of lading shall not be insensible or inapplicable to "the document in which they are inserted." In that case it was held that an arbitration clause in a charterparty was not apt to be introduced into a bill of lading and, in spite of an incorporating clause in the bill of lading, should be rejected as inconsistent with the bill of lading. The same difference in approach will be found between Lord Esher M.R. and Lopes L.J. in *Serraino & Sons* v. *Campbell* [38] respectively. Here we have the converse case of deciding how much, or what, should be written in to a charterparty of terms that were intended for a bill of lading.

Taking section 3 (1) and section 4 (1) and (2) (*a*) by themselves, no difficulty would arise in giving them a literal and effective interpretation as between owner and charterer. Two points, however, are taken, that these provisions do not apply to a ballast, or non-cargo carrying, voyage, and apply only to a voyage to or from a United States port. On the first point, of course, the Act as drawn applied only to cargo voyages because it dealt wholly with contracts of carriage under bills of lading. But ex hypothesi that limitation has gone. The Act is now being applied to a charterparty. A charterparty is a contract for the purpose of the carriage of goods by sea, and I see no difficulty in saying that a voyage in ballast is all part and parcel of and incidental to that purpose. If a chartered ship proceeds to its port of loading, it is, in my opinion, engaged in a voyage relating to the carriage of goods though it is not actually carrying goods at the time. To exclude the carrier in such a case from the obligations and immunities of sections 3 and 4 is merely to assert that the

[34] [1912] A.C. 1.
[35] 5 T.L.R. 677.
[36] [1912] A.C. 1.
[37] Ibid. 10.
[38] [1891] 1 Q.B. 283, 289, 301; 7 T.L.R. 174.

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Act applies to contracts for the carriage of goods by sea under bills of lading which are confined to the actual carriage of goods. Reference was made to section 2, but that does not, in my opinion, advance the argument for exclusion of ballast voyages any further. Indeed, it might be said that a voyage under a charterparty in ballast is a voyage under the contract " in relation " to " the loading, handling, stowage, carriage, etc., of goods. True, it does not cover the period from the time when the goods are loaded to the time when they are discharged as mentioned in section 1 (*e*) of the Act, but that clause has no meaning in a charterparty, which covers a much greater scope of time, and may be rejected as inconsistent with the purpose of the charterparty. In this matter I am reluctant to differ from the learned judge. He seems to attach considerable weight to subsection (1) (*c*) of section 3, which imposes the duty to make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. That is no doubt directed to the carriage of goods, but so is a charterparty. And if a ship has not made this provision before she sails for her port of loading, she will have to do so before she takes on a cargo at the port of loading and on each voyage thereafter under the charterparty on which she carries goods. I am not prepared to hold that because section 3 (1) (*c*) is inapplicable to a ship on a ballast voyage, if that be so, the shipowner is therefore placed under greater liabilities than those imposed in other respects under section 3.

The point that a claim to immunity is confined to voyages to or from United States ports is founded on the words in the enacting part of the statute that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States in foreign trade shall have effect subject to the provisions of this Act, and on the words in section 13 that this Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. But again these words seem to me to have no relevance to the charterparty in this case. Very good reasons can be seen for the United States legislature limiting its Act to goods carried under a bill of lading to or from United States ports. They seem quite inapposite when the Act is introduced contractually into a charterparty covering a very wide range of ports outside the United States. Unless the charterers exercised their option under clause 49 of the charterparty, and in that event the owners secured the approval of the United States Maritime Commission, the ship might never have touched at a United States port after leaving Baltimore on her first voyage. On this point Devlin J. arrived, I think, at the right conclusion.

As to the nature of the loss or damage for which immunity may be claimed, I see no reason for limiting this to physical loss of or damage to goods. Here, again, the force of the argument for such a limitation stems from the fact that the United States Act

applied only to goods carried under bills of lading. Even in such a case it does not follow that loss or damage is limited to physical loss of or damage to goods. Section 3 (8) shows that the loss or damage contemplated is " loss or damage to or in connexion with " the goods," and it has been held in this House that such loss or damage is not limited to physical loss or damage: *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*[39] I proceed, however, on the view that the subject-matter of the contract here was voyages, and loss of voyages naturally falls under the words " loss or damage."

On the view I have taken the point as regards causation of the damage does not arise.

In the result, I would allow the appeal. I agree that the question of law should be answered in the manner proposed by my noble and learned friend on the Woolsack.

LORD SOMERVELL OF HARROW. My Lords, this is an appeal from the order of the Court of Appeal allowing an appeal and dismissing a cross-appeal from an order of Devlin J. on an interim award stated in the form of a special case under sections 14 and 21 (1) (*b*) of the Arbitration Act, 1950.

The respondents were charterers of a tanker, the *Saxon Star*, formerly the *Delaware Sun*, owned by the appellants. The charter was dated May 25, 1950. The charter was for as many consecutive voyages as the vessel could perform within eighteen months. The charterers alleged in effect that owing to the owners' breaches of contract the ship was delayed by having to be repaired. As a result of the time lost, she was able to perform fewer voyages than would have been performed but for the delay caused by the breaches alleged. " The charterers," I am quoting from Devlin J.,[40] " claimed damages which they put at over " £80,000, the claim being for the difference between the charter " and the market rates of freight on cargo-carrying voyages which " might have been performed within the eighteen months if she " had been continuously fit for service."

The umpire, who was dealing only with liability, found that delay was caused by incompetence of the engine-room staff which amounted to unseaworthiness. Delay was also caused on one occasion, at Curaçao, by unseaworthiness in respect of machinery. The umpire found that the owners exercised due diligence in the selection and appointment of the engine-room staff. The owners maintain that was the extent of their liability and therefore they are not liable in respect of delay due to that cause. The umpire found that due diligence had not been exercised in respect of the faulty machinery on the one occasion referred to, and the owners admit their liability in respect of delay due to that cause. The learned umpire set out the questions of law in eleven questions as follows:—

[39] [1957] A.C. 149.

[40] [1957] 2 Q.B. 233, 246.

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" The question of law for the decision of the court is: Whether " upon the facts as found and upon the true construction of the " charterparty the owners are in breach of the charterparty: " (1) In that the *Saxon Star* was not seaworthy when she sailed " from Baltimore on July 27, 1950; (2) In that the breakdown of " the machinery of the vessel between Baltimore and San Juan " was caused by the negligent acts or omissions of the engine-" room staff; (3) In that the vessel was not maintained in sea-" worthy condition during the voyage from Baltimore to Curaçao; " (4) In that the vessel was not seaworthy when she sailed from " Curaçao on August 19, 1950; (5) In that the vessel was not " maintained in seaworthy condition during the voyage from " Curaçao to Recife; (6) In that the breakdown of the machinery " of the vessel between Curaçao and Recife was caused by the " prior negligent acts or omissions of the engine-room staff; (7) In " that the vessel was not seaworthy when she sailed from Buenos " Aires on October 5, 1950; (8) In that the breakdowns of the " machinery of the vessel between Buenos Aires and Curaçao " (save only the breakdowns of the windlass) were caused by the " negligent acts or omissions of the engine-room staff; (9) In " that the vessel was not maintained in seaworthy condition " during the voyage from Buenos Aires to Curaçao; (10) In that " the owners failed to ensure that the vessel performed her service " under the charterparty with all convenient despatch; or (11) On " any other ground? "

Before the learned judge the parties agreed the following questions, which elucidate and perhaps extend the issues lying behind the learned umpire's questions, namely, (1) Whether the United States Carriage of Goods by Sea Act (hereinafter called " the Act ") affects the rights and liabilities of the parties in connexion with (a) non-carrying voyages, (b) cargo carrying voyages other than those to and from ports in the United States of America; (2) Do the words " loss or damage " in section 4 (1) or section 4 (2) of the Act relate only to physical loss or damage? On the last question your Lordships were asked to consider whether the words " loss or damage " covered the damages as claimed in this case.

The charterparty starts with a printed form headed " Tank " Vessel Voyage Charterparty," with, of course, typewritten insertions. Typewritten clauses 24 and 52 are attached. Clause 52 is as follows: " It is agreed that the Chamber of Shipping War " Risks Clauses dated April, 1937, New Jason Clause, Paramount " Clause, and Both to Blame Collision Clause, as attached, are to " be incorporated in this Charterparty."

The clause headed " Paramount Clause " is as follows:— " *Paramount Clause.* This bill of lading shall have effect subject " to the provisions of the Carriage of Goods by Sea Act of the " United States, approved April 16, 1936, which shall be deemed " to be incorporated herein, and nothing herein contained shall " be deemed a surrender by the carrier of any of its rights or

"immunities or an increase of any of its responsibilities or "liabilities under said Act. If any term of this bill of lading be "repugnant to said Act to any extent, such term shall be void to "that extent, but no further."

It is, I think, relevant to set out quite shortly the history of the provisions embodied in this and other similar Acts.

The object of the Brussels Convention, which led to the Hague Rules, which led to the Act, was to produce standard provisions of liability as between shipowner or carrier and shipper. The desirability of standard terms for bills of lading which pass from hand to hand like negotiable instruments had long been felt. The provisions in relation to English law relieved the shipowner of his absolute obligation to provide a seaworthy ship. This was replaced by a duty to exercise due diligence to provide a seaworthy ship. The shipowner was placed under a duty to exercise due diligence in other matters connected with the carriage. He was allowed maximum exceptions to his liability which he could not increase.

The Rules did not apply to charterparties. Charterparties do not pass from hand to hand, and parties were therefore left free to contract on what terms they chose. It was thought at one time that the Rules might be left to be embodied by agreement, as was done with the York-Antwerp Rules on General Average of 1890 (Scrutton on Charterparties, 16th ed., p. 454). Later it was decided that countries should, if so minded, legislate. Our own Carriage of Goods by Sea Act was passed in 1924 and the United States Act in 1936. The United States had led the way in this field by the Harter Act of 1893.

Legislation embodying the Rules with or without modification did not, of course, cover charterparties and could not go beyond shipments which were or came within the jurisdiction of the legislating country. The United Kingdom Act applies to ships carrying goods from any port in Great Britain or Northern Ireland. The United States Act applies (subject to exceptions which are not relevant here) to contracts for carriage of goods to or from ports of the United States.

This short summary is, I hope, useful in emphasizing how natural it was that parties concerned in the carriage of goods by sea should wish to embody this code of obligations, the product of much thought and experience, in contracts to which it would not be applicable by legislation. This would apply to all charterparties and to bills of lading which were not within the geographical limits of any country's legislation.

One might have expected that in such cases the parties would embody the "Rules." The practice clearly grew up at an early date of referring to one or other of the Acts as incorporated. On the issue which comes before your Lordships I have been greatly influenced by the decision in *Golodetz* v. *Kersten, Hunik & Co.*[41] and the fact that that decision has stood unchallenged for thirty

[41] 24 Ll.L.Rep. 374.

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years. The shipper in that case sued on a bill of lading for goods to be carried from Rotterdam to London. The clause to be construed was as follows: "All the terms, provisions and conditions "of the Carriage of Goods by Sea Act, 1924, and the schedule "thereto are to apply to the contract contained in this bill "of lading, and the carriers are to be entitled to the benefits of "all the privileges, rights and immunities contained in such Act, "and the schedule thereto, as if the same were herein specifically "set out . . ." If the words "all the terms," etc., are given their literal meaning, the Act did not apply at all, as the voyage was not one from a United Kingdom port. The provision would have been wholly ineffective. Stopping there in the clause, Banks L.J. was doubtful but said [42]: "I am inclined to think "that what they really intended was that, although this is an "inward bill of lading, it should be treated as an outward bill of "lading, and that the clauses *so far as they are applicable*" (my italics) "should be read into the contract." He was fully satisfied, as was the other member of the court, Warrington L.J., that this was the effect of the clause by the words which followed: "If, or to the extent that, any term of this bill of lading is "repugnant to or inconsistent with anything in the schedule it "shall be void." Similar words occur in the present clause.

I have no doubt that that decision gave effect to the intention of the parties as shown by the words used. It would have been better if they had referred to the Rules scheduled to the Act rather than to the Act. Since that date the incorporation of one or other "Acts" has unfortunately continued. Devlin J. referred to it as very common.

The first point taken by the charterer is based on the opening words of the paramount clause: "This bill of lading . . ." I agree with the learned judge that the answer to this point is an application of the principle falsa demonstratio non nocet. I have nothing I wish to add to his conclusion on this point. The opening words of the paramount clause are to be read as if they were: "This charterparty."

I also agree with the learned judge on the second point based on the provision in section 5 of the Act that the Act shall not be applicable to charterparties. He said [43]: "Since the clause para-"mount says that this charterparty shall be subject to the Act, "it is insensible to incorporate into the clause paramount a "condition which says that the Act shall not apply to charter-"parties." The provisions of the Act are, therefore, to be incorporated as terms of the contract *as far as applicable*. This is to apply the principle laid down in *Golodetz* v. *Kersten, Hunik & Co.*[44]

The contract is one for shipment to or from a very wide range of ports. Although the vessel started from Baltimore it might never again be ordered to a United States port. Further, once

[42] 24 Ll.L.Rep. 374, 375.
[43] [1957] 2 Q.B. 233, 250.
[44] 24 Ll.L.Rep. 374.

one has come to the conclusion that the "Act" is being incorporated in a contract to which it does not as an Act apply, one prima facie rejects the limitations which are imposed in these various Acts necessitated by the limits of the legislative jurisdiction of the country concerned. One takes the geographical limits from the contract. I have, therefore, little difficulty in holding that the paramount clause is not to be restricted to the first voyage—though this is also subject to the next point—and the off-chance of the ship being ordered to a United States port later.

The learned judge decided that the paramount clause had no application to ballast voyages. This would exclude the first voyage from Baltimore to the first port of loading. There is, of course, no difficulty in applying to a ballast voyage the "liabilities "or immunities" of the carrier under what I may call the substantive provisions of the Act. It is, however, said, and with force, that the Act is dealing with cargo. On the other hand, its provisions, so far as applicable, have been incorporated into a charterparty where the contractual relations cover a period of voyages the first of which was, and several of which might be, ballast voyages. The paramount clause not only diminishes the shipowners' responsibility at common law but also the responsibility which he would have under the document to which the clause being considered is paramount. It would be a foolish consequence if the shipowner was under a greater liability when the ship was in ballast than when it was carrying cargo. It is natural, as I have said, that shipowners and cargo owners should intend to incorporate the code of obligations and immunities over the whole of the contractual period. The learned judge was, in the main, I think, influenced by the provision in section 3 (1) (*c*) of the Act putting an obligation on the shipowner to use due diligence to make the holds, etc., fit for the reception of cargo. "If," he says,[45] "this obligation attaches at the time when the "ship leaves in ballast for the port of loading it would in many "cases, probably in most, impose an unreasonable and unneces-"sary burden on the owner." Section 3 has now to be applied as embodied in a contract under which there will be cargo carrying and non-cargo carrying voyages. One has, therefore, to read "voyage" in section 3 (1) in the plural, and so doing it is, I think, natural to read section 3 (1) (*c*) as applicable to the cargo carrying voyages but not to the others. I have therefore come to the conclusion that the provisions of the Act as to the shipowners' obligations apply under the clause paramount to all voyages.

I agree with the learned judge that "loss or damage" in the Act is not limited to physical damage to the goods. I also agree that the loss or damage must arise in relation to the "loading, "handling, stowage, carriage, custody, care and discharge of

[45] [1957] 2 Q.B. 233, 252.

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" such goods." The form of the claim here depends, of course, on the fact that the provisions of the Act have been incorporated into a charterparty for successive voyages. Under a contract with a particular shipper later to be evidenced by a bill of lading issued to him or under a " received for shipment " bill of lading the shipper or prospective shipper might have a similar kind of claim; if, for example, the shipowner failed to ship the goods and freights had risen. The claim is, in my opinion, in relation to loading and carriage of goods and this point, therefore, also fails.

The last point was stated in these words in the respondents' reasons. " If the Act did not apply to the non-cargo carrying " voyage from Baltimore to Curaçao the owners are liable to the " charterers because, on the findings in the award, all the damage " flowed from the initial unseaworthiness at Baltimore consisting " in an incompetent engine-room staff." As I have held that the " Act " did not apply to the voyage from Baltimore I need not elaborate my reasons for thinking that the submission, in my view, failed on the facts as found by the learned umpire.

We were referred to a number of authorities. They lay down familiar principles which I have endeavoured to apply. On the one hand, as Lord Wright said in *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[46] it is the duty of the court to construe commercial contracts broadly, without being too astute or subtle in finding defects. On the other hand, as Lord Wright stated in words which immediately follow, the court is not to make a contract for the parties. There is further the principle stated by Lord Wright in *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*[47] that exceptions to obligations must be in clear words. These principles, as I have said, are familiar, the difficulty arises in their application. In the present case I think the difficulty arises at the initial stage. Is the effect of the clause to incorporate in this charterparty the provisions as to the carrier's liability which are contained in the Act? This is a question of construction. Once this has been decided the answers to the other questions follow with, I think, reasonable clearness.

The Court of Appeal took the view that the problems raised were such that the whole clause fell under the principle that the court will disregard contradictory or obscure provisions (*Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*)[48] It might have advanced clarity if the practice of incorporating an " Act " when the parties meant the provisions of the Rules as applicable to the contract between the parties had been strangled at birth. As it has been recognized in our own courts and in textbooks, the problems that arise in this case do not seem to me to bring the case within the principle laid down in the case cited.

[46] 147 L.T. 503, 514.
[47] 53 T.L.R. 650.
[48] [1908] A.C. 16.

I agree that the questions of law should be answered as proposed by my noble and learned friend on the Woolsack.

I would therefore allow the appeal.

Appeal allowed.

Solicitors: *Constant & Constant; Waltons & Co.*

F. C.

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[PROBATE, ETC., DIVISION.]

MIGUEL SANCHEZ & COMPANIA S.L. *v.* RESULT (OWNERS). NELLO SIMONI LTD., THIRD PARTY. THE RESULT.

1958 *Feb.* 24, 25; *Mar.* 7.

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[1957 M. 2749.]

Practice and Procedure—Parties—Joinder—Application by third parties to be joined as co-defendants—Purpose of joinder to counterclaim against plaintiffs—Jurisdiction—R.S.C., Ord. 16, *r.* 11.

The third parties agreed to buy from the plaintiffs 6,000/7,000 cases of oranges f.o.b. Almeria and chartered the *Result* and the *Juno* for the carriage thereof to the United Kingdom. The third parties nominated the *Result* for the carriage of 3,500 cases and the *Juno* for the further 3,500 cases. The plaintiffs, under a bill of lading, shipped only 1,000 cases on board the *Result* and did not ship any cases on board the *Juno*. On the arrival of the *Result* in the United Kingdom, the defendants (owners of the *Result*) without the production of the bill of lading or the authority of the plaintiffs and, in return for and in consideration of an indemnity, whereby the third parties agreed to indemnify the defendants against all consequences of delivery, delivered the 1,000 cases of oranges to the third parties, who claimed that the property therein had passed to them. The plaintiffs commenced an action in rem against the owners of the *Result*, claiming damages for breach of the contract of carriage under the bill of lading, in that the defendants delivered the 1,000 cases of oranges, the property in which had remained in the plaintiffs, without the production of the bill of lading or the authority of the plaintiffs, and, alternatively, damages for conversion. The defendants served a third party notice on the third parties claiming an indemnity in the event of their being held liable to the plaintiffs. The third parties applied under R.S.C., Ord. 16, r. 11, for an order that they be joined as co-defendants in the action so that they would be in a position to counterclaim against the plaintiffs claiming damages for breach of the contract of sale. The Admiralty Registrar ordered that the third parties be added as co-defendants, and, at the same time, issued third party directions that the third parties should be at liberty to appear at the trial of the action, and take such part as the judge should direct, and be bound by the result of the trial. The plaintiffs appealed against the order of the registrar joining the third parties as co-defendants:—

Held, (1) that the words "cause or matter" in Ord. 16, r. 11, meant the action as it stands between the existing parties.

(2) That the order asked for by the plaintiffs in the "cause or "matter" affected the third parties in the enjoyment of their legal rights, in that the plaintiffs were claiming the property in the 1,000 cases of oranges shipped; but that, with regard to the third

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parties' proposed counterclaim in respect of the 6,000 cases of oranges which were not shipped, the legal rights sought to be asserted by this counterclaim were unaffected by the plaintiffs' claim in the "cause or matter."

(3) That the only reason which makes it necessary to add the name of a party to an action is so that that party may be bound by the result of the trial, and the question to be settled must be a question which cannot be effectually and completely settled unless that party is so joined.

(4) That, since under the third party directions the third parties were at liberty to appear at the trial and to take such part as the judge should direct, and would be bound by the result of the trial, the "cause or matter" was not liable to be defeated by the non-joinder of the third parties as defendants, nor was it necessary to join the third parties as defendants in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the "cause or matter."

(5) That, since the plaintiffs were pursuing a remedy in rem against the ship, which, prima facie, they were entitled to pursue, it could not be said that the action was not properly constituted, and, therefore, the third parties were not parties who should have been joined in the first instance.

(6) Accordingly, since the "cause or matter" was not liable to be defeated by the nonjoinder of the third parties as defendants, nor were the third parties persons who ought to have been joined as defendants in the first instance, nor were the third parties persons whose presence before the court as defendants was necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the "cause or matter," the court had no jurisdiction under Ord. 16, r. 11, to order that the third parties be added as defendants.

Amon v. *Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357; [1956] 2 W.L.R. 372; [1956] 1 All E.R. 273 applied.

Montgomery v. *Foy, Morgan & Co.* [1895] 2 Q.B. 321; 11 T.L.R. 512 distinguished.

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The plaintiffs commenced an action in rem against the defendants' vessel *Result*. By their statement of claim, delivered on January 11, 1958, the plaintiffs claimed that 1,000 cases of oranges, shipped on board the *Result*, under a bill of lading dated Almeria, November 16, 1957, for carriage to Portsmouth, were delivered to the third parties, without the production of the bill of lading and without the authority of the plaintiffs, in breach of the contract of carriage under the bill of lading. In the alternative the plaintiffs claimed that the defendants were guilty of conversion.

On January 23, 1958, the defendants obtained leave to issue a third party notice, whereby they claimed an indemnity from the third parties on the ground that the 1,000 cases of oranges were delivered in return for and in consideration of an undertaking in writing, and, under the terms of this undertaking, the third parties agreed to indemnify the defendants against all consequences of delivery.

By their defence, delivered on February 7, 1958, the defendants denied liability, alleging that the bill of lading was not a

contractual document, and that the plaintiffs in shipping the oranges were acting as the agents of the third parties who were the charterers of the *Result* under a charterparty dated October 25, 1957.

On February 7, 1958, the third parties issued a summons applying for the third parties to be added as co-defendants, and, at the hearing of the summons before the Admiralty Registrar, put in an affidavit sworn by one Nello Simoni, a director of the third parties.

In his affidavit Simoni deposed to the following facts: The 1,000 cases of oranges in question were part of the subject-matter of a contract, made on or about October 23, 1957, between the plaintiffs and the third parties, whereby the third parties agreed to purchase 6,000/7,000 cases of oranges at a certain price f.o.b. Almeria. The third parties chartered the *Result* for the carriage of these oranges with other goods of theirs to the United Kingdom. An agreement was made with a representative of the plaintiffs that payment for the oranges was to be made in part by an irrevocable credit, opened by the third parties in favour of the plaintiffs, and that the balance should be paid in London within 24 hours of the goods being delivered in the United Kingdom. The third parties opened a credit in respect of 3,500 cases of oranges and cabled the plaintiffs nominating the *Result* to load 3,500 cases and the *Juno* to load another 3,500 cases. A further credit was then opened in respect of the 3,500 cases to be shipped on board the *Juno*. Only 1,000 cases were available for shipment on board the *Result* and none were available for shipment on board the *Juno*. By reason of the plaintiffs' breach of their contract the third parties suffered damage, consisting of the loss of freight and loss of profit on the 2,500 cases not shipped on board the *Result*, and loss of profit on the 3,500 cases not shipped on board the *Juno*.

Simoni concluded his affidavit by asking for an order that the third parties be added as defendants in the action so that the third parties will be in a position to counterclaim against the plaintiffs.

The Admiralty Registrar ordered that the third parties be added as co-defendants in the action and that the writ of summons be amended accordingly. At the same time the registrar issued third party directions ordering that the third parties be at liberty to appear at the trial of the action, and to take such part as the judge shall direct, and be bound by the result of the trial.

The plaintiffs appealed against the order of the registrar ordering that the third parties be joined as co-defendants in the action.

After hearing argument in chambers Willmer J. adjourned the summons for judgment in open court.

H. V. Brandon for the plaintiffs.

A. E. Bolton (*Sebag Shaw* with him) for the third parties.

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The following authorities and cases were cited in argument: Carver's Carriage of Goods by Sea, 10th ed., pp. 707–710; The Annual Practice, 1958, pp. 324 and 348; Benjamin on Sale, 8th ed., pp. 381–382; *Norris* v. *Beazley* [1]; *Vavasseur* v. *Krupp* [2]; *Eyre* v. *Moreing* [3]; *Byrne* v. *Brown* [4]; *Moser* v. *Marsden* [5]; *Montgomery* v. *Foy, Morgan & Co.* [6]; *McCheane* v. *Gyles (No. 2)* [7]; *Norbury Natzio & Co. Ltd.* v. *Griffiths* [8]; *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.* [9]; *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* [10]; *Atid Navigation Co. Ltd.* v. *Fairplay Towage and Shipping Co. Ltd.* [11]; *Amon* v. *Raphael Tuck & Sons Ltd.* [12]; *Edison & Swan United Electric Light Co.* v. *Holland.* [13]

Cur. adv. vult.

Willmer J. read the following judgment: This is an appeal from an order made by the Admiralty Registrar on February 14, 1958, whereby it was ordered that the third parties be added as co-defendants in the action and that the writ of summons be amended accordingly.

His Lordship referred to the matters relied on in the statement of claim, the defence and the third party notice. After stating the facts deposed to by Nello Simoni, a director of the third parties, his Lordship continued: At the same time as the registrar made the order now appealed from, he issued third party directions, whereby it was ordered inter alia that the third parties should be at liberty to appear at the trial of the action and take such part as the judge should direct and be bound by the result of the trial.

It was intimated to me by counsel for the plaintiffs that the plaintiffs do not accept as accurate Simoni's version of the arrangement made with regard to the terms of payment, but contend that the third parties failed to open a credit in accordance with the arrangement which the plaintiffs say was made. It was, however, conceded that for the purposes of this summons I must proceed on the basis that the facts deposed to by Simoni are true.

I was informed that at the hearing before the registrar the parties did not attend by counsel, and that the registrar heard only a brief argument, in the course of which none of the authorities was called to his attention. I have had the benefit of a very full argument by counsel for both the plaintiffs and the third parties, in the course of which my attention has been

[1] (1877) 2 C.P.D. 80.
[2] (1878) 9 Ch.D. 351.
[3] [1884] W.N. 58.
[4] (1889) 22 Q.B.D. 657; 5 T.L.R. 255.
[5] [1892] 1 Ch. 487.
[6] [1895] 2 Q.B. 321; 11 T.L.R. 512.
[7] [1902] 1 Ch. 911.
[8] [1918] 2 K.B. 369.
[9] [1945] 2 All E.R. 211.
[10] [1951] Ch. 33; 66 T.L.R. (Pt. 2) 559; [1950] 2 All E.R. 605.
[11] [1955] 1 W.L.R. 336; [1955] 1 All E.R. 698.
[12] [1956] 1 Q.B. 357; [1956] 2 W.L.R. 372; [1956] 1 All E.R. 273.
[13] (1889) 41 Ch.D. 28; 5 T.L.R. 294.

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called to a number of authorities, including the recent judgment of Devlin J. in *Amon* v. *Raphael Tuck & Sons Ltd.*,[1] where all the previous authorities are reviewed. It is now contended on behalf of the plaintiffs, (1) that in the circumstances of this case there is no jurisdiction to make an order, against the wish of the plaintiffs, adding the third parties as defendants, and (2), alternatively, if there is jurisdiction, it is a jurisdiction which the court, in the exercise of its discretion, ought not to exercise on the particular facts of this case.

The rule providing for the joinder of additional parties is R.S.C., Ord. 16, r. 11. It is not, I think, disputed that the third parties are entitled to the order sought only if they can bring themselves within the terms of that rule. The rule—omitting unnecessary words—provides as follows: "No cause "or matter shall be defeated by reason of the misjoinder or "nonjoinder of parties, and the court may in every cause or "matter deal with the matter in controversy so far as regards "the rights and interests of the parties actually before it. The "court or a judge may, at any stage of the proceedings, either "upon or without the application of either party, and on such "terms as may appear to the court or a judge to be just, "order that . . . the names of any parties, whether plaintiffs "or defendants, who ought to have been joined, or whose "presence before the court may be necessary in order to enable "the court effectually and completely to adjudicate upon and "settle all the questions involved in the cause or matter, be "added. . . . Every party whose name is so added as defen-"dant shall be served with a writ of summons . . . and the "proceedings as against such party shall be deemed to have "begun only on the service of such writ. . . ."

Having regard to the terms of the rule, it appears to me that the questions to be determined on this summons are these. First, is the cause or matter liable to be defeated by the nonjoinder of the third parties as defendants? This, I think, means in effect: is it possible for the court to adjudicate upon the cause of action set up by the plaintiffs, unless the third parties be added as defendants? Secondly, are the third parties persons who ought to have been joined as defendants in the first instance? Thirdly, and alternatively, are the third parties persons whose presence before the court as defendants will be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter?

To each of these three questions the third parties contend that the answer must be in the affirmative. As to the first question, it is contended that the real issue between the parties turns upon the matters alleged in Simoni's affidavit, which not only affect the right of the third parties to succeed on the counterclaim sought to be set up, but also govern the question as

[1] [1956] 1 Q.B. 357; [1956] 2 W.L.R. 372; [1956] 1 All E.R. 273.

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to the plaintiffs' right of property in the oranges, which lies at the root of the cause of action set up by them. In such circumstances it is argued that unless the third parties are added as defendants, so that they can prove the facts alleged and set up their counterclaim, the cause or matter will be defeated. As to the second question, it is argued that the third parties ought to have been joined as defendants in the first instance, in the sense that a plaintiff, who deliberately chooses not to join as a defendant a party against whom, if his version of the facts is true, he has a cause of action, must take the risk of an application by such party to be joined. As to the third question, it is contended that, for the reasons already given, the court cannot effectually and completely adjudicate upon and settle all the questions involved in the cause or matter, unless the third parties are added as defendants and given the opportunity of asserting their counterclaim in these proceedings.

Many of the authorities in which Ord. 16, r. 11, has been considered were cited to me in the course of the argument. I do not find it necessary to refer to them in detail in this judgment, for they were exhaustively reviewed by Devlin J. only two years ago, in *Amon* v. *Raphael Tuck & Sons Ltd.*,[2] to which I have already referred. As pointed out by Devlin J. the earlier authorities are by no means easy to reconcile, and broadly speaking it is true to say that two views have been expressed as to the scope of the rule. Devlin J. himself, after reviewing the authorities, held himself bound by the decision of the Court of Appeal in *Moser* v. *Marsden*[3] to decide in favour of what he called the narrower construction of the rule. This involved that he was unable to follow certain dicta, notably of Lord Esher in *Montgomery* v. *Foy, Morgan & Co.*,[4] and *Byrne* v. *Brown*,[5] in which a wider and more liberal view of the construction of the rule was expressed. Having read and re-read the very full judgment of Devlin J. it is sufficient for me to say that I am in agreement with his analysis of the decided cases, and am content to follow his view as to the true construction of the rule, with which I am happy to express my agreement. My difficulty is to apply the provisions of the rule, as so construed, to the particular facts of this case, which seem to me to raise questions rather different from those that have arisen in any of the decided cases.

In seeking to apply the rule, it is useful, I think, to start by reminding oneself of what Lindley L.J., in *Moser* v. *Marsden*[6] described as the key to it. He said[6]: "In order to "properly understand the rule we must look at the whole of "it. It begins by saying, 'No cause or matter shall be "'defeated by reason of the misjoinder or nonjoinder of parties'

[2] [1956] 1 Q.B. 357.
[3] [1892] 1 Ch. 487.
[4] [1895] 2 Q.B. 321; 11 T.L.R. 512.
[5] (1889) 22 Q.B.D. 657; 5 T.L.R. 255.
[6] [1892] 1 Ch. 487, 490.

" —that is the key to the whole section: if the court cannot " decide the question without the presence of other parties, " the cause is not to be defeated. . . . " That observation may be read in conjunction with the useful note which appears in the Annual Practice,[7] among the notes to Ord. 16, r. 1, and which was referred to with approval by Wynn-Parry J. in *Dollfus Mieg et Compagnie S.A.* v. *Bank of England.*[8] The note says: " Generally in common law and Chancery matters " a plaintiff who conceives that he has a cause of action against " a defendant is entitled to pursue his remedy against that " defendant alone. He cannot be compelled to proceed against " other persons whom he has no desire to sue. . . .

" Generally speaking, intervention can only be insisted upon " in three classes of case, namely:

" (A) In a representative action where the intervener is one " of a class whom plaintiff claims to represent. . . .

" (B) Where the proprietary rights of the intervener are " directly affected by the proceedings. . . .

" (C) In actions claiming the specific performance of con- " tracts where third persons have an interest in the question " of the manner in which the contract should be performed."

It is not suggested that the facts of this case fall within class (A) or class (C). As to class (B), within which the third parties must bring this case if they are to succeed, it is, I think, proper to observe that (though this has apparently not so far been noted by the editors of the Annual Practice) the ambit of the class has been materially widened as a result of the decision of Devlin J. in *Amon* v. *Raphael Tuck & Sons Ltd.*[9] The effect of this decision is to include any case in which the order for which the plaintiff asks directly affects the intervener, not in his commercial interests, but in the enjoyment of his legal rights.

Applying this test, I do not see how it is possible to avoid the conclusion that the order asked for by the plaintiffs in this case does affect the third parties in the enjoyment of their legal rights. It is alleged by the plaintiffs in paragraph 1 of the statement of claim that the 1,000 cases of oranges in dispute were the property of the plaintiffs. This is an allegation which the plaintiffs will have to prove if they are to succeed on their claim. But it is an allegation which, I am assured by counsel for the third parties, the third parties are concerned to dispute; they wish, I am told, to contend that the property in the oranges had passed to them. I am bound to say that Simoni's affidavit is singularly uninformative on this aspect of the case. It contains no specific allegation that the property had passed, nor does it set out any facts from which the court could be invited to infer that the property had passed. Nor indeed does

[7] 1958 ed., p. 324.

[8] [1951] 1 Ch. 33, 39; 66 T.L.R. (Pt. 2) 559; [1950] 2 All E.R. 605.

[9] [1956] 1 Q.B. 357, 386.

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it in terms disclose any desire on the part of the third parties to be heard on the plaintiffs' claim to be the owners of the oranges. I think, however, that Mr. Bolton was justified in his submission that, although not stated in terms, it is implicit in the affidavit of Simoni that, according to his contention, the property had passed. At all events, I am prepared to give the third parties the benefit of the doubt, and on that basis it seems clear to me that the plaintiffs' claim is one that does affect the third parties in the enjoyment of their legal rights.

But this, in my judgment, does not conclude the matter. I still have to consider whether the third parties are persons whom it is necessary to add as defendants in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. I agree with the observation of Devlin J. in *Amon* v. *Raphael Tuck & Sons Ltd.*[10] that "The only reason which makes it *necessary* "to make a person a *party* to an action is so that he should "be bound by the result of the action, and the question to be "settled therefore must be a question in the action which "cannot be effectually and completely settled unless he is a "party." Here the third parties are already parties to the action and under the terms of the third party directions they are at liberty to appear at the trial and take such part as the judge shall direct. If they do desire to contest the plaintiffs' claim to be the owners of the 1,000 cases of oranges, this is a matter on which they will already have the right to be heard at the trial, and they will be bound by the result. It was submitted by Mr. Bolton that the fact of his clients being already third parties to the action is an entirely irrelevant consideration when the question at issue is one of jurisdiction. I cannot agree. The jurisdiction to add defendants depends on the rule, and the rule permits them to be added only when it is necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. So far as concerns the plaintiffs' claim in respect of the 1,000 cases of oranges the court is already in a position to do this with the action constituted as it is at present.

If that were all, it would be an end of the matter. But I have yet to consider the counterclaim which the third parties desire to put forward against the plaintiffs. It was very properly conceded by Mr. Brandon that, if the order asked for by the plaintiffs would directly affect the third parties in the enjoyment of their legal rights, it would not matter that the method sought to be adopted by the third parties to protect such legal rights was by way of counterclaim against the plaintiffs. But the counterclaim must be such as will serve to protect the legal rights threatened by the plaintiffs' action. I agree with Mr. Brandon's submission that the mere assertion of a counterclaim, in respect of matters which happen to be connected with the

[10] [1956] 1 Q.B. 357, 380.

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subject-matter of the original claim, does not make it necessary to add the third parties as defendants, unless the legal rights sought to be asserted by the counterclaim are rights which are directly affected by the plaintiffs' claim.

If the third parties here were seeking to assert a counterclaim in respect of the 1,000 cases of oranges which form the subject of the plaintiffs' claim, then I apprehend it might well be necessary to add them as defendants, so as to enable them to protect their legal rights in relation to the oranges, the subject-matter of the plaintiffs' claim. Suppose, for example, that the 1,000 cases of oranges with which the plaintiffs' claim is concerned had been delivered, not to the third parties, but to some other person, e.g., a warehouseman. If the third parties desired to assert a claim to the oranges, in opposition to the plaintiffs' claim, then I apprehend there could be no question but that the third parties ought to be added as defendants, so as to enable them to protect their rights by counterclaim. Such a case would be covered by the decision in *Montgomery* v. *Foy, Morgan & Co.*[11] But here no such state of affairs exists. The third parties have already had the oranges, the subject of the plaintiffs' claim. Their only concern with these oranges is to defeat the plaintiffs' claim for damages, and on this question they are, as third parties, already entitled to be heard.

The real desire of the third parties, as plainly appears from the affidavit of Simoni, is to assert a counterclaim, not in relation to the 1,000 cases of oranges which were shipped, and which form the subject of the plaintiffs' claim, but in relation to the remaining 6,000 cases, which were not shipped, and in respect of which it is alleged that the plaintiffs were in breach of their contract. It is true that, according to Simoni's affidavit, the 6,000 cases that were not shipped were the subject-matter of the same contract under which it is alleged that the 1,000 cases, the subject of the plaintiffs' claim, were purchased. But otherwise there is no connexion between the 6,000 cases, the subject-matter of the proposed counterclaim, and the 1,000 cases, the subject-matter of the plaintiffs' claim. The issue as to whether the plaintiffs were in breach of their contract in failing to ship the 6,000 cases, and whether, if so, the third parties are entitled to recover the alleged or any damages for such breach of contract, does not depend upon any question as to the passing of the property in any of the oranges. Assuming that the third parties are able to make good their allegation that the plaintiffs were in breach of their contract in failing to ship the further 6,000 cases, the decision of that question will not in any way affect the issue as to whether the property in the 1,000 cases actually shipped passed to the third parties, or whether the assertion of the plaintiffs' claim affects the third parties in the enjoyment of their legal

[11] [1895] 2 Q.B. 321.

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rights in relation to the subject-matter of that claim. The determination of the issue as to the plaintiffs' right to sue in respect of these 1,000 cases remains quite unaffected by the success or failure of the third parties' proposed counterclaim. So far as the proposed counterclaim is concerned, therefore, this is an entirely different case from *Montgomery* v. *Foy, Morgan & Co.*,[12] in which the proposed counterclaim did in fact relate to the same subject-matter as the plaintiffs' claim.

In these circumstances I am unable to see how the adding of these third parties as defendants, so as to enable them to put forward their proposed counterclaim, is necessary so as to enable them to protect their legal rights in relation to the subject-matter of the plaintiffs' claim. Nor is it necessary so as to enable the court to adjudicate upon and settle the questions involved in the cause or matter, which, as pointed out by Devlin J. in *Amon* v. *Raphael Tuck & Sons, Ltd.*,[13] means "the action as it stands "between the existing parties."

In these circumstances, in my judgment, the third parties' application to be added as defendants must fail, because it is not shown that the cause or matter—i.e., the dispute arising in relation to the plaintiffs' claim—is liable to be defeated by the non-joinder of the third parties as defendants, nor is it shown to my satisfaction that the third parties are persons who ought to have been joined as defendants in the first instance, or that their presence before the court, as defendants, is necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter, within the meaning of the rule. I do not think that upon any view it can be said that the third parties are persons who ought to have been joined as defendants in the first instance. On this point I agree with Mr. Brandon's submission that the test is whether, under the old practice, a plea in abatement would lie. It is not to be forgotten that the remedy sought by the plaintiffs is a remedy in rem against the ship. This is a remedy which prima facie they are entitled to pursue, and I do not think it can be said that the action is not properly constituted because it is brought only in rem against the ship.

It may be thought that this result produces the maximum of inconvenience—that it would be sensible and reasonable, and would save unnecessary costs, if the third parties could be added as defendants, so that all the questions in issue between the parties can be dealt with at one and the same time. It is possible, of course, that the third parties will be able to achieve this result in another way, e.g., by starting a fresh action against the plaintiffs and applying to consolidate, or at least to have the actions tried together. As to this I say nothing. I am dealing with this matter as a question of jurisdiction. Jurisdiction depends on the terms of the rule, and not upon what I may or

[12] [1895] 2 Q.B. 321. [13] [1956] 1 Q.B. 357, 369.

may not think would be a convenient course in all the circumstances. For the reasons which I have endeavoured to state, I hold that the third parties' application is not within the rule, and that accordingly there is no jurisdiction to make the order asked for.

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The appeal will therefore be allowed, and the order made by the registrar set aside.

Appeal allowed.

Solicitors: *William A. Crump & Son; Roche, Son & Neale.*

A. S-R.

[COURT OF APPEAL.]

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Feb. 11, 12, 13, 28.

Lord Goddard C.J., Morris L.J. and McNair J.

Mines and Minerals—Coal—Breach of statutory duty—Roof and sides—Fall of coal from coal face—Duty to make secure side of working place—Whether "coal face" a "side"—Meaning of "secure"—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49.

The plaintiff was employed as a ripper by the defendants in their coal mine at a coal face which was being worked on the "long "wall" system, the face being about 150 yards long and about six feet high. While the plaintiff was walking along the coal face a large piece of coal came away from the top of the face, striking and injuring the plaintiff. The plaintiff brought an action for damages against the defendants, alleging that the defendants were in breach of their statutory duty under section 49 of the Coal Mines Act, 1911,[1] in that they had failed to make secure the roof and sides of every travelling road and working place, and had caused the plaintiff to walk along the coal face at a time when the face had not been made secure. It was admitted by the defendants that the place where the incident had occurred was a "working place" within the meaning of section 49 of the Act. Salmon J. gave judgment for the defendants. The plaintiff appealed:—

Held, dismissing the appeal (Morris L.J. dissenting), that the obligation imposed by section 49 of the Coal Mines Act, 1911, to make secure the sides of a working place did not extend to the coal face.

Per McNair J. It seems to me to be wholly unrealistic and artificial to say that, when a man is employed to bring down a face of coal in front of him, that face of coal is the side of a working place which has to be made secure, when the whole object of the operation is to make it insecure.

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

[1] Coal Mines Act, 1911, s. 49: "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

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Elliot v. *National Coal Board*, 1956 S.C. 484 applied.

Per Morris L.J. In my judgment it would be strange if the section were inapplicable to cover the place where the need to achieve security is most marked.

Decision of Salmon J. [1957] 1 W.L.R. 973; [1957] 3 All E.R. 368n. affirmed.

Appeal from Salmon J. sitting at Shropshire Summer Assizes.[2]

The plaintiff was an underground worker in the defendants' coal mine, where he was employed as a ripper. On December 2, 1955, the plaintiff was detailed to walk along the coal face to help fill-off coal which had been left by the previous shift. The coal face, which was being worked on the "long wall" system, was about 150 yards long and about 6 feet high. Whilst the plaintiff was walking along the coal face, a large piece of coal came away from the top of the face. Apparently it fell first on the plaintiff's shoulder, knocking him down and rendering him unconscious, and then on his legs, breaking one of them. The plaintiff brought an action for damages against the defendants alleging that the defendants were in breach of their statutory duty under section 49 of the Coal Mines Act, 1911, to make secure the side of a working place. Alternatively, the plaintiff claimed damages for negligence at common law. Salmon J. gave judgment for the defendants. The plaintiff appealed.

This report is confined to the allegation that the defendants were in breach of their statutory duty.

Gerald Gardiner Q.C., *A. E. James* and *I. J. Black* for the plaintiff.

John Thompson Q.C. and *G. K. Mynett* for the defendants.

No cases were cited in argument other than those which are referred to in the judgment.

Cur. adv. vult.

February 28. The following judgments were read.

Morris L.J. On December 2, 1955, the plaintiff, who was an underground worker in the employment of the defendants, the National Coal Board, was a member of a shift that began work at 7 a.m. At about 7.45 a.m., whilst the plaintiff was walking near to the coal face, a large piece of coal fell upon him and he was injured. The piece of coal was about 12 feet in length and about 2 feet 6 inches thick. The falling coal apparently hit his shoulder and knocked him down. He was rendered unconscious and the coal fell on his legs, one of which was broken. He brought an action against the National Coal Board claiming damages for his injury. The case was heard before Salmon J., who dismissed the claim, while assessing the damages in the sum of £600 had they been recoverable.

[2] [1957] 1 W.L.R. 973; [1957] 3 All E.R. 368n.

The claim of the plaintiff was put, first, on the basis of breach of statutory duty and, secondly, on the basis of common law negligence. The plaintiff was employed at the Granville Colliery at Donnington in Shropshire. At the period of his accident work was proceeding at a coal face which was known as " B " panel double face. That face was being worked on the long wall system. The face in question was about 150 yards long and the seam of coal was approximately 6 feet in height. Mechanical coal cutting was in operation. The general system involved progressive winning of the coal from the whole 150 yards length of the seam. This meant that by systematic working there was a gradual advance from day to day of the coal cutting machines and of the conveyors, and also of the main gate road head and of the built-up packs. The system of working demanded three separate shifts. These shifts were operated in the following way: One shift worked from 3 p.m. until 10.30 p.m. That was the cutting shift. During that period mechanical cutting took place. The seam was cut approximately 6 inches from the ground. The cut was to a depth into the seam itself of about 4 feet 6 inches. When the coal in a seam is thus cut, some of it then or soon afterwards falls to the ground. Where it does not so fall wedges are placed in position to support the undercut coal. These are known as " holding props." If the coal is liable to fall from the outer side of the face, then supports are put in position. These are known as " sprags " and they are placed diagonally, where necessary, against the side of the face. The succeeding shift came on at 10.30 p.m. and worked until 7 a.m. That shift was known as the " filling " shift. The task of those on the filling shift was to win and get away the coal that could be extracted as a result of the previous cutting. Some of the coal would be on the ground and for the remainder it was extracted by appropriate means. It is manifest that as such work proceeds continuous and systematic supporting of the roof and sides is necessary. As the coal is obtained it is put on the conveyor which leads to the conveyor in the main gate or supply road. The next shift came on at 7 a.m. and worked until 3 p.m. The main normal task of those employed in that shift was to make all the necessary preparations for the next stage of advance into the coal face. The supply road had to be advanced and its roof and sides made secure. There might be a need to remove stone so as to give the necessary height of roof in the supply road. Packs would have to be built up at suitable intervals so as to support the roof in the space created by the extraction of coal. Stone secured in the process of raising the height of the supply road could be used for building up the packs. The necessary preparations would have to be made near to the then existing face of coal which in the succeeding shift would be operated on by the cutters and the fillers. Hence rails would have to be advanced to new positions nearer to and parallel with the new coal face. At the end of the work done during such third shift, preparations would

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be complete to enable new cutting to be made at the coal face to a new further depth of 4 feet 6 inches so as to enable further coal to be secured. So the cycle of operations would continue. As the coal was extracted, so, from time to time and constantly, had support to be provided in place of the support previously given by the extracted coal.

Under a system of long wall coal mining some of the supports which are used must in the nature of things be in position for only a short time. As advance continues the places where men once worked are left behind in the area in the rear of the packs which is known as the "waste." The supply roads are continually advancing. They will be in use so long as the seam is being worked. They require systematic and progressive attention so as to ensure that the newly added daily extensions are secure for their purpose.

The plaintiff was, as a ripper and packer, a member of the third shift to which I have referred. When he went to work on the morning of December 2, 1955, he found that the previous shift had not been able to do all that they would normally have done. There had been some trouble with a conveyor. As a result the coal had not been won and removed. Accordingly it was necessary for the men on the third shift to take away coal before they could perform their normal and expected tasks. The plaintiff was directed to go to the coal face. He went along the supply road and then turned to his right and proceeded some 50 yards. He was intending to proceed further when the piece of coal fell upon him. He had passed a number of men on his shift who had already begun their work of "filling-off" the coal.

It is provided by section 49 of the Coal Mines Act, 1911, as follows: "The roof and sides of every travelling road and working "place shall be made secure, and a person shall not, unless "appointed for the purpose of exploring or repairing, travel on "or work in any travelling road or working place which is not so "made secure."

It has not been in dispute that the plaintiff was at his "working place" at the time of the accident. In their defence in the action the defendants admitted "That on the date and at "the time and place alleged in the statement of claim a large "lump of coal fell or slid from the coal face and struck the "plaintiff. The place where he was struck was a working place "within the meaning of section 49 of the Coal Mines Act, 1911." The question therefore arises whether the large piece of coal that fell on the appellant came from the side of a working place. If it did, it cannot be doubted that the side had not been made secure. It is said, however, that the coal at the coal face itself should not be regarded as constituting either the roof or the sides of a working place. A question of much importance is here raised. It is one that has received judicial consideration in a number of cases. Salmon J. held in this case that the defendants were not in any breach of their statutory duty for he held that section 49

of the Act does not apply to the coal face itself. He thought that since the whole object of mining is to take down the coal face, it should be held that the section is not applicable to men actually working at the coal face.

Though I am conscious that there is much judicial support (though not binding on this court) for the view of the learned judge, I do not find myself able to share it. In my judgment the section applies to every working place. The section is imperative. It creates an absolute obligation. I see no warrant for reading into the section any words of exclusion. In my judgment it would be strange if the section were inapplicable to cover the place where the need to achieve security is most marked. The section is in that Part of the Coal Mines Act, 1911, which contains provisions as to safety.

It is implicit in the work of extracting coal that some place or places will be made insecure. It is that very circumstance that makes it necessary to impose an obligation to make secure and also to have careful, elaborate and systematic rules in regard to safety and security. The whole operation of mining involves that there is a constantly changing situation. As insecurity is created, so now security must be provided. As the coal in a seam is taken away, so new support must be put in position to replace the support that has been removed.

It is, I think, important to have in mind that the obligation is that the roof and sides of a working place "shall be made "secure." This language involves that there is a state of insecurity that demands attention. The obligation is not to keep secure. Such an obligation might well be impossible of fulfilment in the course of coal mining operations. The very nature of coal mining brings it about that in the process of removing coal from its resting place, there will be a withdrawal of support with consequential temporary instability and insecurity. But, in the interests of safety, the risks must be minimized and, accordingly, there is an absolute duty to make secure.

Under section 50 of the Coal Mines Act, 1911, certain rules have to be made. But the obligations under section 50 do not supplant the general obligation imposed by section 49 of the Act. A consideration of section 50 and of the rules made under it does, however, serve to illustrate that the roof and sides at the face itself are not excluded but are included. Subsection (1) of section 50, which refers to the roof at the working place, provides that "the roof under which any work of getting coal or filling "tubs is carried on shall be systematically and adequately "supported." The props or chocks used to support the roof must be set at such regular intervals and in such manner as may be specified in rules which are known as "Support Rules." It seems to me that the roof is that which is above a man who is getting coal or filling tubs. The area of the roof may extend as work progresses but the roof must not only be adequately but "systematically" supported. Subsection (4) of section 50, as

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substituted by the Coal Mines (Support of Roof and Sides) General Regulations, 1947, provides that the manager of a mine must make rules "specifying in relation to each seam of the mine, "particulars of the system or systems of controlling and support- "ing the roof and sides to be carried out in connection with the "face workings, the roadheads and the roads, respectively." If a man is working at the face it seems to me that that which is above him is the roof and that the exposed surfaces which are about him are the sides. The peril to which he is exposed is the peril that something may fall on him either from the top or from the side. It is this very peril which he and all others must avert. That can only be done by the systematic and continuous erection of new supports in places where, as a result of the mining operation they are newly needed. Accordingly, there must be compliance with the general obligation imposed by section 49 of the Act, and also with any specific or detailed obligations imposed by section 50. In the Support Rules which were made in reference to this working face, it was provided that "When the fall of roof or side involving the displacement or "breakage of supports has occurred in any place where any "person has to work or pass, any newly exposed roof or sides "shall at once (1) be dressed, if necessary, and (2) be secured by "supports before the work of clearing any debris, other than such "work as is necessary to set supports, is begun." It would seem to me to be very strange if this did not cover a newly exposed roof or side consisting of coal at the working face. There will be a newly exposed side when coal is taken down. Those employed in the filling shift are each assigned a stint which consists of a certain number of yards of frontage of the coal face. A man may begin to extract coal from the centre part of his stint and may at first work inwards so that, after a time, he will have coal in front of him and on either side of him.

As he progresses so must he make the roof and sides secure. If a man's work involves that he is engaged in the very process of making secure, then (unless he has reason to complain of the conduct of anyone else) he cannot assert that the defendants are in breach of section 49 of the Act. The position then is that the defendants, through his instrumentality, are engaged upon the actual operation of making secure so as to comply with section 49: see *Walsh* v. *National Coal Board*.[1]

Provision is made in the Coal Mines Act, 1911, for inspections prior to the commencement of work. Subsection (1) of section 64 is as follows: "The fireman, examiners, or deputies of a mine "shall, within such time not exceeding two hours immediately "before the commencement of work in a shift as may be fixed "by the regulations of the mine, inspect every part of the mine "situated beyond the station or each of the stations, [as to which "see section 63] and in which workmen are to work or pass "during that shift, and all working places in which work is

[1] [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632.

" temporarily stopped within any ventilating district in which the " men have to work, and shall ascertain the condition thereof so " far as the presence of gas, ventilation, roof and sides, and " general safety are concerned."

I would think it very strange if such inspections of roof and sides of working places were not to include inspections of the actual face of the coal itself. That face, particularly if it has been undercut, may constitute a great source of peril for those who are sent there, if it is not made secure. It is further provided by subsection (3) of section 64 that there must be a full and accurate report not only as to gas, but as to " whether or not any, and, if " any, what defects in roofs or sides and other sources of danger " were observed." In the printed form which was used in this case to report after inspection, there is a heading " Condition of " roof and sides " followed by the words " State actual conditions " of (*a*) working faces and (*b*) roads, with location of any unsafe " place and action taken." This serves to illustrate the way in which the system was operated. The construction of the Act must, however, be determined upon a fair interpretation of the words which are used and of the context in which they are used.

In the present case, following the inspection made some time between 5 a.m. and 6.30 a.m., it was recorded that the condition of roof and sides was safe. The word used in section 49 is " secure," and no synonym or paraphrase of that word need be used. In its context it does not seem to me to denote an immutable or permanently static condition of affairs. What is required, in my judgment, is that when a man is either on a travelling road or at a working place, that which is on top of him and that which is around him shall be made so that it does not fall upon him.

In the present case the plaintiff was at a point where the work of attacking the face of the coal had not in his shift yet begun. The coal face should, in my judgment, have been made secure to enable the men on the new shift to approach it or pass along it. The men on the last shift should have made it secure before they left. As the plaintiff proceeded along he had the coal face on his left, and on his right hand he had at intervals a number of built-up packs. He was admittedly at a working place. I do not understand it to be doubted that if some stone from one of the packs had fallen on his right shoulder, the defendants would have been in breach of section 49 of the Act. It is said, however, that because the insecure thing that struck him on his left shoulder consisted of coal from the face, there was no breach of section 49. For the reasons that I have given I cannot agree with this submission. It would seem to me to be unfortunate if it were held that the obligation to make secure the roof and sides of a working place does not apply if the working place is at a coal face itself. That involves reading something into the statute. It would involve diminishing the

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scope of the statutory obligation at the very place where, in the interests of safety, compliance with it is most needed.

I have not thought it appropriate to refer to or to consider the Mines and Quarries Act, 1954, the provisions of which are now in operation in the place of those contained in the Coal Mines Act, 1911, now repealed. The latter Act was in force at the times which are relevant in this case.

Though the obligation under section 49 is absolute (see *Edwards* v. *National Coal Board* [2]), a measure of protection is given by subsection (8) of section 102, which provides that "The "owner of a mine shall not be liable to an action for damages "as for breach of statutory duty in respect of any contravention "of or non-compliance with any of the provisions of this Act if "it is shown that it was not reasonably practicable to avoid or "prevent the breach." As, in my judgment, it was shown that the defendants were in breach of section 49, the question arises whether they are protected from liability in this case on the ground that it was not reasonably practicable to avoid or prevent the breach. As the learned judge was of opinion that there was no breach, it was not necessary for him to express a conclusion in regard to this matter. Authoritative guidance as to the considerations to be had in mind is to be found in the case of *Marshall* v. *Gotham Co. Ltd.* [3] If the view that I have formed in regard to the statute is the correct view, then the question arises whether there is sufficient or satisfactory material upon which to reach a conclusion as to whether it was reasonably practicable to avoid or prevent the breach. This matter is to some extent bound up with an issue that arises in regard to the common law aspects of the case.

[His Lordship then considered the plaintiff's claim in negligence, and continued:] The conclusion that I have reached is that it was shown that there was a breach of the obligation imposed upon the defendants by section 49 of the Coal Mines Act, 1911. In my judgment it becomes necessary on this basis to have a further hearing in order to decide whether the defendants are exculpated from liability on the basis of subsection (8) of section 102, i.e., whether the defendants can show that it was not reasonably practicable to avoid or prevent their breach of duty in failing to make secure the roof and sides of the place where the plaintiff was when he was injured.

For the reasons that I have given, I would allow the appeal and order a further hearing.

McNair J. considered the claim at common law and continued: I now turn to the second point raised in the appeal, viz., whether it is established that the defendants committed in respect of the place from which the coal fell, a breach of the statutory

[2] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[3] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

duty imposed by section 49 of the Coal Mines Act, 1911. [His Lordship read section 49 of the Act.]

It is conceded that the obligation imposed upon the owner of a mine by this section is an absolute obligation qualified only by section 102 (8) of the Act, which provides that "The owner of a "mine shall not be liable to an action for damages as for breach "of statutory duty in respect of any contravention of or non-"compliance with any of the provisions of this Act if it is shown "that it was not reasonably practicable to avoid or prevent the "breach."

The argument for the plaintiff on this branch of the case can be stated in the simplest form as follows: (1) The defendants by their defence admit that the place where the plaintiff was struck was a working place within the meaning of this section; (2) as he walked along the coal face to the place where he was struck, he had on his left hand side the coal face which was a side of this working place; (3) the fact that the coal which struck him fell from the coal face established that the face had not been made secure.

The judge rejected the argument in a short passage of his judgment which reads as follows: "The main point, however, "remains that this section cannot be intended to apply to the "coal face because the whole object of mining is to take down "the coal face; therefore, a section that refers to an obligation to "make secure the sides of a working place, and prohibits anyone "from working in such a place which has not been so made "secure, cannot, in my judgment, be intended to apply to the "coal face itself." After stating this conclusion, the learned judge said that if for the word "secure" the word "safe" had been substituted, he would have decided the point the other way. Though I agree with the learned judge that "secure" here does not mean "safe" but means a physical condition of stability which will ordinarily result in safety, I, myself, do not feel that the substitution of the word "safe" would affect the problem.

The question whether a coal face or a ripping face is the side of a working place within the meaning of this section had, before the decision of Salmon J. in this case, been considered by three judges of the Queen's Bench Division on circuit and two Scottish judges of the Outer House, and since Salmon J.'s decision I have considered a similar but not identical point, also on circuit; and with one possible exception (an unreported decision of Byrne J. in *Penny* v. *National Coal Board* [4]) those decisions have been consistent in holding that the coal face is not such a side. The most fully reasoned judgment on this point is to be found in the opinion of Lord Cameron in *Elliot* v. *National Coal Board*,[5] which was followed by Lord Wheatley in *Young* v. *National Coal Board*.[6] Neither of those decisions has, we were informed, been considered by the Inner House.

[4] Unreported, January 27, 1955.
[5] 1956 S.C. 484; 1957 S.L.T. 193.
[6] Unreported, July 5, 1956.

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In *Elliot* v. *National Coal Board*[7] the pursuer was undoubtedly injured by a fall of substance of some kind which occurred while he was working in a working place. The pursuer alleged that it was a heavy fall of stone from the opencast above the coal face, but in his judgment Lord Cameron said that it was by no means clear from the evidence from what precise portion of the area of the opencast the fall came, and in particular, whether it was proved to have come from the face of the opencast. But, in view of the fact that the case proceeded on the basis of unchallenged fact that whatever fell on the pursuer fell from the face in the area of the opencast, Lord Cameron held that the critical issue was "whether the face of this opencast is compre-"hended within the statutory words 'sides of . . . a working "'place.'" Lord Cameron, after observing that "the whole "purpose of longwall method of mining is to cut coal by advancing "the face and to do so by progressive destruction and removal of "the face itself, a process which is the complete antithesis of sup-"porting and making the face secure, and that consequently the "condition as well as the function of the face in longwall working "is totally different from that of the sides proper or the rear or "waste of the working place," turned to the precise construction of the section and said: "Now the Act does not define roof or "sides, but it is plain enough that at least in one important "particular they can be differentiated from the face, because "once a roof, or what is indisputably a side of a working place "or a travelling road is in existence, it will not be subject to "interference or deliberate destruction for the purpose of winning "coal from it, and, therefore, measures already taken for its "security may be expected to have a certain quality of per-"manence. Therefore I think that in the circumstances the "effect of specific reference to portions of a working, which in "the sense I have mentioned, are markedly different from the "face itself is to suggest that the face from which the coal is "won may have been deliberately excluded from the requirement "of this peremptory and penal section and is not comprehended "sub silentio in the word 'sides'." After referring to the provisions of section 50, and in particular to those provisions referring to the Support Rules, relating to the support of roof and sides of face workings, and the absence of any requirement that the face itself shall be supported, he came to the conclusion that "by "limiting the application of section 49 to the roof and sides of "travelling roads and working places the legislature excluded "from the scope of this obligation of security imposed by that "section the face of the working place itself." Lord Whaetley, in *Young* v. *National Coal Board*,[8] expressed his view as follows: "The purpose of the section is manifestly to secure that where a "person has to traverse a road or work at a working place, his "surroundings will be made secure to prevent a fall of material, "whether it be coal or stone or dirt or anything else which might

[7] 1956 S.C. 484.

[8] Unreported, July 5, 1956.

" endanger his safety. There is thus envisaged the taking of " precautions to provide a permanent security to prevent the " occurence of such an event, but I cannot see how that can be " extended to embrace the coal face when the whole purpose of " this mining operation is systematically and continuously to strip " the face and bring down from the face the very materials " against which the workman has otherwise to be protected. " From that point of view it would make nonsense of the section " to include the face in the expression 'sides,' and, in my " opinion, the section cannot be deemed to provide for such an " inclusion."

Turning now to the English cases, Jones J., in *Boyd* v. *National Coal Board*,[9] observed that the section did not apply to a fall from the face itself. Oliver J., in *Green* v. *National Coal Board*,[10] stating that it was perfectly obvious that it would be impossible to maintain that the working face should be made secure when the whole object of the work was to knock it to pieces, held that a man injured by the fall of a stone from the face was not protected by section 49 of the Act. Byrne J., in *Penny* v. *National Coal Board*,[11] after holding that a cutter man employed at the coal face was entitled to recover at common law in respect of injuries he suffered when an overhanging stone fell from the ripping face, on the ground that the defendants knew of the danger of the overhanging stone but took no steps to ensure that the place was rendered safe, also held that the plaintiff was entitled to recover under section 49 on the ground that the face was a side of a working place, stating that, if any other construction were to be put upon this section, it would follow that so far as the coal face of any mine is concerned, the coal face could be left without any support of any kind without committing a breach of the statute. With respect, I consider this reasoning is fallacious, since it overlooks the protection given by the Support Rules under section 50 (2). I refrain from commenting upon my own decision in *Carney* v. *National Coal Board*.[12]

In view of the decisions of the Scottish courts and the desirability of consistent decisions in both jurisdictions, it would, in my judgment, be wrong for this court to arrive at a contrary decision on this matter of construction, unless those decisions and the reasoning upon which they are based, are in the view of this court plainly erroneous.

In my judgment, so far from being plainly erroneous, they are correct. It seems to me to be wholly unrealistic and artificial to say that, when a man is employed to bring down a face of coal in front of him, that face of coal is the side of a working place which has to be made secure, when the whole object of the operation is to make it insecure. The fallacy in the plaintiff's argument seems to me to lie in the false assumption that every working place underground has a roof and four sides. In truth, the coal

[9] Unreported, December 14, 1954.
[10] Unreported, December 20, 1955.
[11] Unreported, January 27, 1955.
[12] Unreported, December 16, 1957.

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face upon which he is operating is part of his working place itself, and does not cease to be part of his working place if, in the process of breaking in he makes a hole in the face and then proceeds to work either way to the boundaries of his stint. No doubt in the progress of his work at the face, he will, according to prudent mining practice, insert props and sprags to provide temporary security from the risk of falls from above him or from his sides, but such props or sprags would not be put up in discharge of the defendants' obligation to make the roof and sides of the working place secure. The cutter who makes the initial cut in the face, thus rendering the face insecure, his mate who inserts the holding props under the uncut coal, the shot-firer who, in cases of necessity still further reduces the stability of the face, are all working in a working place, but it would be absurd, as I see it, to hold that the statute imposes upon the defendants in all those cases the absolute obligation of making the face secure.

Indeed, on the evidence in this case, it is plain that on this particular seam after the cutter has done its work the face, in many places at least, would not even have the characteristic of a side, viz., a vertical plain surface, since a substantial portion of the face—put by one witness as 80 per cent.—" rates off " or falls down as soon as the cutter passes, and lies with the gummings made by the cutter on the floor.

In my judgment, accordingly, the appeal should be dismissed.

Lord Goddard C.J. (read by Morris L.J.): I agree with the judgment of McNair J. and would dismiss this appeal. The point of general importance in the case is as to the true construction of section 49 of the Coal Mines Act, 1911, which hitherto has not been the subject of a decision by an appellate court, either in England or Scotland. Considering how long the section has been in force, it is remarkable that the question whether the coal face could itself constitute the side of a working place, does not appear ever to have been raised until December, 1954, when it was answered in the negative by Jones J. in *Boyd* v. *National Coal Board*.[13] To the same effect were judgments of Oliver J. in *Green* v. *National Board*[14] and McNair J. in *Carney* v. *National Coal Board*,[15] though a contrary view was taken by Byrne J. in *Penny* v. *National Coal Board*.[16] In 1956 there were two decisions in the Outer House of the Court of Session, first by Lord Cameron in *Elliot* v. *National Coal Board*,[17] and then by Lord Wheatley to the same effect in *Young* v. *National Coal Board*.[18] I find the judgment of Lord Cameron entirely convincing, as did Lord Wheatley, and can add nothing to it. I cannot think that the coal face which is being worked can properly be described as the side of the working place.

[13] Unreported, December 14, 1954.
[14] Unreported, December 20, 1955.
[15] Unreported, December 16, 1957.
[16] Unreported, January 27, 1955.
[17] 1956 S.C. 484.
[18] Unreported, July 5, 1956.

[His Lordship then considered the plaintiff's claim in negligence, and continued:] I see no reason for reversing the judge's decision that no claim at common law had been established.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Stafford Clark & Co. for Hooper & Fairbairn, Dudley; F. W. Dawson, Dudley.*

[COURT OF APPEAL.]

LEWIS *v.* LEWIS.

Husband and Wife — Practice (in matrimonial causes) — Discretion statement—Admission of adultery in cross-examination—Whether questions on adultery objectionable—Leave to amend answer to alleged adultery based on petitioner's admission in evidence—Whether party seeking exercise of court's discretion entitled to defer evidence of adultery until after decision on issue of cruelty—Proper practice—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 32 (3) — *Matrimonial Causes Rules,* 1957 (1957 *No.* 619 (*L.*4)), *r.* 28 (5).

Husband and Wife—Practice—Amendment to allege adultery—Discretion statement—Amendment after admission in evidence of adultery.

Evidence—Incriminating question—Adultery—Whether question as to adultery of witness incriminating—Matrimonial Causes Act, 1950, *s.* 32 (3).

Husband and Wife—Divorce—Evidence—Adultery—Whether question as to adultery of witness incriminating—Whether relevant to issue of cruelty—Matrimonial Causes Act, 1950, *s.* 32 (3).

A husband, who had parted from his wife in April, 1954, presented a petition for divorce on the ground of her alleged cruelty, and by his prayer asked for the court's discretion to be exercised in his favour notwithstanding his own adultery. By her answer the wife prayed for a divorce, charging her husband with cruelty, and her particulars included a charge of cruelty on an occasion when she had accused him of philandering with other women shortly before they separated.

At the hearing the husband did not give evidence of his own adultery during his examination in chief; but in cross-examination he was asked whether he had committed adultery, and replied Yes. Despite objection being taken to that question, the commissioner allowed it to be put and also allowed a further question as to when the husband had committed adultery, to which he replied that it was after he had parted from his wife in April, 1954. A further question as to the person with whom the adultery had been committed was objected to and the commissioner upheld the objection.

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Leave was thereupon sought by the wife to amend her answer by adding a charge of adultery "on some day or days unknown, save "that it was after April, 1954, at a place or places unknown . . . "with a woman or women whose name or names are unknown." The commissioner granted the wife leave to amend, but gave leave to appeal from that decision, and adjourned his decision on the issues raised in the suit:—

Held, dismissing the appeal, (1) that the questions on adultery were not objectionable as incriminating and in this case were outside the statutory protection afforded by section 32 (3) of the Matrimonial Causes Act, 1950.[1]

Blunt v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253; 58 T.L.R. 356; [1942] 2 All E.R. 187 applied.

(2) That the questions were not irrelevant to the issue of cruelty in view of the allegation of philandering in the wife's answer; accordingly they had rightly been admitted by the commissioner.

(3) That in those circumstances, there seemed to be no reason for objecting to the exercise of the discretion by the commissioner in giving leave to amend at that stage. Where there is no allegation of adultery in matrimonial proceedings, but only an indication in the prayer that discretion will be sought, and evidence of adultery is then given in the witness-box, leave to amend to allege adultery will not be given as of right; but it is convenient that such leave shall be given, provided that no injustice will thereby be done to the parties.

Clear v. *Clear* [1958] 1 W.L.R. 467; approving *Clueit* v. *Clueit* [1958] 1 W.L.R. 463; [1958] 1 All E.R. 417 applied.

(4) That the amendment charging adultery was not too vague, since it was based on an admission of adultery given in sworn evidence, and not merely on the contents of the prayer to the petition.

B. v. *B. and G.* [1937] P. 1; 52 T.L.R. 719; [1936] 2 All E.R. 1254 distinguished.

(5) That, as the fact of adultery was in this case relevant to the issue of cruelty, evidence of it ought to have been given by the petitioner in his evidence in its chronological place, for a court could not arrive at a finding on the issue of cruelty without having before it the evidence on adultery.

(6) There was no rule of practice entitling a petitioner in a matrimonial cause to defer giving evidence of his own adultery until the court had given judgment on the issues in the pleadings, particularly where cruelty was in issue; nor would such a practice be reasonable or desirable.

Interlocutory appeal by leave from Sir Harry Trusted, sitting as commissioner in divorce at Monmouth Assizes.

The parties were married in 1945. On March 14, 1957, the husband presented a petition for divorce on the ground of the wife's alleged cruelty. The acts of cruelty alleged included one,

[1] Matrimonial Causes Act, 1950, s. 32 (3): "The parties to any proceedings instituted in consequence "of adultery and the husbands and "wives of the parties shall be competent to give evidence in the "proceedings, but no witness in any "such proceedings, whether a party "thereto or not, shall be liable to "be asked or be bound to answer any "question tending to show that he "or she has been guilty of adultery "unless he or she has already given "evidence in the same proceedings "in disproof of the alleged adultery."

" that on an occasion about April 17, 1954, at about 8 p.m. at " a public house in Aylesbury the respondent hit the petitioner " across the face saying ' I've got all the evidence I want now.' " On June 12 the husband amended the prayer of his petition, pursuant to an order made on June 4, to include a prayer for the exercise of the discretion of the court in his favour, on the grounds of his own adultery.

By her answer the wife denied the cruelty and herself alleged cruelty against her husband, asking for the dissolution of the marriage on that ground. In further and better particulars of the alleged cruelty she stated that " on a date in April, 1954, " when she accused him of philandering with other women, a " violent quarrel ensued, and he threatened to kill her if she did " not leave him alone." The wife did not in her answer charge her husband with adultery.

At the hearing on January 29, 1958, the petitioner gave evidence in support of his allegations of cruelty, but made no reference in his evidence-in-chief to his own adultery indicated in his discretion statement; and neither the statement nor any examination on its contents was put to him by his counsel; but in cross-examination by counsel for the wife he was asked whether he had committed adultery, and replied " Yes." His counsel objected that the question ought not to be asked or at least that it was a question which the petitioner could object to answer; but the commissioner ruled that it was admissible, and also allowed a further question as to the date of the admitted adultery, to which the husband replied that it had taken place after he had parted from his wife in April, 1954. A further question as to the person with whom the adultery had been committed was put, but counsel's objection to that question was upheld by the commissioner.

Counsel for the wife then asked for leave to amend her answer to include an allegation of adultery based solely on the sworn evidence of the husband given in the suit in the witness-box. The proposed amendment was in the following terms: " That " the petitioner on some day or days unknown, save that it was " after April, 1954, at a place or places unknown, committed " adultery with a woman or women whose name or names are " unknown." There were minor and consequential amendments to the two following paragraphs.

The commissioner, granting leave to amend, said that the point with which the court was concerned was when exactly the discretion statement should be put in. In his experience the discretion statement was always put in before the evidence was closed. As that had not been done, counsel for the wife had submitted that the petitioner had failed to make out a prima facie case.

The commissioner regarded the point as an entirely technical matter. The materiality of it was that in certain eventualities

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the petitioner might have to make a disclosure which the respondent would use to her benefit and ask for leave to amend in consequence. In the commissioner's view the petitioner ought to put in his discretion statement. The best thing would be for counsel for the wife to call his evidence.

The wife then gave evidence on the issue of cruelty, and the case was adjourned on January 30, 1958, in order that, on the pleadings as they then stood, with the amendment as allowed by the commissioner, counsel for the husband might have an opportunity of pleading to the charge of adultery. On the following day, January 31, an application was made to the commissioner for leave to appeal from his order allowing the amendment to the wife's answer, and leave was granted.

H. B. D. Grazebrook Q.C. and *W. R. K. Merrylees* for the husband.

Neil McKinnon Q.C. and *P. G. Langdon-Davies* for the wife.

The following cases were cited in the course of the argument: *Burford* v. *Burford* [3]; *Apted* v. *Apted and Bliss* [4]; *Bevis* v. *Bevis* [5]; *M.* (*orse. D.*) v. *D.* [6]; *Sims* v. *Sims* [7]; *S.* (*orse. G.*) v. *S.* [8]; *Cavendish* v. *Cavendish* [9]; *Blunt* v. *Park Lane Hotel Ltd.* [10]; *Clear* v. *Clear* [11]; *Edevian* v. *Cohen* [12]; *B.* v. *B. and G.* [13]

Hodson L.J. stated the facts set out above and continued: The objection taken to the amendment is on a variety of grounds. First, as to whether the question was properly asked—which no doubt goes to the root of the matter—the objection that the question was an incriminating question is unsound. The ecclesiastical penalties which may be involved in cases where persons commit adultery have been held by the court not to be, at the present time, such as to carry with them the protection of witnesses which they are able to claim in order to avoid incriminating questions. It is unnecessary to do more than refer to the decision of the Court of Appeal in *Blunt* v. *Park Lane Hotel Ltd.*,[1] where reliance was placed on some observations in the judgment of Bowen L.J. in a divorce case, *Redfern* v. *Redfern*,[2] as showing that the peril of ecclesiastical punishment was still a live peril against which witnesses were entitled to claim protection. But that view was held to be obsolete, and it was pointed out that the decision in *Redfern* v. *Redfern* [2] was based on the particular provisions of the statute which prevented.

[3] [1955] 1 W.L.R. 1242; [1955] 3 All E.R. 664.
[4] [1930] P. 246; 46 T.L.R. 456.
[5] [1935] P. 22, 86; 50 T.L.R. 596.
[6] (1885) 10 P.D. 75.
[7] [1949] W.N. 208.
[8] [1907] P. 224; 23 T.L.R. 460.
[9] [1926] P. 10; 42 T.L.R. 134.
[10] [1942] 2 K.B. 253; 58 T.L.R. 356; [1942] 2 All E.R. 187.
[11] Unreported, C.A. (Feb. 27, 1958).
[12] (1889) 43 Ch.D. 187.
[13] [1937] P. 1; 52 T.L.R. 719; [1936] 2 All E.R. 1254.
[1] [1942] 2 K.B. 253, 256; 58 T.L.R. 356; [1942] 2 All E.R. 187.
[2] [1891] P. 139; 7 T.L.R. 157.

in proceedings instituted in consequence of adultery, questions being asked tending to show that a witness had committed adultery. The relevant statute at the present time—later than the statute under consideration in *Redfern's* case [2]—is the Matrimonial Causes Act, 1950, s. 32 (3): "The parties to any "proceedings instituted in consequence of adultery and the "husbands and wives of the parties shall be competent to give "evidence in the proceedings, but no witness in any such pro- "ceedings, whether a party thereto or not, shall be liable to be "asked or be bound to answer any question tending to show "that he or she has been guilty of adultery unless he or she has "already given evidence in the same proceedings in disproof of "the alleged adultery." These proceedings not having been instituted in consequence of adultery but in consequence of cruelty, that express statutory provision does not apply and does not become applicable now that the amendment has taken place. The answer was given in the witness-box when the proceedings were proceedings for cruelty.

If it be objected to the question that, whether incriminating or not, it could not be asked because it was irrelevant to the issue—which was an issue of cruelty on both sides—the answer is to be found in the pleadings. The charge of adultery relates to April, 1954. In paragraph 14 of the petition the husband said that on April 17, 1954, at a public house in Aylesbury, the wife hit him across the face saying: "I have got all the "evidence I want now." That may not be a very pointed reference to evidence of adultery, but in the particulars of the answer, relating also to April, 1954 (which, of course, may or may not relate to the same incident), the wife says that she accused him of philandering with other women, that violent quarrelling ensued, and that he threatened to kill her if she did not leave him alone.

So that the question whether or not this man was philandering or committing adultery with other women is closely connected with the issue of cruelty which it was for the court to decide on the pleadings as they originally stood. It is unnecessary to go further and consider whether, in any event, the question might have been permissible as tending to go to shake the credit of the husband, to whom the question as to adultery was addressed. So far as the evidence was concerned, in my judgment it was rightly admitted by the commissioner.

If that is so, there seems to be to be no reason at all to object to the exercise of the discretion by the commissioner in giving leave to amend at that stage. Whether an adjournment was necessary or not, I do not know. It seems unlikely that the husband, having given evidence of his adultery in that way, would get much help from some such defence as an allegation of "conduct conducing," although, no doubt, such a defence would

[2] [1891] P. 139.

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be open to him. But there was no objection to the amendment being made. The court has said recently in *Clear* v. *Clear*,[3] that where, in suits for divorce, a husband or wife has given evidence in the witness-box of his or her adultery following on no allegation of adultery, but only a prayer indicating that discretion would be sought, it does not follow as of right that leave to amend will be given—although I think it is generally more convenient that such leave should be given provided that no injustice to the parties will be done. If leave is not given, it may well be that the charges of cruelty will fail, as so often happens, and fresh proceedings can at once be brought by the wife or the opposite party based on the admissions made in the witness-box. We referred in *Clear* v. *Clear*[3] to a decision of Davies J. in *Clueit* v. *Clueit*,[4] where leave to amend was given in similar circumstances; this court agreed with the course taken by Davies J. in *Clueit's* case,[4] and with the reasons which he gave.

So far as the form of the amendment is concerned, it has been argued that the paragraph which I read out was too vague to stand by itself and could be struck out, and, therefore, that leave to amend ought not to be given. Reliance was placed in support of that contention on *B.* v. *B. and G.*,[5] a decision of Langton J., where a respondent to a divorce petition sought leave to amend his answer by putting in a charge of adultery based only on the notice contained in the prayer that discretion was being sought. It was argued that, as the inevitable inference was that discretion was being sought in respect of adultery, leave to amend should be given. But leave was refused; and that decision has stood for a very long time.

It has been recognized that according to the practice of the court the prayer of a petition cannot properly be treated as an admission. Indeed, the practice is now regulated by rules, to which I shall refer, which prevent the other party against whom discretion is being sought ascertaining the facts from any document before the court before the hearing; so that no evidence is given relating to the adultery until the party seeking discretion goes into the witness-box. The rule is rule 28 (5) of the Matrimonial Causes Rules, 1957, which deals with what are called "discretion statements," in which a party has to set out on paper before the hearing details of his or her adultery. Sub-rule (5) reads: "Neither the fact that a discretion statement "has been lodged or that such notice as aforesaid has been given "nor the contents of the discretion statement or notice shall be "given as evidence against the party lodging or giving the same "in any matrimonial cause or matter except when that party has "put the discretion statement or notice or the contents thereof "in evidence in open court." It follows from that that what is contemplated is that before the court can deal with the matter

[3] [1958] 1 W.L.R. 467.
[4] [1958] 1 W.L.R. 463; [1958] 1 All E.R. 417.
[5] [1937] P. 1; 52 T.L.R. 719; [1936] 2 All E.R. 1254.

the party seeking discretion must give evidence which includes evidence of his or her own adultery.

I do not think that there is any substance in the objection that the allegation in the amended answer based on the husband's evidence is too general. He has given his evidence in open court, stating on oath that he committed adultery following upon the parting with his wife in April, 1954. He did not get as far as giving further details of that because he was stopped, for reasons into which I need not go. Without casting any doubt whatever on the decision of Langton J. in *B.* v. *B. and G.*,[5] I do not think it would be sensible to exclude this pleading, based as it is on the husband's sworn statement, on the ground that that sworn statement is not sufficiently specific.

The contention was below and is here that the duty of the court, where discretion is asked for, is to deal with the issues raised by the pleadings and dispose of them by findings before considering the question of discretion. I confess that I cannot lend any support to the contention that that is a practice which, if it ever has been followed, ought to be followed. It is quite true that the judge who has the conduct of the trial is entitled to be master in his own court, and if he finds it convenient, for good reasons, to take a particular issue separately, it may well be that no injustice will be done; but in a matrimonial cause where charges of cruelty are made (as here), and the fact of adultery is a relevant matter, and must be a relevant matter, it seems to me that it would be absurd to ask the judge to arrive at any decision on the cruelty without taking into account the fact of the adultery of the other party. It may be that in some cases the adultery of one spouse may be segregated, but certainly not in this case, where the wife's suspicions of adultery were (according to the pleadings, at any rate; we have not examined the evidence) aroused before the parting; and indeed she claimed to have evidence. How on earth it can be expected that a judge shall arrive at a decision on the issue of cruelty without investigating that matter, I fail to see. Unkindness, abuse, even blows, may wear a very different colour when they are found to have come about because of quarrels arising between spouses where accusations of adultery, true or false, have been made.

For my part, in the ordinary case it seems to me to be convenient that, where discretion is sought, whether the suit be defended or undefended, in examination-in-chief the petitioner should be asked to deal with the fact of his or her adultery in the place in which that fact chronologically appears. If, for example, the adultery had taken place immediately after the marriage it should be dealt with then in evidence; and I deprecate the practice which seems to have been adopted in some cases of dealing with the whole case as pleaded and then suddenly, as if by way of afterthought, producing a document which bears the dignified

[5] [1937] P. 1.

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name of "discretion statement," handing it to the witness saying: "Is that all right?", hoping the witness will say: "Yes," and leaving it at that. The adultery which is referred to in that statement is part of the human story which the court has to investigate, and there is no magic in the discretion statement itself: that is a document which is provided for by the rules in order that these matters may be given proper consideration, and that the court may have the material before the hearing, although the parties have not access to it as of right. But the matter with which the court is concerned at the end of it all is the evidence given by the parties and nothing else—not the so-called "discretion statement" any more than the petition or the answer. It is the evidence which has to be dealt with.

The course which the counsel for the husband sought to induce the commissioner to follow was, I think, rightly resisted by the commissioner, who found himself very unwilling to treat these matters in separate compartments. In my judgment, there is no substance in the contention that leave to amend was wrongly given; and this appeal should be dismissed.

PEARCE J. I agree with all that my Lord has said. In my judgment, there is no rule of practice entitling a petitioner to defer giving evidence of his own adultery until the judge has given judgment on the issues on the pleadings; nor would such a practice be reasonable or desirable. It would seem a strange thing if a party could compel a judge to decide issues while deliberately withholding from him evidence which might throw a strong light on those issues—evidence which would be told to him as soon as it had become too late for him to use it. In many cases it is very difficult to arrive at true findings of cruelty or desertion without knowing whether at all relevant times one or other of the parties was committing, or had committed, or was about to commit, adultery. Even concealed adultery is likely to have a serious effect on the relations between husband and wife. Whether wholly unknown, or partially suspected, it may alter the whole atmosphere of a home. It is important that such a matter should be fully known to the judge when he is deciding the issues between the parties, and it would be wrong to allow one of the parties to deprive him of that knowledge.

Appeal dismissed.

Solicitors: *W. H. Matthews & Co.; Seeley & Co. for L. C. Thomas & Son, Neath, Glam.*

M. M. H.

[COURT OF APPEAL.]

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Hodson, Morris and Sellers L.JJ.

Practice — Set-off — Equitable set-off — Building contract — Action for failure to complete works—Claim to set-off on quantum meruit for extra work—Trespass to tools—Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 39 (1)—*R.S.C., Ord.* 19, *r.* 3.

Costs — County court action—Set-off — Counterclaim or set-off — Claim extinguished by set-off—Judgment for defendant on claim and for balance of counterclaim—Appropriate order for costs—County Court Rules, 1936 (*as amended*), *Ord.* 47.

Under a building contract the plaintiff, a widow, sued the defendant builder in the county court for £266 for breach of contract for failing to complete or properly complete certain items of work. The defendant counterclaimed or claimed by way of set-off (1) on a quantum meruit in respect of extra work done outside the contract, (2) on the ground that the loss was caused by the plaintiff's refusal to admit the defendant's workman, and (3) for trespass to the defendant's tools. The county court judge, revising the report of a referee to whom the respective claims had first been submitted, awarded the plaintiff £74 17s. 6d., and the defendant £84 19s. 3d. (£69 11s., £12 7s. 6d., and £3 0s. 9d. on each of the three grounds respectively), and ordered the plaintiff to pay the balance of £10 1s. 9d. to the defendant. He further gave the plaintiff the costs on her claim on scale 3 * and the defendant his costs on the counterclaim, also on scale 3, and directed that the parties should share equally the costs of the reference.

The defendant appealed, contending that his counterclaim should be treated as being a set-off and, therefore, the plaintiff should recover nothing, and he (the defendant) should recover £10 1s. 9d. and be awarded the costs of the proceedings:—

Held, (1) that since the passing of the Judicature Acts reliance might be placed in any court on any equitable set-off that formerly could only have been asserted in a court of equity; and that there might be (i) a set-off of mutual debts, (ii) in certain cases a setting up of matters of complaint which, if established, reduced or even extinguished the claim, and (iii) reliance on equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or protection.

(2) That a court of equity would have held that neither of the claims in the present case ought to be insisted upon without the

* County Court Rules, 1936 (as amended), Ord. 47, r. 1: "Subject to "the provisions of any Act or Rule, "the costs of proceedings in the "county court shall be in the dis- "cretion of the court . . ."

R. 5: "(2) The Scale of Costs "applicable to a sum of money only "is as follows:

Sum of Money.	Scale applicable.
"Exceeding £2 and not exceeding £10 . .	Scale 1
"Exceeding £10 and not exceeding £30 . .	Scale 2
"Exceeding £30 and not exceeding £100 . .	Scale 3
"Exceeding £100 . .	Scale 4."

R. 6: "Subject to Rules 7 . . . "of this Order, the Scale of Costs in "an action for the recovery of a sum "of money only shall be deter- "mined—(*a*) as regards the costs of "the plaintiff, by the amount re- "covered; and (*b*) as regards the "costs of the plaintiff, by the "amount claimed; . . ."

R. 7: "(1) Subject to the next "succeeding paragraph, Rule 6 of "this Order shall apply to a counter- "claim as it applies to a claim."

R. 7 (2) contains detailed provisions relating to the position where plaintiff or defendant is awarded costs on both claim and counterclaim.

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other being taken into account, and that the defendant had an equitable set-off which defeated the plaintiff's claim; there would, therefore, be judgment for the defendant on the claim and judgment for him on the counterclaim for the balance of £10 1s. 9d.

(3) That on that basis the fair order to make as to costs was that there should be judgment for the defendant on the claim with costs on scale 4: that there should be judgment for the defendant for £10 1s. 9d. on the counterclaim with costs on scale 2: that the costs of the reference (which should be taxed on scale 3) should be dealt with as was directed by the judge, that is, that they be treated as referable as to one-half to the plaintiff and one-half to the defendant.

Dicta of Baron Cleasby in *Young* v. *Kitchin* (1878) L.R. 3 Ex.D. 127, 130 and 131; Lord Esher in *Stumore* v. *Campbell & Co.* [1892] 1 Q.B. 314, 316; 8 T.L.R. 99, and of Lord Alverstone C.J. and Channell J. in *Bankes* v. *Jarvis* [1903] 1 K.B. 549, 552, 553; 19 T.L.R. 190; *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.* [1949] 1 K.B. 107; 64 T.L.R. 381; [1949] 2 All E.R. 196; and *Sharpe* v. *Haggith* (1912) 106 L.T. 13; 28 T.L.R. 194 applied.

Judgment of Judge Reid reversed.

APPEAL from Judge Reid, sitting at Kingston-on-Thames County Court.

The plaintiff, Mrs. Bozena Hanak, a widow, bought a house from the defendant, Sidney Arthur Green, a builder. The purchase was to be completed on July 31, 1954. The defendant agreed to do certain works to the house which were detailed in a specification. For this he was to receive £800 in addition to the purchase price of the house. The works were to be finished by the date fixed for completion and the £800 was to be paid with the balance of the purchase money payable on completion. The works were not finished to time. The plaintiff ordered certain extra items of work. The plaintiff went into occupation of the house on August 11, 1954. The plaintiff said that most of the interior work was then finished but that a good deal of it had not been done satisfactorily: as to the exterior work the plaintiff said that it was not at that date completed, and that some of the work that had been done was not satisfactory. The defendant, in a letter of August 31, agreed that some work remained to be completed. He complained of unreasonable behaviour on the part of the plaintiff in that she had refused to give the defendant's men entry to carry out repairs. Much correspondence took place in which mutual complaints were expressed. Both parties employed solicitors. In a letter of January 5, 1956, which contained detailed comments or replies as to the complaints that had been made concerning various items of work required by the specification, the defendant's solicitors wrote: "Your client still "owes our client certain moneys for extras, and taking into "account the additional expense to which they were put as a "result of your client's lack of co-operation, it seems to us that "to settle the matter your client should be allowed this money "to off-set any expense which she may incur to complete any "work which remains outstanding under the contract." No settlement was, however, effected.

Eventually the plaintiff commenced proceedings in the county court. By her particulars of claim dated December 7, 1956, she complained of failures to complete items of work or properly to complete them. The items of complaint were 37 in number, and the referable items of damage added up to £266 14s. In his pleading the defendant admitted that certain of the works were not completed in proper manner, and that "subject to the "counterclaim herein the plaintiff is entitled to recover in respect "of such matters as follows": there was then an enumeration of 10 items with referable amounts totalling £19 2s.

On the reference, which was to a chartered architect, it was held that the plaintiff was right as to 16 items, and in reference to these the amount allowed was £110 7s. 6d. When the matter came before the judge he disallowed one of the 16 items. That left 15 items totalling £74 17s. 6d.

In addition to dealing with the plaintiff's claim as referred to above, and saying that his admissions of liability were "subject "to the counterclaim therein," the defendant also pleaded (in paragraph 7) as follows: "The defendant will refer to his counter-"claim in this action and will, if necessary, seek to set up the "same by way of set-off in extinction or in the alternative in "diminution of the plaintiff's claim." The counterclaim was threefold. First, a claim based on a quantum meruit for extra work ordered and done. There were four items and £95 15s. 10d. in total was claimed. The referee allowed the four items and fixed the figures to total £69 11s. Secondly, there was a claim that loss was caused because the plaintiff refused access to the defendant's workmen. Under this heading £18 2s. 2d. was claimed. The referee allowed £12 7s. 6d. Thirdly, there was a claim that the plaintiff had thrown away certain tools of the defendant's workmen. Damages in trespass were claimed in the sum of £3 0s. 9d. This was allowed by the referee.

To the counterclaim of the defendant the pleading of the plaintiff was as follows: "The plaintiff makes no admissions as "to any of the facts and matters alleged in the counterclaim and "puts the defendant to the proof thereof. If any sum is found "due from the plaintiff to the defendant the plaintiff will give "credit for the same against the sum due to her on her claim."

In the result, therefore, the plaintiff became entitled to £74 17s. 6d. because the defendant had done bad work or omitted to do certain work. The defendant became entitled to £69 11s. for doing work not originally ordered: the defendant further became entitled to the £12 7s. 6d. and to £3 0s. 9d. as damages for trespass. The total entitlement of the defendant was £84 19s. 3d. The plaintiff was given judgment for £74 17s. 6d. and the defendant was given judgment for £84 19s. 3d. An order was made that the plaintiff should pay to the registrar of the court the sum of £10 1s. 9d., being the balance in favour of the defendant after deducting the amount adjudged to the plaintiff.

When the question of costs came to be considered Mr.

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Campbell (for the defendant) urged that all the claims arose out of one transaction and should be set off. The judge gave the plaintiff her costs (on scale 3) on the claim, and gave the defendant his costs (on scale 3) on the counterclaim. The referee had stated in his report that the defendant failed to complete the work by the agreed time and did some of the contract work some few months after the agreed time. In deciding what order to make as to costs the judge was influenced by the fact that "the "root cause of the trouble was the defendant's failure to do "properly and on time the work he originally contracted to do." The judge thought "that justice would best be done" by the order he made and by setting off one total against the other. He thought that it would be fair to treat the costs of the reference as attributable as to one-half to each of the parties.

The defendant appealed, contending that the items of his counterclaim should have been treated as being in part a set-off and, therefore, he should have been awarded the whole costs of the action.

Alan R. Campbell for the defendant.
C. F. Dehn for the plaintiff.

In addition to the cases referred to in the judgments, the following cases were cited in argument: *Wilson* v. *Walters* [1]; *Baines* v. *Bromley* [2]; *Noel* v. *Davis* [3]; *Gray* v. *Webb* [4]; *Lund* v. *Campbell* [5]; *Medway Oil and Storage Co.* v. *Continental Contractors* [6]; *Knight* v. *Abbott, Page & Co.* [7]; *Bright* v. *Rogers* [8]; *McCreagh* v. *Judd* [9]; *Shrapnel* v. *Laing* [10]; *Cinema Press Ltd.* v. *Pictures and Pleasures Ltd.* [11]; *Hart* v. *Rogers* [12]; *In re Brown, Ward* v. *Morse* [13]; *Christie* v. *Platt* [14]; *Best* v. *Hill* [15]; *Freeman* v. *Lomas.* [16]

Cur. adv. vult.

April 1, 1958. The following judgments were read:

HODSON L.J. I have had an opportunity of seeing the judgment which Morris L.J. is about to read, with which I fully concur. In those circumstances, I do not propose to deliver a judgment of my own.

MORRIS L.J. The disputes between the plaintiff and the defendant were decided by the judge after considering the report made

[1] [1926] 1 K.B. 511.
[2] (1881) 6 Q.B.D. 691.
[3] (1838) 4 M. & W. 136.
[4] (1882) 21 Ch.D. 802.
[5] (1885) 14 Q.B.D. 821; 1 T.L.R. 341.
[6] [1929] A.C. 88; 45 T.L.R. 20.
[7] (1882) 10 Q.B.D. 11.
[8] [1917] 1 K.B. 917.
[9] [1923] W.N. 174.
[10] (1888) 20 Q.B.D. 334; 4 T.L.R. 241.
[11] [1945] K.B. 356; 61 T.L.R. 282; [1945] 1 All E.R. 440.
[12] [1916] 1 K.B. 646; 32 T.L.R. 150.
[13] (1883) 23 Ch.D. 377.
[14] [1921] 2 K.B. 17.
[15] (1872) L.R. 3 C.P. 10.
[16] (1851) 9 Hare 109.

by a referee before whom the parties appeared for three days. So far as conclusions of fact and conclusions as to amounts are concerned there is no appeal. The appeal originates in the discontent of the defendant as to the orders as to costs. But in order to meet the difficulties that face those who complain of orders concerning costs when there is a discretion in a judge as to the award of them, the defendant challenges the form in which the judgment was entered. If he does this successfully then he submits that on a different form of judgment he can ask for a different order as to costs. It is only because of a very natural concern as to the costs of the struggle that submissions have been made to us as to the form in which the decisions in the struggle, not themselves now in issue, should be expressed. So it has come about that we have heard a learned debate, rich in academic interest, but, save so far as costs are affected, barren of practical consequence, on the subject as to whether certain claims could be proudly marshalled as set-off or could only be modestly deployed as counterclaim.

Before recording a view on the points of law it is necessary to have in mind the nature of the various claims. [His Lordship stated the facts and continued:] The judge did not, in his judgment, deal with the question as to whether there was a set-off: this was probably because the submission as to set-off was only being made in furtherance of the endeavour to have an order as to costs which was favourable to the defendant.

Mr. Campbell submits that the items which total £84 19s. 3d. should have been treated as being in part set off, with the result that the plaintiff should have been adjudged to recover nothing and the defendant to recover £10 1s. 9d. on his counterclaim.

In *In re A Bankruptcy Notice*,[1] Lord Hanworth M.R. said: "With regard to the word 'set-off,' that is a word well known "and established in its meaning; it is something which provides "a defence because the nature and quality of the sum so relied "upon are such that it is a sum which is proper to be dealt with "as diminishing the claim which is made, and against which the "sum so demanded can be set off." But in an action at law a defendant could only set off after the passing of the Statutes of Set-off. The statute of 2 Geo. 2, c. 22, provided that if there were mutual debts between a plaintiff and a defendant then one debt might be set against the other. But under that statute and under the statute of 8 Geo. 2, c. 24, the claims on both sides had to be liquidated debts or money demands which could be ascertained with certainty at the time of pleading. Counterclaim is the creature of statute. The Supreme Court of Judicature Act, 1873, s. 24 (3), enabled the courts to hear a counterclaim: until then a cross-claim had to be advanced by a separate action. But before the Judicature Act, 1873, there were circumstances in which a defendant who was sued could, without bringing a separate action, set up certain contentions against the plaintiff.

[1] [1934] Ch. 431, 437.

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Thus, in answer to a claim for the price of goods sold, it became possible for a defendant to assert that the goods were of poor quality. He was allowed to do so by way of defending the claim made against him. That was not, however, by way of set-off.

Though a set-off when permissible is a defence, it is, of course, not correct to say that every defence is a set-off. The way in which the matter developed was explained by Parke B. in his judgment in *Mondel* v. *Steel*.[2] He said: "Formerly, it was the "practice, where an action was brought for an agreed price of a "specific chattel, sold with a warranty, or of work which was to "be performed according to contract, to allow the plaintiff to "recover the stipulated sum, leaving the defendant to a cross-"action for breach of the warranty or contract; in which action, "as well the difference between the price contracted for and the "real value of the articles or of the work done, as any conse-"quential damage, might have been recovered; and this course "was simple and consistent. In the one case, the performance "of the warranty not being a condition precedent to the payment "of the price, the defendant, who received the chattel warranted, "has thereby the property vested in him indefeasibly, and is "incapable of returning it back; he has all that he stipulated for "as the condition of paying the price, and therefore it was held "that he ought to pay it, and seek his remedy on the plaintiff's "contract of warranty. In the other case, the law appears to "have construed the contract as not importing that the "performance of every portion of the work should be a condition "precedent to the payment of the stipulated price, otherwise the "least deviation would have deprived the plaintiff of the whole "price; and therefore the defendant was obliged to pay it, and "recover for any breach of contract on the other side. But "after the case of *Basten* v. *Butter*,[3] a different practice, which "had been partially adopted before in the case of *King* v. *Boston*,[4] "began to prevail, and being attended with much practical "convenience, has been since generally followed; and the defen-"dant is now permitted to show that the chattels by reason of "the non-compliance with the warranty in the one case, and "the work in consequence of the non-performance of the contract "in the other, were diminished in value. *Kist* v. *Atkinson*,[5] "*Thornton* v. *Place*.[6] The same practice has not, however, "extended to all cases of work and labour, as for instance, that "of an attorney, *Templar* v. *M'Lachlan*,[7] unless no benefit what-"ever has been derived from it; nor in an action for freight; "*Sheels* v. *Davies*."[8]

Parke B. further said[9]: "It must however be considered, "that in all these cases of goods sold and delivered with a war-"ranty, and work and labour, as well as the case of goods agreed

[2] (1841) 8 M. & W. 858, 870.
[3] (1806) 7 East 479.
[4] (1789) 7 East 481n.
[5] (1809) 2 Camp. 63, 64.
[6] (1832) 1 M. & Rob. 218.
[7] (1806) 2 B. & P.(N.S.) 136.
[8] (1814) 4 Camp. 119.
[9] 8 M. & W. 871.

" to be supplied according to a contract, the rule which has been " found so convenient is established; and that it is competent for " the defendant, in all of those, not to set off, by a proceeding " in the nature of a cross action, the amount of damages which " he has sustained by breach of the contract, but simply to " defend himself by showing how much less the subject-matter of " the action was worth, by reason of the breach of contract; and " to the extent that he obtains, or is capable of obtaining, an " abatement of price on that account, he must be considered as " having received satisfaction for the breach of contract, and is " precluded from recovering in another action to that extent; " but no more."

Before the passing of the Judicature Acts there were circumstances in which a court of equity would restrain one who was a plaintiff in an action at law from proceeding until the further order of the court with the trial of his action at law, or might restrain him until the further order of the court from levying execution upon a judgment obtained in his favour. The Court of Equity would not act merely because there were cross-demands. The assistance of the Court of Equity would only be given to someone who could show some equitable ground for being protected against his adversary's demand. Lord Cottenham L.C. made that clear in 1841 in his judgment in *Rawson* v. *Samuel*.[10] Lord Cottenham examined the reported cases dealing with what he said was " familiarly " spoken of as " equitable set-off," and came to the conclusion that what had to be established was that there was an equity which went to impeach " the title to the legal demand."

After the Judicature Acts were passed it was no longer necessary for a defendant to bring a separate action if he had a cross-claim. He could present his cross-claim in the existing action brought against himself. So counterclaim, the creature of the Judicature Acts, became possible. Furthermore, it was provided that equitable defences could be relied upon in actions at law: see section 38 of the Supreme Court of Judicature Act, 1925. Section 41 provides: " No cause or proceeding at any time pending in " the High Court or the Court of Appeal shall be restrained by " prohibition or injunction, but every matter of equity on which " an injunction against the prosecution of any such cause or " proceeding might formerly have been obtained, whether uncon- " ditionally or on any terms or conditions, may be relied on by way " of defence thereto."

If a plaintiff had a demand which was a matter of equitable jurisdiction and brought proceedings in a court of equity, then not only could there be a set-off in regard to any liquidated demand but the courts of equity allowed a defendant to defend by showing that he had what was called an equitable set-off, that is, as Lord Cottenham pointed out, some equitable ground for being protected against the claim.

In *Young* v. *Kitchin*,[11] a firm of builders, Messrs. Downs &

[10] (1841) Cr. & Ph. 161, 178.

[11] (1878) L.R. 3 Ex.D. 127.

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Co., erected certain buildings for the defendant, who then entered into possession of them. At that time a sum of money was due from the defendant to Downs & Co. in respect of the contract. Messrs. Downs & Co. then assigned such sum to the plaintiff, who sued the defendant for it. But the defendant pleaded that Messrs. Downs & Co. had been late in erecting the buildings, whereby he had suffered loss, and he also said that Messrs. Downs & Co. had done defective work, and that the contract had provided that defects were either to be remedied or allowed for. The plaintiff demurred to the plea that Messrs. Downs & Co. had not completed the buildings by the contract dates: he so demurred on the ground that the plaintiff as assignee of Downs & Co. could not be held liable for breaches of contract by Downs & Co., and that such breaches constituted no answer to the plaintiff's claim. Cleasby B. said [12]: "In substance I think the "defendant is entitled to the benefit of this defence in reduction "of the plaintiff's claim. The Judicature Act, 1873, s. 25 (6) (i) "says that the assignment of a debt or other legal chose in "action shall be 'subject to all equities which would have been "'entitled to priority over the right of the assignee if this Act "'had not passed,' that is, subject to all equities which would "be enforced in a court of equity. I think this is a case where "in equity, the whole matter might be dealt with and the "plaintiff's claim settled, after deducting all that ought to be "deducted in respect of the failure to complete and deliver the "buildings." Cleasby B. pointed out that the defendant could not recover anything from the plaintiff but was entitled "by way "of set-off or deduction from the plaintiff's claim, to the damages "which he had sustained by the non-performance of the contract "on the part of the plaintiff's assignor." Cleasby B. further put the position as follows [13]: "he only meets the plaintiff's claim "by a counterclaim of damages arising out of the same contract."

The case of *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.*[14] proceeded on the basis that a Court of Chancery would have recognized an equitable set-off. The plaintiffs claimed a sum of money for storing the defendants' vehicles. The defendants acknowledged that pursuant to contract the sum claimed would, but for what they asserted, have been due. They said, however, that as to one of the vehicles, which the plaintiffs were storing, itself worth more than what the plaintiffs claimed, the plaintiffs had either handed it over to someone else or had negligently allowed it to be stolen. So they said that their case was of such a nature that, quite apart from forming the basis for counterclaiming, it amounted to an equitable defence and that, accordingly, following section 38 of the Judicature Act, the court should give the same effect to it by way of defence as the Court of Chancery ought formerly to have given. If what a Court of

[12] L.R. 3 Ex.D. 130.
[13] Ibid. 131.
[14] [1949] 1 K.B. 107; 64 T.L.R. 381; [1948] 2 All E.R. 196.

Chancery would formerly have done would have been, on equitable grounds, to have granted an injunction against the prosecution of the plaintiffs' action, then, pursuant to section 41 of the Judicature Act, the equitable grounds could be relied upon by way of defence. The defendants were, in effect, saying: "We "ought not to have to pay you for storing our vehicles since "as to one of them you have allowed us to be deprived of it." The defendants said, therefore, that the plaintiffs ought not to have judgment for the amount claimed even though such judgment was stayed pending the hearing of the defendants' counterclaim but that there should be leave to defend the plaintiffs' claim. Leave to defend was given.

The question which arose was whether, in the circumstances of the case, a court of equity would have recognized that the defendants had an equitable set-off. The judgment of Tucker L.J.[15] shows that counsel for the plaintiffs conceded that a court of equity would have recognized that the defendants had an equitable set-off. Mr. Dehn has submitted that this concession need not have been made. But Tucker L.J. thought that it was properly made, as is seen from his judgment.[16] He cited the judgment of Lord Cottenham L.C. in *Rawson* v. *Samuel*,[17] and proceeded[18]: "Those cases to which the Lord Chancellor referred "do, however, indicate the kind of circumstances in which the "Court of Chancery gave this equitable relief. As already "indicated, the case most in point was *Piggott* v. *Williams*,[19] "where there was a charge against a solicitor for negligence "which went directly to impeach the demand for payment which "he was making. In view of those authorities, I think that the "present case is one where, on the facts set out in the affidavit, "the Court of Chancery would clearly have allowed the defendant's claim as an equitable set-off against the plaintiff's claim."

Cohen L.J. was of the same opinion. He said[20]: "Once "Mr. Hale conceded, as, in my view, he was constrained by the "authorities to which we were referred, in particular by the "decision in *Piggott* v. *Williams*,[21] to concede, that the facts "alleged in the affidavit sworn for the defendants, if proved at "the trial, would establish a good equitable set-off, then it "followed that the appeal must succeed. Before the Judicature "Act, such claims were very often enforced by injunction, but it "is plain from section 41 that an injunction would not be the "appropriate way of giving effect to a set-off now and that effect "should be given to it, under section 38, as an equitable defence "if so pleaded. That being so, it seems to me to follow that the "matter must be treated as Cleasby B. indicated in *Young* v. "*Kitchin*[22] that equity would treat it, namely, by deducting from "the claim of the plaintiff all that ought to be deducted in respect

[15] [1949] 1 K.B. 107, 109.
[16] Ibid. 113.
[17] Cr. & Ph. 161.
[18] [1949] 1 K.B. 107, 113.
[19] (1821) 6 Madd. 95.
[20] [1949] 1 K.B. 107, 114.
[21] 6 Madd. 95.
[22] L.R. 3 Ex.D. 127.

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" of the failure, if failure be proved, to deliver the lorry that the " plaintiff received from the defendant."

Though the statutes of set-off were repealed by the Civil Procedure Acts Repeal Act, 1879, and the Statute Law Revision and Civil Procedure Act, 1883, there was in the former Act a saving for any jurisdiction or principle or rule of law or equity established, or confirmed (see section 4 (1) of the Act of 1879), and the preamble of the latter Act referred to certain enactments " . . . the subject-matter whereof is provided for by or under the " Supreme Court of Judicature Act, 1873, and the Acts amending " it or rules made pursuant thereto . . . " Section 39 (1) of the Judicature Act, 1925, which is in terms comparable with section 24, rule 3 of the Judicature Act, 1873, and Order 19, rule 3 of the Rules of the Supreme Court, are now operative. It has, however, been held in this court that the Judicature Acts conferred no new rights of set-off.

In *Stumore* v. *Campbell* [23] Lord Esher M.R. said: " The " Judicature Acts, as has been often said, did not alter the rights " of parties, they only affected procedure, so that no set-off could " now be maintained in such a case as this. Before these Acts " a person having a cross-claim must have raised it by a cross- " action; but these Acts have given a right to counterclaim. In " some of the cases language has been used which would seem " to imply that a counterclaim is sometimes in the nature of set- " off and sometimes not. No doubt matter is occasionally pleaded " as counterclaim which is really set-off; but counterclaim is " really in the nature of cross-action. This court has determined " that, where there is a counterclaim, in settling the rights of " parties, the claim and counterclaim are, for all purposes except " execution, two independent actions. If the plaintiff sustains his " claim, judgment goes for him on that; and if the defendant " sustains his counterclaim, judgment goes for him on that. " Either claim may be reduced by set-off. But if the plaintiff " succeeds in the one case and the defendant in the other, there " are two judgments which are independent for all purposes " except execution." Lopes L.J. said [24] that the Judicature Acts did not alter or intend to alter the rights of parties.

Since the passing of the Judicature Acts it is clear that reliance may be placed in any court upon any equitable set-off that formerly could only have been asserted in a court of equity: furthermore, counterclaims may be presented and there is no need to advance cross-claims in a separate action. But it is not the case that every cross-claim may be presented as a set-off even if in amount it equals or overtops the claim. Nor does the mere fact that the cross-claim is in some way related to the transaction which gave rise to the claim serve to invest the cross-claim with the quality of set-off.

The position is, therefore, that since the Judicature Acts there may be (1) a set-off of mutual debts; (2) in certain cases a setting

[23] [1892] 1 Q.B. 314, 316. [24] Ibid. 318.

up of matters of complaint which, if established, reduce or even extinguish the claim, and (3) reliance upon equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or prohibition. The basis of (1) was explained in *Stooke* v. *Taylor*,[25] in which case Cockburn C.J. pointed out that in the case of a set-off, the existence and the amount of a set-off must be taken to be known to a plaintiff who should give credit for it in his action against the defendant. He pointed out that that reasoning did not apply to a counterclaim, which to all intents and purposes is an action by the defendant against the plaintiff, and in which the claims are not confined to debts or liquidated damages. In the same case he said[26]: "Set-off and counterclaim are both the creation of "statute, the common law not admitting of the action of a plain- "tiff against a defendant being met by an independent claim of "the defendant against the plaintiff, but leaving the defendant "to his cross-action. The effect of these two modes of proceeding "must, therefore, be sought in the statutes by which they were "introduced, and in their results; and when these are looked at, "it will be seen how essentially these two forms of procedure "differ. By the Statutes of Set-off this plea is available only "where the claims on both sides are in respect of liquidated "debts, or money demands which can be readily and without "difficulty ascertained. The plea can only be used in the way "of defence to the plaintiff's action, as a shield, not as a sword."

The cases within group (2) are those within the principle of *Mondel* v. *Steel*,[27] to which I have referred. In these cases there is a defence to the claim which the law recognizes (compare Sale of Goods Act, 1893, s. 53). The cases within group (3) are those in which a court of equity would have regarded the cross-claims as entitling the defendant to be protected in one way or another against the plaintiff's claim. Reliance may be placed in a court of law upon any equitable defence or equitable ground for relief: so also any matter of equity on which an injunction against the prosecution of a claim might formerly have been obtained may be relied on as a defence. This may involve that there will have to be an ascertainment or assessment of the monetary value of the cross-claim which, as a matter of equity, can be relied on by way of defence. But this does not mean that all cross-claims may be relied on as defences to claims.

In *Bankes* v. *Jarvis*[28] the position was that the plaintiff's son had bought a veterinary surgeon's practice from the defendant, and in regard to a house of which the defendant was lessee, and which was used in connexion with the practice, the plaintiff's son had covenanted to pay the rent and to perform the covenants and to keep the defendant indemnified. After carrying on the practice for a time the plaintiff's son left the country after giving the

[25] (1880) 5 Q.B.D. 569, 576.
[26] Ibid. 575.
[27] 8 M. & W. 858.
[28] [1903] 1 K.B. 549; 19 T.L.R. 190.

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plaintiff authority to sell the practice. The plaintiff sold it to the defendant. The sum of £50, being part of the agreed price, was owing by the defendant, but he had a claim against the plaintiff's son because he (the defendant) had had to pay £21 rent which the plaintiff's son had failed to pay, and had also had to pay £30 because the plaintiff's son had failed to perform the covenants in the lease. The plaintiff, suing as agent or trustee for her son, claimed £50 from the defendant. The defendant had a perfectly good claim for £51 damages against the plaintiff's son. It was held that the defendant could set up as a defence to the claim against him that the plaintiff's son (the cestui que trust of the plaintiff) was indebted to the defendant in a sum for unliquidated damages exceeding the amount of the claim.

The conclusion seems to me to be clearly correct and obviously fair. It would have been manifestly unjust if the defendant had had to pay £50 to the plaintiff (who was an agent or trustee for her son) at a time when the defendant had an unquestioned claim for £51 against the plaintiff's son, who had left the country. There was a close relationship between the dealings and transactions which gave rise to the respective claims. If the case had been brought before the Judicature Acts it would appear that the defendant would have had strong equitable grounds for asking a Court of Chancery to restrain the plaintiff from proceeding with her case. But since the Judicature Acts the position is that matters of equity on which such injunctions might formerly have been obtained may now be relied on by way of defence. Lord Alverstone C.J., in his judgment, said [29]: "If grounds exist which "formerly would have entitled a defendant to file a bill in Chancery "to restrain the plaintiff from proceeding with his action, I think "a defendant is now enabled to rely on these grounds as a "defence to the action." Channell J., in his judgment, pointed out that if the defendant's claim had been for a liquidated amount then, as the plaintiff was suing as trustee for her son, there could even before the Judicature Acts have been a set-off. Channell J. added [30]: "Then the Judicature Act, and more especially the "rules, distinctly put an unliquidated claim on the same footing "as a liquidated claim for the purposes of set-off; and conse-"quently the defendant's claim against the plaintiff's son, which, "if liquidated, could have been pleaded before the Judicature Act "as a set-off to the plaintiff's claim, can now, although unliqui-"dated, be relied on as a defence to the extent of the claim." These words must, I think, be read in relation to the situation being dealt with in the case and in their context: they accord with the reasoning of Lord Alverstone C.J., and they explain the effect of the Judicature Acts in allowing reliance as a defence upon matters of equity which formerly might have called for injunction or prohibition. But I do not understand that Channell

[29] [1903] 1 K.B. 549, 552. [30] Ibid. 549, 553.

J. was saying that the Judicature Acts abolish entirely the difference between set-off and counterclaim, and, indeed, in view of the authorities, he could hardly have so intended.

It was pointed out in *Bankes* v. *Jarvis* [31] that the plaintiff, suing as trustee, "could not be in a better position than an "assignee for value suing in his own name against whom all "equitable defences can be relied on." The case is in line with *Young* v. *Kitchin* [32] and with *Newfoundland Government* v. *Newfoundland Railway Co.*[33] In the latter case, as in *Young* v. *Kitchin*, there was an assignment and the principle of *Young* v. *Kitchin* was followed. An assignee takes subject to equities. The result is, that by allowing certain matters of equity to be relied on by way of defence, there may in some cases be a setting up by way of defence of cross-claims which are for liquidated damages.

For the reasons that I have indicated, I consider that a cross-claim can be regarded as a set-off if in a court of law it would have been so regarded at the time of the Judicature Acts, or if it would have been regarded by a court of equity as the basis for equitable set-off or for giving protection on equitable grounds to a defendant.

What, then, is the result in the present case? The two sums of £69 11s. and £12 7s. 6d. were in substance and for all practical purposes sums which were extras to the defendant's contract. Although the latter of these was claimed to be recoverable as a sum due for breach of an implied term of the contract to allow reasonable access to the premises, it represented expenses incurred by the defendant in the course of doing work for the plaintiff. Hence, leaving aside the small item of £3 0s. 9d., the sum recovered as damages for trespass, the defendant was entitled to £81 18s. 6d. That was an amount which in effect remained due to the defendant under the contract under which he agreed to do work for the plaintiff. But he had done some of the work badly and because of this the plaintiff was entitled to £74 17s. 6d. from him. On the authorities to which I have referred, it seems to me that a court of equity would say that neither of these claims ought to be insisted upon without taking the other into account. It would not be equitable for the plaintiff to recover the £74 17s. 6d. while the £81 18s. 6d. was owing by her under the contract. If the defendant had assigned his claim to £81 18s. 6d. and if his assignee had sued the plaintiff, the plaintiff would have been entitled to set off her £74 17s. 6d. The position would be comparable with that in *Young* v. *Kitchin*,[34] to which I have referred above, and the passage from the judgment of Cleasby B. becomes applicable. It would be a case where in equity the whole matter could be dealt with. The assignee would take subject to equities and the plaintiff, if sued for the £81 18s. 6d., would be entitled "by way of set-off or deduction" to the

[31] [1903] 1 K.B. 549.
[32] L.R. 3 Ex.D. 127.
[33] (1888) 13 App.Cas. 199, 213.
[34] L.R. 3 Ex.D. 127.

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damages which she had sustained by the non-performance or faulty performance of the contract on the part of the defendant.

On the authorities to which I have referred, it seems to me that the defendant had an equitable set-off which defeated the plaintiff's claim. This conclusion does not in any way depend upon the terms used in the defence to the counterclaim. The question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings. (See *Sharpe* v. *Haggith*.[35])

In my judgment, therefore, the defendant succeeded in defeating the claim of the plaintiff and in establishing his right to £10 1s. 9d. on the counterclaim. It becomes necessary to consider what is the fair order to make as to costs on this altered and different basis. I think that there should be judgment for the defendant on the claim with costs on scale 4: that there should be judgment for the defendant for £10 1s. 9d. on the counterclaim with costs on scale 2: that the costs of the reference (which should be taxed on scale 3) should be dealt with as was directed by the judge, that is, that they be treated as referable as to one-half to the plaintiff and one-half to the defendant (a qualifying fee for one expert witness on each side being ordered).

I would therefore allow the appeal.

SELLERS L.J. (read by Hodson L.J.). The defendant has, at the termination of this relatively expensive and protracted litigation, finished with a balance in his favour of £10 1s. 9d., which liability the plaintiff could have avoided if she had accepted the defendant's solicitors' suggestion in the letter of January 5, 1956, and had refrained from commencing the proceedings. In these circumstances, it seems an undue burden to put on the defendant to order him to pay the costs of the action, even although they are to be reduced by the defendant's costs of the counterclaim. The judge's reasons for so ordering included some provocation of the plaintiff by the conduct of a loutish workman of the defendant. This matter seems to have arisen in the evidence, but it had nothing to do with the defendant's conduct of the case. On the other hand, the plaintiff, who was of an excitable nature, so conducted herself in the course of the trial that she had to be committed to prison for contempt of court. She should not be further punished by depriving her of costs if she is in law entitled to them, but I cannot help feeling that this was a case where, on any view, the opinion of Denning L.J. in *Chell Engineering Co.* v. *Unit Tool & Engineering Co.*[36] might have been invoked and applied—" that in most of these cases it is desirable that a judge " should consider whether a special order should be made as to " costs because the issues are often very much interlocked, and " the usual order of ' judgment for plaintiff on claim with costs

[35] (1912) 106 L.T. 13; 28 T.L.R. 194.

[36] [1950] 1 All E.R. 378, 383.

" ' and for defendant on counterclaim with costs ' does not always " give a just result."

In *Childs* v. *Blacker*[37] the defendant, a tenant of a flat, had withheld rent to compensate for damages she claimed for breach of her tenancy agreement. She had tendered the balance of the rent, and at the trial the damages she recovered were greater than she had originally set off against the rent, so that the landlord recovered less rent than she had tendered to him. The county court judge thought that the *Chell Engineering Co.* decision laid down the procedure which was to be followed except in exceptional circumstances. The Court of Appeal unhesitatingly reversed the order and directed that the tenant should have the costs of the action.

There had been in that case a tender, but it was a tender only of the balance of the rent. There was no tender in the present case, but there was, as it turned out, no balance in favour of the plaintiff. In order to avoid the liability for costs, if correctly awarded here, and to meet the plaintiff's claim, which was pleaded at £266 4s. and had been originally advanced at nearly double, the defendant would have had to tender before action or have paid into court £75 or thereabouts. If this had been accepted (as it might have been) the defendant would have been left with no security for his counterclaim of £85 or thereabouts. This leads me to think that the fair order would have been to have set off the two amounts and given the defendant judgment on the counterclaim for £10 1s. 9d. and for the costs of the claim, counterclaim and reference to have been dealt with on that basis as the judge thought right.

The question which has been argued is whether the judge would have been entitled to make such an order in law and if so whether he was obliged to do so in the circumstances of this case. Set-off was relied on by paragraph 7 of the defence, and it was reflected in the report of the referee, who assessed the plaintiff's damages at £25 8s. 3d., having set off the defendant's counterclaim against the total claim allowed at £110 7s. 6d. This was also in accordance with the plea of the plaintiff in her defence to the counterclaim. Unfortunately for the plaintiff, the judge disallowed an item of £35 10s., reducing her claim to £74 17s. 6d., which was £10 1s. 9d. less than she owed the defendant.

If the judge had followed the form of the referee's report and had entered judgment for the defendant for the balance in his favour after the claim had been set off against the counterclaim, I think it would have been open to him to have done so and that it would have been in accordance with practice as it has developed. If he had no such power in law (which includes equity) it would, I think, be unfortunate, for costs would then seem to prevail over the substance of the matter. If in this case the result had been (and it would have meant but little adjustment of the cross-demands) that each was to recover £75

[37] [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243.

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from the other, neither party would have received a penny out of the litigation but the defendant, who did not want to litigate, would have been ordered to pay the costs of the action.

Some counterclaims might be quite incompatible with a plaintiff's claim, in no way connected with it and wholly unsuitable to be used as a set-off, but the present class of action involving building or repairs, extras and incidental work so often leads to cross-claims for bad or unfinished work, delay or other breaches of contract that a set-off would normally prove just and convenient, and in practice, I should have thought, has often been applied, as indeed it was in the referee's report. It would serve to reduce litigation and its consequent costs. I would not be astute to restrict the right but rather to develop it and discourage litigation when no or little monetary benefit ensues on balance. It cannot, as I see it, make any difference which side commences proceedings in which cross-claims arise. If there is a set-off at all each claim goes against the other and either extinguishes it or reduces it.

Set-off in its infancy was restricted, as my Lord has indicated, by the cases cited. I refer not to the statutory set-off but to the practice of the courts of equity. But as far back as *Piggott* v. *Williams*,[38] in 1821, it is interesting to observe that the Vice-Chancellor thought that the course which the cause would probably take would be to retain the bill until an action for damages had been tried. The bill was for foreclosure of an estate pledged as security for the plaintiff's solicitor's costs. The client filed a cross-bill alleging that nothing was due and that the estate ought to be re-surrendered on the ground that the costs had been occasioned by the negligence and want of skill of the solicitor. The Vice-Chancellor held that the client, the plaintiff in the cross-bill, could restrain the defendant from enforcing his security "leaving the plaintiff's demand for damages unsatisfied." The purpose of this, it would appear, would be to see whether the damages as assessed when set off from the claim for costs would extinguish it or to what extent they would reduce it.

It seems to me that the *Mondel* case,[39] in 1841, also reveals the germ of the law's development. As the shipowners (the building owners) could not counterclaim in the shipbuilders' action they established a defence, pro tanto, for breach of contract and could sue nevertheless in a separate action for the balance of the damages suffered. The second action could only be maintained for the balance of the damages as part had been set off against the shipbuilders' claim in the first action.

After the Judicature Acts, which permitted a counterclaim in an action for the first time, as Channell J. pointed out in *Bankes* v. *Jarvis*,[40] this difficulty was removed and a defence of set-off to the claim and a counterclaim could be set up to extinguish a claim and recover any balance in the one action.

[38] 6 Madd. 95.
[39] 8 M. & W. 858.
[40] [1903] 1 K.B. 549.

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It is to be observed that *Morgan & Son Ltd.* v. *S. Martin Johnson & Co. Ltd.*[41] was not cited to the court in the case of *Chell Engineering Co.*[42] Many cases were reviewed by Tucker L.J. in *Morgan's* case, and *Young* v. *Kitchin*[43] and *Morgan's* case itself would, as I read them, have supported the learned Commissioner's form of judgment in *Chell's* case, but would not have affected the appellate court's decision on the costs. In all these three cases the cross-claim arose from the breaches of the same contract as the one sued on.

In *Bankes* v. *Jarvis*,[44] where a set-off was allowed, the damages set off did not arise out of the contract for sale on which the plaintiff sued but on an earlier contract between the defendant and the plaintiff's son on whose behalf the plaintiff, his mother, was suing. As I read the case, the court would have held that a set-off existed against the son if he himself had been the plaintiff. He was in fact out of the country, but if he had been in the country and had been penniless and he had sued, the defendant would have been no less anxious to establish a set-off.

In *Government of Newfoundland* v. *Newfoundland Railway Co.*[45] the Judicial Committee of the Privy Council allowed a set-off by the Government against the railway company, who sued as contractors, and against the other plaintiffs, the trustees of the bondholders. It was held that it was clearly conceivable that the Government might show damage arising from the non-construction of the railway, whether by the delay or otherwise. Lord Hobhouse stated the law as follows[46]: "There is no "universal rule that claims arising out of the same contract may "be set against one another in all circumstances. But their "Lordships have no hesitation in saying that in this contract the "claims for subsidy and for non-construction ought to be set "against one another. It is hardly necessary to cite authorities "for a conclusion resting on such well-known principles. Their "Lordships will only refer to *Smith* v. *Parkes*,[47] not so much on "account of the decision as for the sake of quoting a concise "statement by Lord Romilly of the principle which governed it. "He says,[48] 'All the debts sought to be set off against the "'defendant Parkes are debts either actually due from him at "'the time of the execution of the deed' (this was the deed by "which the third party who resisted the set-off was brought in) "'or flowing out of and inseparably connected with his previous "'dealings and transactions with the firm.' That was a case of "equitable set-off, and was decided in 1852, when unliquidated "damages could not by law be the subject of set-off. That law "was not found conducive to justice, and has been altered. "Unliquidated damages may now be set off as between the "original parties, and also against an assignee if flowing out of "and inseparably connected with the dealings and transactions

41 [1949] 1 K.B. 107.
42 [1950] 1 All E.R. 378.
43 L.R. 3 Ex.D. 127.
44 [1903] 1 K.B. 549.
45 (1888) 13 App.Cas. 199.
46 Ibid. 199, 212.
47 (1852) 16 Beav. 115, 119.
48 16 Beav. 115, 213.

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"which also give rise to the subject of the assignment. It appears "to their Lordships that in the cited case of *Young* v. *Kitchin* [49] "the decision to allow the counterclaim was rested entirely on "this principle."

In the present case the referee allowed the defendant £12 7s. 6d. for loss suffered by him because the plaintiff refused access to the defendant's workmen. I would regard that as clearly a matter of equitable set-off as it arises directly under the contract on which the plaintiff herself relies. But that sum deducted from the plaintiff's claim of £74 17s. 6d. would not in itself be sufficient so to reduce the claim as to alter the scale of costs.

The items for extras totalling £69 11s. include two charges in connexion with the moving in of the plaintiff's household goods, and the other item of £3 0s. 9d. is a claim for damages in trespass as the plaintiff had apparently thrown away some tools of the defendant's workmen. These two items are closely associated with and incidental to the contract of June 14, 1954, on which the plaintiff sues for breach, and in my opinion they also should have been allowed as a set-off.

I agree, therefore, that the appeal should be allowed and an order for costs made in the terms proposed.

Appeal allowed with costs.
Leave to appeal to House of Lords refused.

Solicitors: *H. B. Wedlake, Saint & Co.; Ashurst, Morris, Crisp & Co.*

A. W. G.

[49] L.R. 3 Ex.D. 127.

[COURT OF APPEAL.]

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Mar. 24, 25.

Jenkins, Romer and Ormerod L.JJ.

HOLMES AND ANOTHER *v.* KEYES AND OTHERS.

Company—Meeting—Vote—Date of vote—Poll taken on resolution for election and completed—Votes counted and result declared on following day—Whether director elected on day of poll or when result declared—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 182.

On December 23, 1957, at a general meeting of the G. Co. a poll was taken on resolutions for the election of the defendants to be directors. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers informed the company that the defendants had been elected. The company's articles required that the qualification of a director should be the holding of 500 shares in the capital of the company and that, in accordance with section 182 of the Companies

Act, 1948,[1] he should obtain that qualification within two months after his appointment. The articles further provided that a transferor of shares should be deemed to remain the holder of shares until the name of the transferee was entered in the company's register. The defendants' names were not entered into the company's register as holders of the requisite number of qualification shares until the afternoon of February 24, 1958.

On a motion to restrain the defendants from acting as directors of the company, the plaintiffs contended that the defendants were elected on December 23, 1957; that, therefore, the period within which they must obtain their qualification began to run at midnight on December 23/24, 1957; and that the entry of the defendants' names in the register on February 24, 1958, was too late.

Danckwerts J. granted the injunction sought. On appeal:—

Held, that the elections of the defendants took place on December 24, when the result of the poll had been ascertained, and, accordingly, the period within which they were required to obtain their qualifications began at midnight on December 24/25, 1957, and expired at midnight, February 24/25, 1958. Therefore, the registration of the defendants' names on February 24, was within time.

Shaw v. *Tati Concessions Ltd.* [1913] 1 Ch. 292; 29 T.L.R. 261, and *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.* [1926] W.N. 78 applied.

Decision of Danckwerts J., ante, p. 540; [1958] 1 All E.R. 721 reversed.

APPEAL from Danckwerts J.[2]

By this motion in the action, the plaintiffs, William Arthur Holmes and Zena Daniels, on behalf of themselves and all other shareholders in the Gordon Hotels Ltd., sought an interlocutory injunction restraining the first two defendants, Lord Keyes and Fredman Ashe Lincoln from acting as directors of the company, the third defendant.

On December 23, 1957, at a general meeting of the company, resolutions for the election of the defendants to be directors were presented and, in accordance with a previous demand, a poll was taken on the resolutions. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers communicated the result, namely, that the defendants had been elected, to the company.

[1] Companies Act, 1948, s. 182: "(1) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles. . . . (3) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification . . . (5) If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time or the day on which he ceased to be qualified, as the case may be, and the last day on which it is proved that he acted as a director."

[2] Ante, p. 540; [1958] 1 All E.R. 721.

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The defendants were not told of the result until about December 27. Article 23 of the Company's Articles of Association provided that " . . . the transferor shall be deemed to " remain the holder of the share until the name of the transferee " is entered in the register." Article 83 provided: " The quali- " fication of a director other than a nominated director shall be " the holding in his own right of 500 ordinary shares of the " company of £1 each and section 141 of the Act [the Companies " Act, 1929] shall be duly complied with by every director " requiring such qualification." Section 141 of the Companies Act, 1929, was in terms similar to those of section 182 of the Companies Act, 1948. No steps were taken by the defendants to acquire the necessary qualification until about January 31, 1958, when the requisite number of shares were purchased by brokers on behalf of each of them. The completion of the purchases was delayed, however, until February, 1958, and the defendants' names were not entered in the company's register as holders of the shares until the afternoon of February 24, 1958.

The plaintiffs contended that the defendants were elected to be directors on December 23, 1957; that the period of two months in which they were required to obtain their qualifications began to run at midnight on December 23/24, 1957, and expired at midnight on February 23/24, 1958, and that the entry of the defendants' names in the company's register on the afternoon of February 24, 1958, was too late. The defendants contended that they were not appointed until December 24, 1957, and the period, therefore, did not begin to run until midnight on December 24/25, 1957.

Danckwerts J. granted the injunction sought.

The first two defendants appealed.

J. E. S. Ricardo for the first defendant.

Gerald Gardiner Q.C. and *T. D. D. Divine* for the second defendant.

Denys Buckley for the defendant company.

Gilbert Beyfus Q.C. and *Paul Sieghart* for the plaintiffs.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Neuschild* v. *British Equatorial Oil Co. Ltd.*[3]; *Jackson* v. *Hamlyn*[4]; *Catesby* v. *Burnett*.[5]

JENKINS L.J. stated the facts and continued: The substantial question in the case is whether in the circumstances, for the purposes of section 182 of the Act of 1948, the two individual defendants should be treated as having been appointed at the meeting itself so soon as all the votes on the relevant resolutions

[3] [1925] 1 Ch. 346; 41 T.L.R. 414.
[4] [1953] Ch. 577; [1953] 2 W.L.R. 709; [1953] 1 All E.R. 887.
[5] [1916] 2 Ch. 325; 32 T.L.R 380.

had been cast, or whether the true view is that the two individual defendants were not appointed until the result of the poll was ascertained on the following day. The importance of that question is this: If the individual defendants are to be treated as elected on December 23, then for the purposes of the two months allowed for the acquisition of qualification shares, time began to run from midnight on December 23, 1957, and expired, as I understand it, at midnight on February 23.

The individual defendants in fact set about acquiring their qualification shares some time during January, and well within the two months they became beneficially entitled to shares, but there was no registration of the individual defendants as proprietors of the shares acquired until some time on February 24, which would be too late, if time is properly to be calculated from midnight on December 23. If, on the other hand, they were not elected until December 24, when the result of the poll was ascertained, then their acquisition of qualification shares and completion of their title by registration took place just within time. The question is a highly technical one and probably would not have been litigated at all but for certain unfortunate internal divisions in the councils of the company.

[His Lordship read section 182 of the Act of 1948 and continued:] Article 1 of the articles of association of the company excludes Table A in the First Schedule to the Companies Act, 1929, which was the Act in force when the articles were adopted, "except so far as the same are repeated or contained in these "articles." Article 80 deals with the number of directors and provides: "Until otherwise determined by a general meeting, the "number of directors shall not be less than three nor more than "nine." I understand that the maximum of nine was reduced to seven, exclusive of certain directors appointed on behalf of debenture holders, but nothing turns upon that.

Article 81 is the usual provision for the appointment of directors by the board: "The directors may from time to time "appoint any other person to be a director, either to fill a casual "vacancy or by way of addition to the board, but so that the "maximum number fixed as above shall not be thereby exceeded. "Any director appointed under this article shall hold office only "until the ordinary general meeting following next after his "appointment, but shall then be eligible for re-election."

Article 83 concerns the qualification of a director. That article as it originally stood was altered by special resolution, and in its new form reads as follows: "The qualification of a director "other than a nominated director shall be the holding in his own "right of 500 ordinary shares of the company of £1 each and "section 141 of the Act shall be duly complied with by every "director requiring such qualification." Section 141 of the Act of 1929 corresponds to section 182 of the Act of 1948.

Article 98 deals with the vacation of office by directors and it provides: "The office of a director shall be vacated." Then there

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are events (A) and (B) which are not material. Then (C): "If "he ceases to hold the number of shares required to qualify him "for office or does not acquire the same within two months after "election or appointment." There are three other disqualifying events, with which we are not concerned.

There follow provisions as to the rotation of directors. They begin with article 100: "At the ordinary meeting in every year, "two of the directors for the time being shall retire from office." Then there is the usual provision deciding who is to retire, the rule being that the longest in office since their last election are the ones to retire; and there is a provision that as between directors of equal seniority, the directors to retire, in the absence of agreement, are to be selected from among them by lot. Then: "A retiring director shall be eligible for re-election and shall act "as a director throughout the meeting at which he retires."

Article 102 provides: "Subject to any resolution for reducing "the number of directors, the company shall, at the meeting at "which any directors retire in manner aforesaid, fill up the "vacated office of each director by electing a person thereto." Nothing turns on article 103.

Article 104 provides: "Subject to any resolution for reducing "the number of directors, if at any meeting at which an election "of directors ought to take place, the places of the retiring "directors are not filled up, the retiring directors as aforesaid "shall be deemed to have been re-elected."

We were referred in the course of the argument to articles 23 and 24, which deal with transfers of shares. I need not refer to those articles, for they were quoted only on the point that a director cannot be said to have qualified himself by the requisite shareholding unless and until his title is perfected by registration. That point was the subject of some argument, I understand, before the judge, but it is not now contended that a director can claim to have acquired his qualifying shares until he is actually on the register.

Finally, I should refer to some of the articles dealing with general meetings and proceedings at general meetings. Article 60 is the usual article stating the ordinary business at an ordinary meeting, and that includes the election of directors. Then article 63 gives the usual power to the chairman, with the consent of any meeting at which a quorum is present, to adjourn the meeting from time to time and from place to place.

Article 65 is another article which has been amended by special resolution. In its present form it reads thus: "At any "general meeting of the company a resolution put to the vote of "the meeting shall be decided on a show of hands unless before "or upon the declaration of the result of the show of hands a "poll be demanded in writing by the chairman or by at least five "members present in person or by proxy and entitled to vote "at the meeting, or by the holder or holders in person or by "proxy of at least one-tenth of the total voting rights of all

"members having the right to vote at the meeting." I do not think it is necessary for me to read the whole of that article, which is in a very usual form. After the provisions for demanding a poll, it goes on: "and unless a poll be so demanded a declaration by the chairman of the meeting that a resolution has been carried, or has been carried by a particular majority, or lost, or not carried by a particular majority, shall be conclusive and an entry to that effect in the minute book of the company shall be conclusive evidence thereof, without proof of the number or proportion of the votes recorded in favour of or against such resolution."

Article 66 is of some importance. It is in these terms: "If a poll be demanded in manner aforesaid, it shall be taken at such time and place and in such manner as the chairman shall direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. The demand for a poll may be withdrawn."

Article 68 provides: "In the case of an equality of votes, either on a show of hands or at a poll, the chairman of the meeting shall be entitled to a further or casting vote, in addition to the votes to which he may be entitled as a member." Article 69: "The demand of a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded."

Those are all the relevant articles, but I should perhaps refer again to the Act for section 144. That provides: "Where a resolution is passed at an adjourned meeting of—(*a*) a company"—that is the material case—"the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date."

In the course of his submissions to us on behalf of the two individual defendants, Mr. Gardiner made two admissions. First, he said that he did not pursue the contention to the effect that the two individual defendants became duly qualified when they entered into contracts to purchase shares, but accepted the view that they could only become qualified when their title was completed by registration. That point, therefore, disappears from the case. Mr. Gardiner further agreed that if the election took place on December 23, time began to run from midnight on that day, and, on the other hand, if the election is treated as taking place on December 24, time began to run from midnight on that day. So there is no dispute as to the method of computing time, and it is clear that if December 23 was the proper date from which to compute the time, these two defendants were too late. On the other hand, if the proper date was December 24, they were within time.

The judge, after stating the facts and citing the relevant articles of association, expressed his conclusion thus [1]: "In the

[1] Ante, p. 545.

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"present case the meeting was called on December 23 and was "on no other day. It is true that the result was not ascertained "till the next day, but the meeting was complete and the poll "was complete, except for the declaration of the result, on "December 23; and the elections of the defendants, if they were "valid, took place on that day and on no other day. Conse- "quently, time did start to run from midnight at the end of "that day, December 23, and, therefore, expired at midnight on "February 23, 1958; and the registration of the defendants' "shares in their names on February 24 was too late."

That is the conclusion which Mr. Gardiner, for the two individual defendants, was concerned to attack. In the course of his argument he referred us to certain authorities, which were also referred to before the judge but which he regarded as distinguishable from the present case. It is perfectly true that these authorities did each of them deal with a different set of circumstances, but two of them, I think, do afford some assistance to the appellants' case, and I propose to confine my citation to those two cases. The first is *Shaw* v. *Tati Concessions Ltd.*,[2] which is a decision of Swinfen Eady J. The headnote reads: "A poll demanded at a company meeting was directed to be "taken at a future date, but the meeting itself was not "adjourned:—*Held*, that the mere postponement of the poll was "not an adjournment ad hoc of the meeting within the meaning "of an article allowing the lodgment of proxies forty-eight hours "before a meeting 'or adjourned meeting,' but the original meet- "ing continued for the purpose of the poll, and no fresh proxies "could be lodged."

The judge said this at the conclusion of his judgment[3]: "If "there is an adjourned meeting they"—that is, the proxies—"may be deposited later, namely, forty-eight hours before the "adjourned meeting. But here there was no adjourned meeting, "and the taking of a poll is not a meeting. The true legal "position is this. There is no adjourned meeting, but the original "meeting continues for the purpose of taking the poll until the "poll is closed. Therefore proxies obtained and lodged later than "forty-eight hours before the original meeting are not available."

Mr. Beyfus, in regard to that authority, points to the words "until the poll is closed," and he says the poll was closed in the present case when the votes on the poll were cast. Therefore, he says that this authority should not be regarded as telling against him. I doubt whether, when he referred to the closing of the poll, Swinfen Eady J. meant to say that the meeting did not continue for the purpose of ascertaining the result of the poll.

The other authority, *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.*,[4] appears to me clearly to regard a meeting in such a case as continuing until the declaration of the poll, which is in effect the ascertainment of the result of the poll. It was a

[2] [1913] 1 Ch. 292; 29 T.L.R. 261.
[3] [1913] 1 Ch. 292, 297.
[4] [1926] W.N. 78.

case tried by Russell J. To put it very shortly, the question appears to have been whether, on the true construction of the articles of association of the company, a proxy could be revoked between the holding of a meeting at which a poll was demanded on a resolution and the time when the poll was held, this being a case where the entire poll—that is to say, the casting of the votes as well as the ascertainment of the result—was held on a day subsequent to the meeting. I think that sufficiently indicates the nature of the case, and I refer to it for these observations [5]: "The first point was there had been in fact no intimation of any "revocation at all. In his Lordship's opinion that could not be "sustained. The second point was in his view a more formid-"able one. It was said that no intimation of the revocation was "received before the meeting. In his Lordship's opinion, if "English language meant anything, the article required that in "order to invalidate the vote, intimation in writing of the revoca-"tion must be received at the office before the meeting, and in "his view that must mean before the commencement of the "meeting. It was well settled that the taking of a poll was not "a meeting of the company in the strict sense, but was in "law a mere continuation of the meeting at which the poll was "directed to be taken. For the particular purpose in question "therefore the meeting must be held to have begun on Decem-"ber 15 and to have come to an end at the declaration of the "poll, a week later. The intimation of revocation, however, had "been received between those two dates. In his opinion it was "impossible to say on the true construction of the particular "article that the proviso had been complied with, namely, that "intimation in writing of the revocation had been received before "the meeting."

Those are the only two authorities to which I propose to refer on the effect of a poll being taken, or the result of a poll being declared, on a day subsequent to the date of the actual meeting at which the resolution was put, but I should also make some reference to *Carruth* v. *Imperial Chemical Industries Ltd.*[6] I cite that for this reason: It appears that in fact on each of the resolutions appointing directors at the meeting of December 23, a poll was demanded without first going through the formality of a show of hands, and it was suggested that, on the true construction of article 65, that vitiated not only the appointments of the two individual defendants, but also the appointments of the directors who were appointed at the same meeting (in some ways one might say a rather appropriate conclusion to the dispute), but I am satisfied that the resolutions cannot be regarded as having been invalidated on that ground.

The case to which I refer dealt with a highly complicated scheme of arrangement between a company and its various classes of shareholders. The presentation of the scheme to the court for

[5] [1926] W.N. 78, 79.

[6] [1937] A.C. 707; 53 T.L.R. 524; [1937] 2 All E.R. 422.

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approval had to be preceded by the approval of the scheme at a meeting of the company, and also at the meetings of the various classes of shareholders. The proceedings at these meetings had to be regulated in accordance with the articles of association of the company. The particular article of association which was material for the present purpose was the article corresponding to article 65 in the articles of Gordon Hotels Ltd., but it had this important difference, that provision was made for a demand for a poll simply on the declaration of the result of the show of hands.

The point arose in this way: Apparently the arrangements for separating the different classes for the purposes of their several meetings were not as effective as they might have been, so that in the case of at least one meeting there were present holders of shares of the class and strangers of various kinds—I imagine members of the company holding shares of other classes. The resolution was, in fact, put to the vote by show of hands, and on the declaration of the result, a poll was demanded, but Lord Blanesburgh took the point that inasmuch as the meeting was diluted by the presence of strangers, the vote on a show of hands was (as one might say) a nullity because it was impossible to tell how far it included non-members. Of course, that difficulty would not enter into the voting by poll because each member would have to produce proper evidence of his being a holder of shares in the class. So, said Lord Blanesburgh, as there had been no valid show of hands, the demand for a poll was irregular, because the proper time to demand it was upon the declaration of the result of the show of hands, being a valid show of hands.

In my view, that case does not touch the present case. I should say that the point was taken and dealt with only by Lord Blanesburgh, so that his observations may, I think, be regarded as obiter, though entitled to respect.

What, to my mind, concludes the matter is the circumstance that the article with which we are here concerned, article 65, as adopted by special resolution, provides as follows: "At any "general meeting of the company a resolution put to the vote "of the meeting shall be decided on a show of hands unless before "or upon the declaration of the result of the show of hands a poll "be demanded . . ." It is to be observed that a poll can be demanded before the show of hands as well as upon the declaration of the result of the show of hands. The language is capable of reading: "Unless before the declaration of the result of the "show of hands or upon the declaration of the result of the show "of hands," and then it could conceivably be argued that the demand could not be made before the declaration of the result of the show of hands if there was no show of hands at all. That would be an inconvenient construction, which would compel going through the formality of a show of hands, not for the purpose of obtaining the result of that vote, but merely so that a demand for a poll could be made before the declaration of the result. I think the article should read as suggested by my brother Romer in the

course of the argument, in this way: "At any general meeting of "the company a resolution put to the vote of the meeting shall be "decided on a show of hands unless before (comma) or upon the "declaration of the result of (comma) the show of hands." That makes it clear that a poll can be demanded without going through the formality of a show of hands. That question, therefore, is, in my judgment, out of the way.

I should next state as best I can the arguments on either side in this highly technical controversy. The case for the two individual defendants may possibly be put in some such way as this: It cannot be said of any candidate for the office of director that he has been elected or appointed until he can say with truth "I am a director," or until the company could truthfully tell him, if he asked, "You are a director." These defendants agree that knowledge on the part of a candidate of his election is not the test, but they do submit that at all events he is not elected, in any effective sense of that expression, until the company can tell him, if he asks, "Yes, you are a director." It is clear, say these defendants, that neither of them could, during the period between the casting of the votes on the poll and the ascertainment of the result of the poll, claim to be, or to exercise, any of the powers of a director. In these defendants' submission, the taking of the poll was not complete until the result was ascertained. Therefore, the individual defendants could not be said to have been elected until the result was ascertained. The possibility was suggested, I think, of the resolution for the election of a director being put to the vote by show of hands, and in such a case it was said that, although the votes had been cast in the form of hands raised, so that in one sense the election may be said to have taken place, in another sense, and in the effective sense, it cannot be said to have taken place until the result of the show of hands, by counting hands raised on either side, has been ascertained.

On the appellants' side it is further argued that there is no sufficient reason for treating the election (which only becomes effective when the result is ascertained) as relating back to the date of the meeting; and it is pointed out that the period between the meeting and the ascertainment of the result need not (as in the present case) be a matter only of one day, it might be a substantial period; and, indeed, under certain circumstances, delay in ascertaining the result of the poll on the resolution for the appointment of a director might absorb the whole period allowed him under the articles in which to qualify himself. Suppose the articles said that he was to acquire his qualification within a fortnight of his appointment, and suppose a poll on the resolution for his election had been demanded and the result was not ascertained for a fortnight after the date of the meeting. The peculiar result would apparently ensue that at the very moment when for the first time it could be said of him: "He is a director," he would vacate office for failure to acquire his qualification shares.

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This side of the argument may also be put thus: By the express terms of section 182 of the Act, every director is placed under a duty to obtain his qualification within two months after his appointment. How can a person who has stood for the office of director at a meeting and whose appointment has been the subject of a resolution, voted upon by a poll vote, of which the result has not yet been ascertained, be said to be under a duty to acquire his qualification shares? He does not know whether he is a director or not; the company does not know whether he is a director or not. Nobody knows or can know until the result is ascertained. If he asks the secretary of the company: "Am I "under a duty to acquire my qualification shares?" at any time before the ascertainment of the result of the vote, the secretary could only answer: "Well, you may be under an obligation to "do so, but it is impossible to say whether you are or not." It is obviously unreasonable to expect such a person to acquire the shares necessary to qualify him in case the poll turns out to have resulted in his election.

In substance, therefore, in the appellants' submission, the effect of the view contended for by the plaintiffs and taken by the judge is that the period prescribed by the Act or the article for the acquisition of the qualification would be curtailed by the period of time elapsing between the date of the meeting and the date of the ascertainment of the result of the poll. The true view, as the appellants would have it, is, as I understand it, in effect that the meeting should be treated as notionally continuing until the result of the poll is ascertained and that the appointment of the director concerned takes effect as from the date of such ascertainment. Some support for that view is, I think, to be found in *Shaw* v. *Tati Concessions Ltd.*[7] and *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.*[8] to which I have already referred. It is not right, in the defendants' submission, to treat the ascertainment of the result as a mere formality, and by way of illustration of their submission to the contrary, they point out that in the event of an equality of votes, the chairman has a second or casting vote. They say that the ascertainment of the result is just as much a part of the taking of the poll as the casting of the votes.

Article 66 is relied on to some extent by both sides. It will be remembered that that article provides: "If a poll be "demanded in manner aforesaid, it shall be taken at such time "and place and in such manner as the chairman shall direct, and "the result of the poll shall be deemed to be the resolution of the "meeting at which the poll was demanded." The appellants point out that what is referred to is the result of the poll and not the taking of the poll, and they say the effect of it is that when the result of the poll is ascertained, then that result is to be deemed to be the resolution of the meeting, but they say, in effect, that the resolution of the meeting should be taken as being

[7] [1913] 1 Ch. 292. [8] [1926] W.N. 78.

of the same date as the ascertainment of the result of the poll. The plaintiffs' view, on the other hand, is that the effect of article 66 is to make the result of the poll the equivalent of the resolution of the meeting, that resolution being dated back to the date of the meeting, that is to say, December 23, 1957, in the present case.

On the plaintiffs' side, the argument is of this nature: The election is complete when the votes are cast on the poll; the ascertainment of the result of the poll is mere machinery; the people who ultimately turn out to have been elected were elected when those votes were cast, although they did not know it and the company did not know it, and although they could not claim to be considered directors pending such ascertainment. Mr. Beyfus, for the plaintiffs, admitted, as I understood him, that if the poll was taken—that is to say, if the votes on the poll were taken—on a later date, then that later date would be the date of the directors' appointment or election; but he says it is otherwise if the votes are cast on the actual day of the meeting and the counting takes place on a later day. That seems to me to involve an extremely fine distinction, because the effect would be that if in the present case the poll, in the sense of the casting of the votes, had been taken on December 24, then that date would have been the date of appointment of the directors concerned, whereas December 23 is taken for the day in the plaintiffs' submission simply because the convenient course was to let the votes be cast on December 23, before the meeting broke up, and to arrange for the votes to be counted and the result to be ascertained on the following day. Moreover, this line of argument involves abandonment of the contention that the election must take place strictly at a meeting, for the holding of the poll on a date subsequent to the actual meeting is recognized as amounting to election on that day.

I hope I have now done justice to the arguments on either side, and, finally, I should endeavour to express my own conclusions. I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable. In my view, the doctrine of relation back for which the plaintiffs contend would produce a wholly unreasonable result, and I decline to adopt it unless constrained to do so by the terms of the Act and the articles. I can find nothing in the Act or the articles which constrains me to do so. I do not think that article 66 is inconsistent with the individual defendants' view; on the contrary, I think it tends to support that view. In my judgment, the ascertainment of the result should be considered as part of the poll, and, consequently, there can be no appointment of a director by a general meeting until the result of the poll is ascertained. It is only then that the appointment

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can become in any sense effective. I think that, in effect, the meeting should be treated as continuing until the result of the voting on the poll is ascertained. Unless the appointment begins when the result of the poll is ascertained and on no earlier date, it would be impossible for the company to know who its directors were. It seems to me that produces a really quite impossible result. It also seems to me to be contrary to principle to place a man under a duty to acquire qualification shares, on the footing that he has been elected as a director, at a period when it is not known whether the resolution appointing him a director has been carried or not.

It is with reluctance that I differ from the judge, a judge of great experience in matters of this kind, but, for the reasons I have endeavoured to express, I would allow this appeal and discharge this injunction.

I should perhaps add, that in the course of the hearing before us reference was made to some further evidence which it was suggested might cast doubt on the qualification in shares of the individual defendants or one of them even now. We did not go into the details of that matter because it appeared to us that we should confine our attention to the matters which were raised before the judge. I only wish to say that I am for allowing the appeal simply on the footing that the only material facts were those before the judge and before us, and I say nothing as to any other ground it may be possible to advance for the contention that these directors are not duly qualified.

ROMER L.J. I agree. It appears to me that the appeal raises a very short question of construction of section 182 (3) of the Companies Act, 1948, and of article 98 (C) of the company's articles of association. It is said by the plaintiffs that the effect of those provisions is that the two months which the appellants had to acquire their qualification shares started at midnight on December 23/24 on the ground that the poll which had been demanded at the meeting on December 23 was taken on the same day and was then closed, and that there was nothing remaining to be done thereafter except to ascertain the result of the voting. That was the view which found favour with the judge. The appellants, however, say that the period of two months did not start to run until midnight on December 24/25, because the count did not take place until December 24, and, therefore, it was not known until that day whether the appellants had been elected or not.

It may well be that from one point of view the appellants may be regarded as having been elected directors on December 23, for it was by virtue of the votes given at the meeting on that day that they were appointed to the board. The question is, however, what is meant by " the date of his appointment " in the context in which those words appear in section 182 (3) of the Act. The provisions of that subsection impose a time limit within which a

director has to perform a specified act, videlicet, attain his qualification shares. Failure to perform the act within the stipulated time is attended by serious consequences, namely, the compulsory vacation of his office by the director concerned.

In these circumstances, common sense would seem to suggest that the time should not start to run until it was known, at least by somebody, that a position had arisen which necessitated the acquisition of the qualification shares; and that position could not be said to have arisen until it had been ascertained that a particular candidate had in fact been elected, for until that was known, no question of obtaining qualification shares could arise.

It seems to me that in a case such as the present a director cannot be said to have been appointed for relevant purposes until the result of the poll has been made known. Until that moment of time, it is a matter of speculation as to whether he has been elected to the board or not, and until that moment he is neither entitled to exercise the rights nor is he subject to the obligations of a director of the company.

In my judgment, it is not until those rights and obligations are shown to have arisen and a candidate has become clothed with his office accordingly that he can be said to have been appointed for the purpose of the section and article 98 (C).

It is unnecessary to refer to any of the authorities cited further than my Lord has already done. As I have said, it is a mere, short question of construction, primarily of section 182, and in a parallel sense of article 98, and, in my opinion, the effect of those provisions is as I have stated it to be. I would, therefore, allow the appeal. I would only add that I agree that it is irrelevant that the poll was not preceded by a show of hands. This is really quite clear when one analyses article 65 as my Lord has done.

ORMEROD L.J. I agree, and were it not for the fact that we are differing from the judge, I think I should find it unnecessary to add anything to the reasons which have already been given by my brethren.

The issue as it came before this court resolved itself into a short point, and that was whether the poll was complete when the votes were cast, or was not complete until the result was ascertained by somebody, not necessarily communicated to the persons interested, but certainly ascertained by somebody.

It was agreed, I think, by Mr. Sieghart, on behalf of the plaintiffs, that in the case of a vote by a show of hands, the result was not complete until the votes had been counted and the result of the count declared by the person in charge of the meeting. That seems a reasonable and common-sense view, particularly having regard, as was pointed out, to the fact that people may take their hands down in the course of the voting, and that many other things may happen before the votes are finally counted. But it was contended on behalf of the respondents that the same considerations would not apply to the taking

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of a poll, that when the votes were cast the matter was complete, the result could then be determined, and the contingencies such as a voter being able to change his mind and withdraw his hand could not arise, and therefore the poll was complete and nothing further needed to be done.

I find it extremely difficult to accept this argument. Apart from anything else, it appears that even when the votes are cast, there may be much to be done and much to be decided before the result of the poll can be ascertained. It may well be that the proxies have to be examined, some of the votes may be disqualified, and so on; and, of course, there is always the possibility, as was pointed out by Mr. Gardiner, that there may be a tie which would require the casting vote of the chairman.

In these circumstances, it seems to be abundantly clear that the poll cannot be said to be taken until these matters have been examined, the votes finally determined and counted and the result ascertained. In this case the votes were cast on December 23, the day of the meeting, but the result was not ascertained until December 24, the day after the meeting.

Mr. Beyfus, as I understand his argument, does not now contend that in any event, having regard to article 66, the result of the poll, which is to be deemed to be a resolution of the meeting, must be dated back to the date of the meeting. His contention is that all that was necessary to be done had been done at the meeting on December 23, and that, in those circumstances, the matter was complete and the directors were elected.

I find it extremely difficult to accept that view, and it does not seem to be in accordance with article 66, which provides that when a poll is taken it shall be taken at such place and in such manner as the chairman may direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. As I see it, the words "the result of the "poll" must imply the necessary ascertainment of that result, and until that result is ascertained, I find it difficult to understand how the poll could become what the article required, something which may be deemed to be the resolution of the meeting.

In any event, it does appear that any other construction would be so impracticable as to be unworkable. In this particular case, for instance, there were four vacancies on the board of directors. There were five candidates and four were elected. Until the result of the poll was ascertained, the officials of the company had no idea how many of the persons who had been candidates for election had been elected, who they were, and out of the seven directors to which the company was entitled there were only three who could with any certainty be said to be directors of the company. It seems quite impossible that a company should carry on its business in such circumstances. Though the delay here was only a matter of some 24 hours, there seems to be no reason why in a similar case the delay should not be for a very much longer period.

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Taking all those matters into consideration, I am of the opinion that the poll here was not taken until the result was ascertained, and as the result was not ascertained until December 24, it means that the election or the appointment of these two directors did not take place until then, and if that be so, they have, of course, acquired their qualification shares in time and the provisions of section 182 (1) of the Companies Act, 1948, do not apply.

I agree that this appeal should be allowed.

Appeal allowed.
Leave to appeal refused.

Solicitors: *Alistair Thomson; A. Kramer & Co.; Herbert Oppenheimer, Nathan & Vandyk; Basil Greenby & Co.*

J. A. G.

[COURT OF APPEAL.]

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[1955 L. No. 1038.]

Copyright — Assignment — Assignment of performing right — Whether transmissible or personal to assignee.
Copyright—Death of author—Assignment before death—Before 1911*—Rights of assignee—Assignment of performing right before Act of* 1911*—Death of authors after* 1911*—Rights of assignee thereafter—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 24 (1).

In 1905 an agreement was made between Leon and Stein, the authors, and Lehar, the composer of a German musical play known as "Die Lustige Witwe," and Felix Bloch Erben, a Berlin firm of dramatic agents. The agreement was in German and was governed by German law; it provided that the firm should have assigned to it the sole rights of distribution of the work in theatres all over the world, of public performance and of translation into foreign languages, subject to the payment of the proceeds less a commission to the authors and composer.

Pursuant to the rights so conferred, Felix Bloch Erben in 1906 entered into an agreement with George Edwardes, a theatrical producer, in the English language and subject to English law, which provided that "the said Felix Bloch Erben agrees to sell and "the said George Edwardes agrees to purchase the sole rights of "production in the English language in Great Britain and Ireland "and the British Colonies and in the United States and Canada of "'Die Lustige Witwe' . . ." There followed provisions for the production of the work in due time; for the payment of weekly royalties; for the payment of advance royalties, to be increased if Edwardes did not produce the work in London or New York by a specified date, and by a further provision: "In the event of the "said George Edwardes failing to adhere to the terms set forward "in this agreement all rights and interests in the said opera in "the country in which it has not been produced within the stipu-"lated period shall then and there revert to the said Felix Bloch "Erben. . . ."

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Edwardes, after producing the work with success under the title of "The Merry Widow," died in 1915, and by various assignments such rights as passed on his death became vested in the plaintiffs. The survivor of the two authors died in 1940 and the composer in 1948. At all times until action brought, royalties were paid to and accepted by Felix Bloch Erben, and neither they nor any representatives of the authors and composer challenged the plaintiffs' title. No notice was given pursuant to section 24 (1) of the Copyright Act, 1911.[1]

In 1955, in consequence of a performance of the work in England not authorized by the plaintiffs, they brought an action against the producer and others concerned. The legal representatives of the authors and composer, and Felix Bloch Erben, intervened and were added as defendants, and it was ordered that the question of title should be tried between the plaintiffs and the added defendants. Vaisey J. found that, according to German law, Felix Bloch Erben had no authority to grant to Edwardes rights transmissible on his death, and held that, on the true construction of the agreement of 1906, he received a mere personal interest terminable on his death. On an appeal by the plaintiffs, the Court of Appeal reversed the finding of Vaisey J. on German law; on further points:—

Held, (1) that the agreement of 1906 conferred rights on Edwardes which were transmissible to successors in title.

Messager v. *British Broadcasting Co. Ltd.* [1928] 1 K.B. 660; 44 T.L.R. 247, C.A.; [1929] A.C. 151; 45 T.L.R. 50, H.L. applied.

(2) That by virtue of section 24 of the Copyright Act, 1911, the plaintiffs had, as to the words until seven years after the death of the surviving author, and as to the music until seven years after the death of the composer, the sole and exclusive rights conferred on Edwardes to perform and license the performance of the work

[1] Copyright Act, 1911, s. 24: "(1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder: Provided that—(*a*) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would so have expired was the owner of the right or interest shall be entitled at his option either—(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or (ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration. . . . The notice above referred to must be given . . . not less than six months before the date at which the right would have so expired, . . ."

in the English language in Great Britain; and that after these respective dates they had similar but non-exclusive rights.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

The facts are taken substantially from the judgment of the court.

The question at issue in this appeal was the ownership of the English stage performing rights of a well-known musical play known in this country as "The Merry Widow." The plaintiffs were a company incorporated in the United States of America, and on May 5, 1955, they issued a writ against the defendants, Emile Littler and others, claiming (inter alia) an injunction to restrain the defendants and each of them from infringing the plaintiffs' copyright in the said play. By an order made on May 4, 1956, it was ordered that the claim of the plaintiffs against the defendants Otto Blau, Anna Amalia Hebein, Fritz Stein and Felix Bloch Erben (who had been added as defendants at their own request), and the counterclaim of the first three of the said defendants against the plaintiffs for a declaration (inter alia) that they were the owners of the said copyright, should be tried before the claim of the plaintiffs against the other defendants. These issues were tried by Vaisey J., and on October 25, 1957, he held that the plaintiffs' claim must fail, and the counterclaim of the added defendants succeed. The plaintiffs appealed.

The music of the play was composed by Franz Lehar, and the words were written by Victor Leon and Leo Stein, hereinafter referred to as "the authors." Leo Stein died in 1920 and his interests were now vested in the defendant Felix Stein. Victor Leon died on February 23, 1940, and his interests were vested in the defendant Anna Amalia Hebein. Franz Lehar died on October 24, 1948, and his interests were vested in the defendant Otto Blau.

The plaintiffs' title to the rights claimed by them depended on the construction of two agreements. The first, dated November 30, 1905, was made between the authors and Felix Bloch Erben, a firm of musical and dramatic agents carrying on business in Berlin. The second, dated February 27, 1906, was made between Felix Bloch Erben and George Edwardes, a well-known English theatrical producer. The place of fulfilment of the 1905 agreement within the meaning of article 29 of the German Code of Civil Procedure was stated in the agreement to be Berlin, and it was agreed between the parties that it must be construed according to German law, but that the 1906 agreement should be construed in accordance with English law. An agreed translation of the 1905 agreement, which was made in the German language, provided by article 1: "Messrs. Lehar, Leon and Stein hand over "the Operetta 'The Merry Widow' in three Acts written and "composed by them respectively to the firm of Felix Bloch Erben "for the sole and exclusive distribution to all theatres in this

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"country and abroad and transfer to it the rights of public "performance and recital of the said work which rights, as they "hereby affirm, are exclusively vested in them as authors, as well "as the rights of translation into foreign languages in accordance "with articles 11, 12 and following of the German Reich Law "of June 19, 1901, as their legal successor, in such a way that "the firm of Felix Bloch Erben shall solely and exclusively be "entitled during the period of this agreement to exercise the "said rights either by itself or by its agents abroad without any "restriction."

Article 3 provides: "The entire income which may be "obtained by the distribution to theatres of the work mentioned "in section 1 shall be paid by Messrs. Felix Bloch Erben of "Berlin to the authors after deduction of the following dis-"tributor commissions, that is to say," and then it went on to set out the various payments and commissions to be made. Article 4 provided for monthly accounts and payments, while by article 5: "The duration of this agreement is fixed so as to "coincide with the duration of the legal rights of protection of "the work mentioned in section 1." Lastly, article 9 provides: "The place of fulfilment for both parties within the meaning of "article 29 of the Code of Civil Procedure will be Berlin."

It was the contention of the plaintiffs that, under this agreement, Felix Bloch Erben was empowered to grant to suitable persons a transmissible right to produce and perform the play in Germany and other countries. The defendants, on the other hand, contended that Felix Bloch Erben had no power under the 1905 agreement to confer on a transferee any right other than the right of performance during the life of the transferee, and Vaisey J. so held.

By the 1906 agreement Felix Bloch Erben transferred to George Edwardes certain rights for the production and performance of the play in the English language in Great Britain and elsewhere. The relevant paragraphs of the agreement were as follows: "The said Felix Bloch Erben agrees to sell and the "said George Edwardes agrees to purchase the sole rights of pro-"duction in the English language in Great Britain and Ireland "and the British Colonies and in the United States of America "and Canada of 'Die Lustige Witwe,' comic opera in three Acts "by Victor Leon, Leo Stein and Franz Lehar. (2) The said "George Edwardes agrees to pay to the said Felix Bloch "Erben for performances of the said opera in London the sum "of £35 a week, and for performances of the said opera in New "York an equal sum of £35 a week. (3) The said George "Edwardes agrees to pay to the said Felix Bloch Erben for per-"formances of the said opera in the provinces of the United "Kingdom and the United States and Canada," certain sums therein stated. "(4) The said George Edwardes further agrees "to pay to the said Felix Bloch Erben for the sole rights of "production in the English language in Great Britain and

"Ireland and the British Colonies and in the United States of "America of the opera mentioned in paragraph 1 a sum of £1,000 "on account of above fees, which sum is to be paid to the said "Felix Bloch Erben at the signature of this agreement. (5) The "said George Edwardes agrees to produce the said opera in three "acts and not to make any more alterations or add more songs "and other musical numbers than are necessary to ensure the "success of the said opera on the English speaking stage. "(6) The said George Edwardes agrees to produce or cause to be "produced the said opera in London or New York not later than "May 1, 1907. (7) Should, however, for some reason or other "the said George Edwardes be prevented from producing the said "opera in London or New York on or before May, 1907, the said "Felix Bloch Erben agrees to grant to the said George Edwardes "an extension of term of one year from the said date for the "ultimate date of production of the said opera in London or in "New York upon payment by the said George Edwardes to the "said Felix Bloch Erben of a further sum of £200 on account "of above fees." By clause 10: "In the event of the said "George Edwardes failing to adhere to the terms set forward in "this agreement all rights and interests in the said opera in the "country in which it has not been produced within the stipulated "period shall there and then revert to the said Felix Bloch Erben "who shall not be liable to return to the said George Edwardes "any sums paid by him to them in respect thereof."

George Edwardes caused the play to be translated into English with suitable adaptations, and added certain lyrics, and produced it at Daly's Theatre, London, the first performance taking place on June 8, 1907. The production had a long and successful run, and had since been revived in London and the provinces from time to time. George Edwardes died on October 4, 1915, and after various assignments such rights as existed on his death became vested in the plaintiffs. After the death of George Edwardes his successors continued to pay to Felix Bloch Erben the royalties specified in the 1906 agreement, and the correspondence which was before the court between Felix Bloch Erben and the various successors to George Edwardes, and between the respective solicitors and agents of the parties showed that Felix Bloch Erben and the successors to the authors were aware of (and certainly took no objection to) the assignments which took place after the death of George Edwardes. Further, by agreement dated July 23, 1929, Lehar, Leon and Fritz Stein, as the personal representatives of Leo Stein, transferred to Metro-Goldwyn-Mayer Pictures certain rights in relation to the exhibition of motion pictures of the play; and in the warranty clause it was set out that the stage performing rights had been granted to the late George Edwardes; and by an agreement dated March 30, 1930, made between Felix Bloch Erben and Metro-Goldwyn-Mayer, and also relating to the transfer of motion picture rights, the continuing existence of

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the rights granted to George Edwardes by Felix Bloch Erben was clearly recognized.

Charles Russell Q.C. and *F. E. Skone James* for the plaintiffs.

K. E. Shelley Q.C., *Guy Aldous Q.C.* and *D. W. Falconer* for the defendants.

The following cases cited in argument are not referred to in the judgment: *Watcham* v. *East Africa Protectorate* [2]; *Serra* v. *Famous Lasky Film Service* [3]; *British Actors Film Co. Ltd.* v. *Glover* [4]; *Barker* v. *Stickney* [5]; *Sweet* v. *Cater* [6]; *Griffith* v. *Tower Publishing Co. Ltd. and Moncrieff* [7]; *Karno* v. *Pathé Frères Ltd.* [8]; *Gaisberg* v. *Storr.* [9]

Cur. adv. vult.

April 1. JENKINS L.J. The judgment about to be read by Ormerod L.J. is the judgment of the court in this case.

ORMEROD L.J., after stating the facts reviewing the evidence of two experts in German law, continued: It may well be, as Vaisey J. found, that the 1905 agreement is a contract of personal service, but it is agreed that the service which Felix Bloch Erben contracted to render was to exploit the play by finding suitable persons to produce it. It was agreed by both witnesses that George Edwardes was a producer of the highest reputation, so far as plays of this type were concerned; and it is a reasonable inference that Felix Bloch Erben, in seeking a producer in this country, would be anxious to obtain his services. It would be surprising if an impresario of the standing of George Edwardes would be willing to go to the expense of having the play translated and adapted for performance in England, and the further expense of a production at Daly's Theatre, if the right he had acquired was to last only so long as he should live, and not carry with it any right of transmission. In order to obtain production of the play by producers of standing, it would, of course, be necessary to enter into agreements with them, and no doubt, after negotiation, terms would be agreed which satisfied, so far as possible, the wishes of both parties. To enter into such agreements, therefore, seems on the face of it a reasonable way for Felix Bloch Erben to perform their personal service, and, in our judgment, having given careful consideration both to the evidence and the document itself, they were justified in so acting.

It was the view of both the expert witnesses that the subsequent conduct of the parties could be taken into account in ascertaining the intention of a document, although one expert

[2] [1919] A.C. 533; 34 T.L.R. 481.
[3] [1921] W.N. 347; [1917–23] Mac.C.C. 272.
[4] [1918] 1 K.B. 299; 34 T.L.R. 162.
[5] [1919] 1 K.B. 121.
[6] (1841) 11 Sim. 572.
[7] [1897] 1 Ch. 21; 13 T.L.R. 9.
[8] (1909) 25 T.L.R. 242.
[9] [1949] W.N. 337; 65 T.L.R. 485; [1949] 2 All E.R. 411.

witness said that this would only be so if the meaning of the document was not clear on the face of it. If support was necessary for the conclusion we have come to as to the meaning of the agreement, it could surely be found by applying this principle. The conduct of the authors and their representatives and of Felix Bloch Erben is, in our view, consistent only with the view that in the minds of the parties the powers given in the 1905 agreement to Felix Bloch Erben were not limited as the judge has found, but enabled Felix Bloch Erben, if circumstances so warranted, to transfer rights which were themselves transferable.

The next question is whether Felix Bloch Erben did in fact by the 1906 agreement transfer to George Edwardes a transmissible right, or whether the rights so conferred were personal to George Edwardes, and lapsed on the day of his death, October 4, 1915. The judge, after discussing the various devolutions of what he described as the "paper title" from the late George Edwardes, and the fact that the respondents had been content to accept the assignees from time to time on the footing that there had been a valid succession to the position held by George Edwardes, said: "I hold, however, that on its true "construction the 1906 document did not convey to George "Edwardes anything more than a personal interest terminable "on his death, however much it may have been considered "reasonable and convenient to act on the assumption that "it did."

Mr. Russell argued on behalf of the plaintiffs that the agreement, which contained in clause 1 the words: "The said "Felix Bloch Erben agree to sell and the said George Edwardes "agrees to purchase the sole rights of production in the English "language" etc., constituted an agreement to assign. The rights were by their nature transferable, and there was nothing in the document expressing a contrary intention. He pointed out that George Edwardes purchased the sole right of performance; that there was no limit in point of time to the agreement; and that the words in the agreement were not mere words of licence to George Edwardes. Therefore, submitted the plaintiffs, there must be a transfer of the copyright so far as it related to this country for the entire period.

The plaintiffs cited in support of their contention *Messager* v. *British Broadcasting Co. Ltd.*[1] This was a case where the plaintiff, André Messager, granted to George Edwardes the sole and exclusive right of representing or performing a play called "Les Petites Michus" in this country. The full terms of the agreement are set out in the report: "The licensors hereby "grant the licensee the sole and exclusive right of representing "or performing the play in the United Kingdom of Great Britain "and Ireland, America, and the British Colonies and Dominions.

[1] [1928] 1 K.B. 660; 44 T.L.R. 247, C.A.; [1929] A.C. 151; 45 T.L.R. 50, H.L.

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" (2) The copyright in the music of the play shall remain the " property of the said André Messager, and he shall be at liberty " to use the English lyrics for sale with the music. (3) The play " shall be adapted for the English stage at the expense of the " licensee. (4) The licensee shall in consideration of the rights " hereby granted pay to the licensors the following royalties or " fees," and then are set out the various royalties. " (5) If the " play be not produced in London by the said George Edwardes " within three months from this date, all rights of representation " as aforesaid shall revert to and become again the absolute " property of the licensors. (6) The licensee agrees not to inter- " polate into the score any piece or number not composed by the " said André Messager without the said André Messager's per- " mission, but the said André Messager agrees to furnish and " compose such alterations and additional numbers required for " the English version as the said George Edwardes may reason- " ably require. (7) The said André Messager shall assist at such " rehearsals as may be agreed and shall conduct the orchestra " on the occasion of the first production of the play at Daly's " Theatre aforesaid." Then clause 8 refers to the keeping of proper books of account, and so on.

In May, 1920, George Edwardes's successors assigned to George Edwardes (Daly's Theatre) Ltd. " so far as they lawfully " could " the benefit of the contract. In October, 1926, George Edwardes (Daly's Theatre) Ltd. granted to the British Broadcasting Co. Ltd. the right to give a performance by wireless telegraphy. McCardie J. held that the licence to George Edwardes was personal to himself, and could not be assigned. In the Court of Appeal the decision of McCardie J. was reversed, and in a short judgment Scrutton L.J. said [2]: " That document, properly " construed, conferred rights upon Mr. George Edwardes, which " were not merely personal to himself but rights which he could " assign." The decision of the Court of Appeal was affirmed by the House of Lords.[3] After discussing the contentions raised by the appellants on the various clauses of the agreement, Lord Hailsham L.C. continues [4]: " But even if I were wrong on this " construction and if the payments to the licensors were limited " to 4 per cent. of the gross receipts of the performances at " theatres, I should still be unable to treat that expression as " limiting or cutting down the plain grant which is contained in " clause 1. That, in my view, plainly operates as an assignment " to Mr. George Edwardes of the sole and exclusive right of " representation within the area named in the clause, and I think " that that view of the clause is strengthened, not only by the " expression in clause 2, which stipulates that the copyright in " the music shall remain the property of M. Messager, but also " by the language of clause 5, which provides that in the event

[2] [1928] 1 K.B. 660, 663.
[3] [1929] A.C. 151.
[4] Ibid. 155.

" of non-production within three months ' all rights of representa-
" ' tion as aforesaid shall revert to and become again the absolute
" ' property of the licensors.' That seems to me inept language
" in which to describe the mere cessation of a licence, and is
" much more apt to describe the reversion to the licensors of
" rights which had been assigned by clause 1."

The defendants' contention was that the agreement was personal to George Edwardes, and gave him no right to transmit any of the rights acquired under it. It was pointed out that nowhere in the agreement were the words " his successors or " assigns " added to the name of George Edwardes. The respondents particularly relied on clauses 5 and 6 of the agreement in which George Edwardes agreed to produce the play, or cause it to be produced, in London or New York not later than May 1, 1907, and argued that under the agreement George Edwardes, and George Edwardes only, was entitled to produce, and was under a duty to do so. They sought to distinguish *Messager* v. *British Broadcasting Co. Ltd.*[5] mainly by emphasizing that in the 1906 agreement each clause referred to George Edwards personally, whereas in the agreement in the *Messager* case he was referred to by name only in clause 5 and 6, and in the other clauses was referred to merely as " the licensee." Whether George Edwardes would have been entitled to delegate his duty under the agreement to produce the play within the specified time is a question which does not arise in this case. The fact was that he did produce the play. The question is whether he had under the agreement acquired rights which were intended to subsist for the whole period of the copyright, and could be transmitted if so desired.

We can find no real distinction between the present case and that of *Messager* v. *British Broadcasting Co. Ltd.*[6] It should be noted that clause 10 of the agreement, which provides that all rights and interest " shall there and then revert " to Felix Bloch Erben, is in very similar terms to clause 5 of the agreement in the *Messager* case, the language of which was held by Lord Hailsham to be inept in which to describe the mere cessation of a licence. In our judgment, the appellants' contention is the right one, videlicet, that the 1906 agreement did confer on George Edwardes a transmissible right.

The remaining question for consideration is the nature of the rights (if any) remaining in the plaintiffs by virtue of the provisions of the Copyright Act, 1911. Prior to the passing of that Act the period during which the copyright existed in a work was the life of the author and seven years after his death. Of the two joint authors of the play, Leon was the second to die. He died on February 23, 1940, and apart from the 1911 Act the copyright

[5] [1929] A.C. 151. [6] Ibid.

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in the words would have expired on February 23, 1947. Lehar died on October 24, 1948, and so the copyright in the music would have expired on October 24, 1955. The Copyright Act, 1911, extended the period to fifty years after the death of the author, and therefore the copyright in both music and words is still in existence. Provision was made in the Act for rights acquired before it came into force. [His Lordship read section 24 (1) and continued:]

It was not disputed that in the event of the plaintiffs being held to have a transferable right, this was a case coming within the proviso—that is, a case where an author had, before the commencement of the Act, assigned his right or any interest therein for the whole term of the right. The first option set out in the proviso could not apply, as the plaintiffs had not given notice within the prescribed time. The question, therefore, to be determined is what are the rights remaining in the plaintiffs under the terms of the second option. The submission of the plaintiffs is that the words entitling them "to continue to repro- "duce or perform the work in like manner as heretofore" mean that they are to be regarded as continuing to have the rights granted to them under the 1906 agreement, and therefore to have for the remainder of the extended term the sole right of the stage production and performance in this country. If the plaintiffs are right in this, it means that under the second option, without giving notice or taking any other steps, they are in the same position as they would have been if they had given the prescribed notice under the first option and obtained an assignment of the rights subject to the payment of royalties which were either agreed, or determined by arbitration. This construction, in our judgment, cannot be right.

The defendants, on the other hand, submit that as the plaintiffs have failed to give the required notice to exercise the first option, their right to continue to reproduce or perform under the second option does not amount to anything more than the continuation for the length of the run of any production which was in being on the date when the copyright would have expired but for the passing of the Act. They submitted, too, that the plaintiffs had, since before the original date of expiry of the copyright, done nothing more than authorize the production of the play. They had not themselves reproduced or performed it, and the words of the option did not carry any right to authorize a performance. This is, in our view, taking too narrow a view of the words of the statute.

The option does not, in our judgment, give the plaintiffs the sole right to produce and perform in this country which they had under the 1906 agreement, but it does, we think, mean that the plaintiffs still have such rights to continue to produce and perform the play as they originally had. This would include the right to authorize others to perform it also; but it may well be

that if the plaintiffs have no longer the sole right to produce, this will be of little value to them.

For these reasons we are of the opinion that this appeal should be allowed.

Appeal allowed.
Leave to appeal.

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Solicitors: *Wright & Webb; Kenneth Brown, Baker, Baker.*

F. R. D.

[COURT OF APPEAL.]

BAUME & CO. LTD. *v.* A. H. MOORE LTD.

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Feb. 26, 27, 28; *Mar.* 28.
Jenkins, Romer and Ormerod L.JJ.

[1955 B. 72.]

Passing Off—Risk of confusion—Bona fide use of own name on goods—Whether defence.

Trade Mark—Infringement—Bona fide use of own name, defence of—Whether applicable to use as a trade mark—Risk of confusion—Trade Marks Act, 1938 (1 & 2 *Geo.* 6, *c.* 22), *ss.* 4 (1), 8 (*a*).

The plaintiffs, an English company, carried on the business of the sale of watches and were the proprietors of the registered trade mark "Baume." The defendant company, who carried on business in the sale of (inter alia) watches, sold watches bearing the mark "Baume & Mercier, Genève," or "Geneva"; these watches were manufactured by a Swiss company called Baume & Mercier S. A., who had manufactured watches for many years.

In an action by the plaintiffs to restrain infringement of registered trade mark and passing off:—

Held, as regarded the claim in passing off (1) that there was no exception to the rule that no man was entitled so to describe or mark his goods as to represent that they were the goods of another.

Dictum of Romer J. in *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers & Co.* (1924) 41 R.P.C. 277, 291 applied.

(2) That it was not a defence to an action for passing off that the defendant had no intention to deceive.

Dictum of Buckley L.J. in *John Brinsmead & Sons Ltd.* v. *Stanley Brinsmead* (1913) 30 R.P.C. 493, 506; 29 T.L.R. 237 applied.

(3) That the plaintiffs had established that the sale by the defendants of Baume & Mercier watches was reasonably calculated to cause confusion in the trade and in the minds of the public, and that, accordingly, the claim in passing off succeeded.

Per curiam. Inasmuch as the defendants had incorporated the whole of the plaintiffs' registered mark in their own mark, albeit that it contained in addition the words "& Mercier, Genève," or "Geneva," they were in breach of section 4 (1) of the Trade Marks Act, 1938; but that as the use of such name was a bona fide use on the defendants' goods of the name of the manufacturer they were protected by section 8 (*a*) of the Act of 1938, which protected such use of the manufacturers' name as a trade mark.

Decision of Danckwerts J. [1958] Ch. 137; [1957] 3 W.L.R. 870; [1957] 3 All E.R. 416 reversed.

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BAUME & CO. LTD. v. A. H. MOORE LTD.

APPEAL from Danckwerts J.[1]

The plaintiff company, Baume & Co. Ltd., or their predecessors in title, had been trading as distributors and sellers of watches in this country for approximately one hundred years, and, since 1878, had been registered under the Trade Marks Acts as proprietors of the mark "Baume" (trade mark No. 14263) for watches and all other descriptions of horological instruments.

The defendants, A. H. Moore Ltd., were importers and distributors of watches and had for a few years past been importing into this country watches made by a Swiss firm of the name of "Baume & Mercier, Société Anonyme." These watches had been sold by the defendants in boxes bearing on the outside the words "Baume & Mercier, Genève," or, in some cases, "Geneva." The watches bore on the dial, and also on the inside of the movement the same words "Baume & Mercier, "Genève," or "Geneva." At one time members of the family of "Baume" were connected with the Swiss firm.

The plaintiffs commenced an action against the defendants claiming (1) an injunction restraining them from infringing the plaintiffs' registered trade mark, No. 14263; (2) an injunction restraining them from advertising, offering for sale or selling watches or other horological instruments, not being the goods of the plaintiffs, under the name "Baume and Mercier" or any other name containing the word "Baume" and calculated to pass off or to enable others to pass off such watches or other horological instruments as and for the plaintiffs' watches or other horological instruments; (3) destruction, or obliteration on oath from all watches or other horological instruments, advertising or other matter in the possession, custody and control of the defendants of the word "Baume" or any word so nearly resembling the same as to be calculated to deceive; (4) an inquiry as to damages or at the plaintiffs' option an account of profits.

The defendants, by their defence, admitted that they had offered for sale, sold, and supplied watches bearing the mark "Baume & Mercier, Genève," and that all such watches were, in fact, watches manufactured by a Swiss firm of the name of "Baume & Mercier, S. A."; and they denied the alleged infringement of trade mark or that their use of the name "Baume" as part of the name "Baume & Mercier" was calculated to deceive or cause confusion.

Danckwerts J. held that, though there was some risk of confusion, the use of the name "Baume & Mercier, Genève," was a bona fide use on the defendants' goods of the name of the manufacturer; that section 8 (*a*) of the Trade Marks Act, 1938, protected such use of the manufacturers' name as a trade mark; and that such bona fide use afforded also a defence to passing off.

The plaintiffs appealed.

[1] [1958] Ch. 137; [1957] 3 W.L.R. 870; [1957] 3 All E.R. 416.

Guy Aldous Q.C. and *John Whitford* for the plaintiffs.

Sir Lionel Heald Q.C. and *F. E. Skone James* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Spalding (A. G.) & Bros.* v. *Gamage (A. W.) Ltd.*[2]; *Wright, Layman & Umney Ltd.* v. *Wright*[3]; *West Derby Union* v. *Metropolitan Life Assurance Society*[4]; *Cash (J. & J.) Ltd.* v. *Cash*[5]; *Teynham (Lord)* v. *Mullins*[6]; *Turton* v. *Turton*[7]; *Pianotist Co.'s Application*[8]; *Rysta Ltd.'s Application*[9]; *Hendriks* v. *Montagu.*[10]

Cur. adv. vult.

March 28. JENKINS L.J. The judgment about to be delivered by Romer L.J. is the judgment of the court.

ROMER L.J. This is an appeal from an order of Danckwerts J. dismissing the plaintiffs' action in which they sought an injunction restraining the defendants from infringing the registered trade mark of the plaintiffs and from passing off watches not being the goods of the plaintiffs as the plaintiffs' watches.

The plaintiffs' trade mark consists of the word "Baume" and it was registered in 1878 in Class 10 of Schedule III for watches and all other descriptions of horological instruments. They and their predecessors in title have carried on business in the sale of watches since 1834. The watches are made for them by a firm in Switzerland called Mildia and are imported into this country and sold by the plaintiffs. It was admitted by the defendants that, since at least 1880, the plaintiffs' business of selling watches has been carried on by them or their predecessors under the trade mark "Baume"; that such business is a substantial one; and that for many years past substantial moneys have been expended in advertising.

The defendant company carry on business as watch importers and they sell directly to wholesalers. In about 1954 they entered into business relations with a Swiss Company called Baume & Mercier, Société Anonyme, of Geneva, and began to import watches made by that company into this country for sale. These watches are supplied by the defendants to wholesalers in boxes, on the outside of which is printed the name "Baume & Mercier "Geneva" and that name is also printed on the face of the watches themselves.

The plaintiffs' case, as pleaded by paragraph 5 of their statement of claim, is that "the use of the word 'Baume' as part of

[2] (1915) 32 R.P.C. 284; 31 T.L.R. 328.
[3] (1949) 66 R.P.C. 149, C.A.; reversing (1948) 65 R.P.C. 185.
[4] [1897] A.C. 647, 656; 13 T.L.R. 536.
[5] (1902) 19 R.P.C. 181; 18 T.L.R. 299.
[6] (1674) 1 Mod.Rep. 119.
[7] (1889) 42 Ch.D. 128; 5 T.L.R. 545.
[8] (1906) 23 R.P.C. 774.
[9] (1942) 60 R.P.C. 87, 106.
[10] (1881) 17 Ch.D. 638.

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" the name of the watches advertised, offered for sale and sold " by the defendants is an infringement of the plaintiffs' said regis- " tered trade mark and it is further calculated to deceive and " cause confusion and to lead the trade and public to believe that " the goods offered for sale or sold by the defendants are goods of " the plaintiffs' manufacture or merchandise and is calculated to " pass off or enable others to pass off goods not of the plaintiffs' " manufacture or merchandise as and for the plaintiffs' goods."

In his judgment, the judge, after considering the evidence which had been called before him, said [1]: " In a matter of this " sort it is always rather difficult to see how far confusion really " is likely or possible, and what exactly the public will do, in the " absence of positive evidence of actual deception. On the whole, " I have come to the conclusion that the names are sufficiently " similar so that members of the public would not necessarily be " likely to perceive that ' Baume & Mercier ' was not the same " as ' Baume,' and I think, therefore, that there is some " probability that confusion might occur in England in respect of " the sales of the watches." The judge, however, dismissed the action in so far as it was founded upon infringement of the plaintiffs' trade mark on the ground that the defendants were entitled to the protection afforded by section 8 of the Trade Marks Act, 1938; and, in so far as the plaintiffs' claim was based upon passing off, the judge dismissed it on the ground that there had been an honest user by the defendants of the makers' own name.

We first propose to consider the issue of passing off. It is quite clear on the evidence, and indeed from the defendants' admission to which we have already referred, that the name " Baume " has, for many years past, been associated in this country with the watches distributed by the plaintiffs. The questions on this part of the case would accordingly appear to be: (1) Have the plaintiffs established that the sale by the defendants of Baume & Mercier watches is reasonably calculated to cause confusion in the trade and in the minds of the public; and (2) If so, is it a valid defence for the defendants to show (as they did show to the judge's satisfaction) that there had been an honest use by them of the makers' own name? Taking the second question first, it is to be observed that this is not a case of a defendant carrying on a business under a name, but of marking goods with a name. The distinction between these two classes of case was emphasized and explained by Romer J. in *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers & Co.*[2] " It is the law " of this land," he said, " that no man is entitled to carry " on his business in such a way as to represent that it is " the business of another, or is in any way connected with the " business of another; that is the first proposition. The second " proposition is, that no man is entitled so to describe or mark

[1] [1957] 3 W.L.R. 870, 873; [1958] Ch. 137; [1957] 3 All E.R. 416.

[2] (1924) 41 R.P.C. 277, 291.

" his goods as to represent that the goods are the goods of " another. To the first proposition there is, I myself think, an " exception: a man, in my opinion, is entitled to carry on his " business in his own name so long as he does not do anything " more than that to cause confusion with the business of another, " and so long as he does it honestly. It is an exception to the " rule which has of necessity been established. . . . To the second " rule, to which I have referred, I think there is no exception at " all; that is, that a man is not entitled so to describe his goods " as to lead to the belief that they are the goods of somebody " else. It is not necessary that there should be an exception to " that. It is perfectly legitimate for a man in the cutlery business " to carry on business under his own name whatever that name " may be, but I can see no necessity for his marking his cutlery " with a name (although it be his own name) which may have " the effect of passing off those goods as the goods of the " plaintiffs."

Whether or not Romer J. may have expressed the exception to the first of the two rules too widely it is not necessary, for present purposes, to consider; but he said (quite rightly in our opinion) that there is no exception to the second rule and it is that rule which is relevant to the present case. In *Reddaway* v. *Banham*,[3] Lord Herschell, after referring to *Burgess* v. *Burgess*,[4] said[5]: " This, I think, clearly recognizes that a man may so " use even his own name in connexion with the sale of goods " as to make a false representation "; and see also *Valentine Meat Juice Co.* v. *Valentine Extract Co. Ltd.*[6]

The next point which arises is whether it is a valid defence to an action for passing off that the defendant had no intention to deceive. In our judgment, it is clearly not, for fraud is not a necessary constituent of such an action. This clearly appears from the judgment of Buckley L.J. in *John Brinsmead & Sons Ltd.* v. *Stanley Brinsmead*.[7] The Lord Justice, in laying down certain propositions with regard to passing off, expressed himself as follows[8]: " The law, as I understand it, is this:—if a man " makes a statement which is true, but which carries with it a false " representation and induces the belief that his goods are the " plaintiffs' goods, he will be restrained by injunction. He cannot " rely on the fact that his statement is literally and accurately " true, if, notwithstanding its truth, it carries with it a false repre- " sentation. . . . Secondly, if it is found that a man's object in " doing that which he did was to deceive—that he had an inten- " tion to deceive—the court will be very much more ready to " infer that his object has been achieved if the facts tend to " show that that is the case, and to say that his intention to " deceive ripening into deceit gives ground for an injunction; but

[3] [1896] A.C. 199; 12 T.L.R. 295.
[4] (1853) 3 De G.M. & G. 896.
[5] [1896] A.C. 199, 211.
[6] (1900) 17 R.P.C. 673; 16 T.L.R. 522.
[7] (1913) 30 R.P.C. 493; 29 T.L.R. 706.
[8] (1913) 30 R.P.C. 493, 506.

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"it is not necessary to prove intention to deceive. . . . If the "fact is that the act which the defendant is doing does deceive, "with the result that a man, who intends to be a customer of the "plaintiffs, is induced by something which the defendant has "done to become a customer of the defendant instead, even if "the defendant has done that innocently, yet as soon as he learns "that in point of fact that which he had no intention of using "for the purpose of deceit does create deception, then he is doing "that which is wrong, and he will be restrained from pursuing a "course of action the result of which is, in point of fact, to take "that which is the plaintiffs' property and give it to him, to "defraud the plaintiffs' customers into becoming the defendant's "customers. Thirdly, in the application of the principles which "I have stated there is, in my opinion, no difference whatever "where the true statement consists in an accurate statement of "the defendant's name as distinguished from any other true "statement of fact, if of course you have evidence that from the "use of his own name deception results. If a trader takes a "name which is not his own name, but is that of a rival trader, "and uses it in his trade, no doubt that is very strong evidence "that he intends to deceive, and the court will fasten upon that "in any case in which it occurs; but if that is not so, if he is "simply using his own name and it is proved that its use results "in deception, he will be restrained even from using his own "name, without taking such steps as will preclude the deception "which, by hypothesis, is engendered by his using his own name. "There are many authorities for this proposition."

In our judgment, it follows from the second of the three principles enunciated by Buckley L.J. that the defence of innocent and honest user of the manufacturers' name on the watches which the defendants have sold will not avail them as a defence if the other ingredients of an action for passing off are established.

We turn, therefore, to the question whether the evidence which was called before the judge was such as to justify the view that the acts of which the plaintiffs complain were likely to cause deception. This is essentially a question of fact. In *Reddaway* v. *Banham*,[9] which was an action to restrain passing off, Lord Halsbury L.C. said: "My Lords, I believe in this case that the "question turns upon a question of fact. The question of law "is so constantly mixed up with the various questions of fact "which arise on an inquiry of the character in which your Lord-"ships have been engaged, that it is sometimes difficult when "examining former decisions to disentangle what is decided as "fact and what is laid down as a principle of law. For myself, "I believe the principle of law may be very plainly stated, and "that is, that nobody has any right to represent his goods as the "goods of somebody else.

"How far the use of the particular words, signs or pictures

[9] [1896] A.C. 199, 204.

" does or does not come up to the proposition which I have " enunciated in each particular case must always be a question " of evidence, and the more simple the phraseology, the more " like it is to a mere description of the article sold, the greater " becomes the difficulty of proof; but if the proof establishes " the fact the legal consequence appears to follow."

[His Lordship then referred to the evidence and continued:] That concluded the evidence on the question of likelihood of confusion. Sir Lionel Heald contended before us that it was insufficient to afford a basis for an injunction against his clients. He relied on the fact that no case of actual confusion between the plaintiffs' watches and Baume & Mercier watches had been proved; that the only witnesses on the issue of likelihood of confusion called by the plaintiffs had been trade witnesses, and that notwithstanding that both the plaintiffs and Baume & Mercier had registered their names and trade marks in Switzerland, no evidence was before the court to show that any confusion had occurred in that country. He also contended that the fact that the plaintiffs' name was " Baume " simpliciter, whereas the offending name was the double name of " Baume & Mercier," was sufficient in itself to distinguish the one from the other, and that such distinction was emphasized by the word " Geneva " which follows upon " Baume & Mercier."

On the other hand, Mr. Aldous, in addition to relying upon the specific evidence of his witnesses (and in particular that of a Mr. Smitherman), pointed out that the plaintiffs' goods and Baume & Mercier watches are of similar quality and in the same general price range and are sold through the same shops and over the same counters; that the name " Baume " is an unfamiliar one in this country except as a trade name for watches; that it has been used in connexion with the plaintiffs' watches for 100 years and that every witness knew it well as a trade name for watches; and that there was some evidence before the judge that double names are usually referred to by their first names.

In our judgment, the considerations upon which Mr. Aldous relied, coupled with the witnesses whom the plaintiffs called, do establish a reasonable likelihood of confusion arising if the defendants continue to sell " Baume & Mercier " watches in this country. It appears to us that the evidence of the very experienced watchmaker and jeweller, Mr. Smitherman, was particularly cogent. He said, in effect, that he would not stock both Baume and Baume & Mercier watches in his shop because he thought that it would result in confusion both among his staff and through them, or independently of them, among the public. Evidence of a similar character was given by other of the plaintiffs' witnesses, though their evidence was admittedly not so strong as that of Mr. Smitherman. Notwithstanding the contrary views expressed by the witnesses called on behalf of the defendants, we are of opinion that there is a real probability of the Baume & Mercier watches being regarded in the shops as being the same

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as, or in some way associated with, the plaintiffs' goods, and that the plaintiffs have accordingly made good their case in so far as they found it upon passing off; and that an injunction should be granted accordingly.

Inasmuch as it is a matter of indifference to the plaintiffs whether they obtain an injunction against passing off or an injunction against infringement of trade mark, so long as they are granted either one or the other, it becomes in strictness irrelevant to consider, or adjudicate upon, the arguments which were addressed to us on the trade mark aspect of the case. As, however, several points were raised and argued before us upon the subject, we will briefly express our provisional views upon them.

The sections of the Trade Marks Act, 1938, which are relevant to the matter are section 4 (1) and section 8. Section 4 (1) is as follows: "Subject to the provisions of this section, and of "sections 7 and 8 of this Act, the registration (whether before or "after the commencement of this Act) of a person in Part A of "the register as proprietor of a trade mark (other than a certifi- "cation trade mark) in respect of any goods shall, if valid, give "or be deemed to have given to that person the exclusive right "to the use of the trade mark in relation to those goods and, "without prejudice to the generality of the foregoing words, that "right shall be deemed to be infringed by any person who, not "being the proprietor of the trade mark or a registered user "thereof using by way of the permitted use, uses a mark identical "with it or so nearly resembling it as to be likely to deceive "or cause confusion, in the course of trade, in relation to any "goods in respect of which it is registered, and in such manner "as to render the use of the mark likely to be taken either— "(*a*) as being use as a trade mark; or (*b*) in a case in which the "use is use upon the goods or in physical relation thereto or in "an advertising circular or other advertisement issued to the "public, as importing a reference to some person having the "right either as proprietor or as registered user to use the trade "mark or to goods with which such a person as aforesaid is "connected in the course of trade."

Section 8 provides: "No registration of a trade mark shall "interfere with —(*a*) any bona fide use by a person of his own name "or of the name of his place of business, or of the name, or of the "name of the place of business, of any of his predecessors in "business; or (*b*) the use by any person of any bona fide descrip- "tion of the character or quality of his goods, not being a "description that would be likely to be taken as importing any "such reference as is mentioned in paragraph (*b*) of subsection (1) "of section 4, or in paragraph (*b*) of subsection (3) of section 37, "of this Act."

It is convenient also to refer to the definition of "mark" and "trade mark" in section 68 of the Act, which provides: "'mark' includes a device, brand, heading, label, ticket, name, "signature, word, letter, numeral, or any combination thereof";

and " ' trade mark ' means, except in relation to a certification " trade mark, a mark used or proposed to be used in relation to " goods for the purpose of indicating, or so as to indicate, a " connection in the course of trade between the goods and some " person having the right either as proprietor or as registered user " to use the mark, whether with or without any indication of the " identity of that person, and means, in relation to a certification " trade mark, a mark registered or deemed to have been registered " under section 37 of this Act."

The first question to be considered is whether the defendants, in using the name " Baume & Mercier, Geneva," as a mark indicating the origin of the goods which are in question in this case, have infringed the plaintiffs' right to the exclusive use of the trade mark " Baume "; and, inasmuch as " Baume & " Mercier, Geneva," is not identical with " Baume," the answer to the question depends on whether " Baume & Mercier, Geneva," nearly resembles " Baume " in the manner mentioned in section 4 (1). In our view, this question must be answered in the affirmative, inasmuch as the defendants have incorporated the whole of the plaintiffs' registered mark, and the addition of the words " & Mercier, Geneva," does not avoid the prohibited resemblance. The defendants have undoubtedly used the " essential feature " of the plaintiffs' mark. (Compare the observations of Lord Radcliffe in *de Cordova* v. *Vick Chemical Co.*,[10] and see also *Saville Perfumery Ltd.* v. *June Perfect Ltd.*[11]) Accordingly, and having regard to the views which we have expressed earlier in this judgment as to the likelihood of confusion, the defendants are in the position of infringers of the plaintiffs' trade mark unless they are entitled to the protection of section 8 of the Act of 1938.

Mr. Aldous, for the plaintiffs, contended before us that they are not. His argument, in summary, was that the section only protects a trader in the use of his own name if he uses it as the name of his business or on his stationery, invoices, etc., and that it does not protect him if he uses the name (assuming the likelihood of confusion) as a trade mark in respect of his goods; that the section was introduced into the Act ex abundanti cautela to show that the defence of bona fide user by a man of his own name as a business name which may be open to him in a passing off action is also available to him in an action for infringement of a registered trade mark. Mr. Aldous's contention on this point would appear to have the support of a dictum of the Privy Council in *de Cordova* v. *Vick Chemical Co.*[12] The Judicial Committee in that case was considering a section of the Jamaican Trade Marks Law which was the same, so far as relevant, as section 4 of the Trade Marks Act, 1905 (which was the forerunner of section 8 of the Act of 1938), and Lord Radcliffe said [13]: " There " is nothing in the section to suggest that it is directed speci- " fically, if it is directed at all, towards protecting use by a person

[10] (1951) 68 R.P.C. 103, 105, 106.
[11] (1941) 58 R.P.C. 147.
[12] 68 R.P.C. 103.
[13] Ibid. 107.

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" of a name or place of business or description by way of a trade " mark."

The expression of this view was, however, in no way necessary to their Lordships' decision, and for ourselves we find some difficulty in accepting it. Section 8 (*a*) is expressed in perfectly general terms, and we can see no sufficient warrant for confining its operation to the bona fide use by a trader of his own name as a trade name as distinct from using it as a trade mark. We do not accept Mr. Aldous's suggestion that section 8 (the provisions of which were enacted in a somewhat narrower form by section 44 of the Trade Marks Act, 1905) was introduced merely ex abundanti cautela. It seems to us that its object was to ensure that the use by a man of his own name should be protected, provided that the user was bona fide, whether he traded under that name or whether he used it as a trade mark in respect of his goods; and, if the narrower interpretation for which Mr. Aldous contends is attributed to the section, it is difficult to apprehend the purpose of Parliament in enacting it at all. We would only add that the construction of the section which seems to us to be the right one is in conformity with the view which Farwell J. apparently took of the effect of section 44 of the Act of 1905 in *C. & T. Harris (Calne) Ltd.* v. *F. S. E. Harris.*[14]

The next point which was discussed before us was as to the meaning of " bona fide " used in section 8. Danckwerts J. said [15] that he understood that " bona fide " normally " means the " honest use by the person of his own name, without any inten- " tion to deceive anybody or without any intention to make use " of the goodwill which has been acquired by another trader ": and in that sense he acquitted the defendants of any want of bona fides in the present case. We agree with the judge's definition of the term " bona fide " and we see no reason to attribute a different or special meaning to the phrase in its context in section 8. The mere fact in itself that a trader is using his own name which too closely resembles a registered trade name of which he is aware, does not prevent the user from being " bona " fide," provided that the trader honestly thought that no confusion would arise, and if he had no intention of wrongfully diverting business to himself by using the name. The truth is that a man is either honest or dishonest in his motives; there is no such thing, so far as we are aware, as constructive dishonesty. In our judgment, if a trader is honestly using his own name, then no action will lie for infringement of trade mark, and any rival trader who thinks himself aggrieved must sue, if at all, for passing off.

We would accordingly hold, were it necessary to do so, that the defendants were entitled to rely on section 8 of the Act as a defence to a claim for infringement, having regard to the finding of the judge that they acted in good faith.

[14] (1933) 51 R.P.C. 98; 50 T.L.R. 123.

[15] [1957] 3 W.L.R. 870, 876

A final point which emerged at a somewhat late stage of Mr. Aldous's submissions was that the use of the name "Baume & Mercier" by the defendants was an infringement of the "exclusive right" conferred on the plaintiffs by the first part of section 4 (1) of the Act of 1938 to use their registered mark "Baume," whether or not such user was "likely to deceive or cause confusion." The point clearly does not arise in the present case, for the judge found (and we agree with him) that the plaintiffs had established likelihood of confusion. We prefer, therefore, to express no opinion on the point, but would merely say that, if Mr. Aldous is right in his submission, it would seem to afford solid ground for adopting a wide construction of section 8.

In the result, we are of opinion, for the reasons stated earlier in this judgment, that the plaintiffs are entitled to succeed on the issue of passing off in this action, and that the appeal should, accordingly, be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Cummings, Marchant & Ashton; Stollard & Limbrey.*

J. A. G.

[CHANCERY DIVISION.]

LONDON COUNTY COUNCIL *v.* CENTRAL LAND BOARD.

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March 12.

Danckwerts J.

[1956 L. No. 789.]

Town and Country Planning — Development — Assessment of development value—Land intended to be developed to be viewed as a whole —Land acquired for building purposes—High cost of making part of land suitable for building exceeding value of the whole—Whether development charge payable—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 70 (2).

A local authority by virtue of the Housing Act, 1936, and in pursuance of a local order, acquired some 231 acres of land for development as a building estate. While most of the land was suitable for this purpose, heavy expenditure on site works was incurred in respect of part. This expenditure was greater than the value of the whole estate when valued for building purposes. Planning permission to develop the estate was granted in 1949 and 1952, and apart from certain industrial development, that development was almost entirely carried out prior to November 18, 1952. A dispute arose between the plaintiffs and the defendants over the

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[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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exigibility of development charge because of the provisions of the Town and Country Planning Act, 1947, s. 70 (2) [1]:—

Held, that development charge was not payable, since regard should be had to the entirety of the land being developed when considering the increase of the value of the land due to the granting of planning permission for the purposes of section 70 (2). The fact that the expenditure needed to render some of the land fit for development exceeded the value of the land devoted as a whole to building purposes rendered such an increase nugatory.

ADJOURNED SUMMONS.

The London County Council acquired the Sheerwater Estate at Woking under the provisions of the Housing Act, 1936, partly by agreement and partly by compulsory purchase under the County of London (Woking, Surrey) Extension Order, 1951. Planning permission was obtained from the Surrey County Council in respect of all the estate, except that part of it to be developed for industrial purposes, in November, 1949. Permission in respect of the industrial land development was granted by the Woking Urban District Council in March, 1952. In November, 1951, the London County Council applied to the Central Land Board so that the development charge on the whole estate (with the exception of certain small parts either excluded by agreement or exempt from such charge) might be assessed. In consideration of an undertaking by the council to pay the charge when determined, the board agreed to development proceeding before payment. Apart from the industrial land referred to, the development of the estate was completed before Nov. 18, 1952.

The London County Council by this originating summons sought a declaration upon the true construction of the Town and Country Planning Act, 1947, and the Town and Country Planning (Development Charge) Regulations, 1948, that for the purpose of determining whether any development charge was to be paid in respect of the operations carried out by them on land forming the major part of the Sheerwater Estate at Woking, the Central Land Board ought to value that land with the benefit of the planning permission which had been granted in respect of it upon the footing that the council would proceed to carry out the said operations within a reasonable time.

Michael Rowe Q.C. and *H. E. Francis* for the council.
Denys Buckley for the board.

[1] Town and Country Planning Act, 1947, s. 70 (2): "In determining "whether any and if so what develop- "ment charge is to be paid under this "Part of this Act in respect of any "operations or any use of land, the "board shall have regard to the "amount by which the value of the "land with the benefit of planning "permission for those operations or "that use (calculated without regard "to any charge payable in respect "thereof under this Part of this Act "and on the assumption that the "operation or use can lawfully be "carried out or made apart from the "provisions of this Act) exceeds the "value which it would have without "the benefit of such permission, and "shall not give any undue or un- "reasonable preference or advantage "to one applicant over another."

The following case was referred to in argument: *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer Vizagapatam*.[2]

DANCKWERTS J. This dispute is between the London County Council, who acquired and developed an estate at Woking, and the Central Land Board, who claim that a development charge became payable under the provisions of the Act by virtue of the permission which was given to the development in question. The estate was the Sheerwater Estate at Woking, having an area of 231 acres. The greater part of the land was suitable for development for building houses, but a portion of it was not so suitable, and by reason of that fact the London County Council had to incur considerable expenditure.

Joseph Edward James Toole, the valuer of the London County Council, says in his affidavit: "By reason of the physical "condition of the land the council were compelled to incur very "heavy expenditure on site works and in particular on culverting "a watercourse known as the Rive Ditch which passed through "the land and which took surface water from the town of "Woking. In addition, the council had to make a substantial "contribution to the Surrey County Council pursuant to the "provisions of the Surrey County Council Acts, 1925–1936, "towards the cost of improving a further length of the Rive "Ditch outside the boundary of the estate. The total cost of "these works was considerably in excess of the value of the land "as a whole for building purposes."

The council contends that as a result of that the increase in value by reason of the permission was nil. On the other hand, the board contend that the sum of £22,500 was payable. According to a statement by the valuer in his affidavit, that £22,500 was arrived at on the footing that it would be open to the board "to assess the "development charge on the basis that only those parts of the "estate which an ordinary developer would consider it advan-"tageous to develop from a commercial point of view would be "developed and that those parts of the estate which would "involve abnormal development costs would be left un-"developed."

That statement of the basis of the claim was contradicted by an affidavit of Stedman, district valuer of the Guildford District of the Inland Revenue Valuation Department. He says: "I "did not proceed on the footing described [by Toole in his] "affidavit" which I have just read, "but on the footing that "a developer would be at liberty to carry out forthwith so much "of the development as was for the time being profitable and "to defer the remainder of the development until such time as "the carrying out of that further development would be "profitable." As far as I can see, it comes to much the same thing, because it would mean that the unprofitable part would be

[2] [1939] A.C. 302.

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left undeveloped indefinitely and perhaps never developed at all, and I am bound to say that I thought Mr. Buckley's argument for the board proceeded very much on those lines.

The London County Council, in pursuance of their purpose and powers provided for in this Act, undoubtedly proceeded to develop the whole estate, notwithstanding the heavy expenditure which they had to make in respect of the less profitable part of it. The provisions which are relevant appear in Part VII of the Town and Country Planning Act, 1947. Section 69 provides by subsection (1) as follows: "Subject to the provisions of this Act, there shall "be paid to the Central Land Board in respect of the carrying out "of any operations to which this Part of this Act applies, and in "respect of any use of land to which this Part of this Act applies, "a development charge of such amount (if any) as the board may "determine, and accordingly no such operations shall be carried "out, and no such use shall be instituted or continued, except with "the consent in writing of the Central Land Board, until the "amount of the charge (if any) to be paid in respect of those "operations or that use has been determined by the board in "accordance with the provisions of this Part of this Act, and "the board have certified that the amount so determined has "been paid or secured to their satisfaction in accordance with "those provisions." Then subsection (2) provides: "This Part "of this Act applies to all operations for the carrying out of which "planning permission under Part III of this Act is required, and "to all uses of land for the institution or continuance of which "such permission is so required."

Section 70 (1) provides: "Subject as hereinafter provided, "the Central Land Board shall, on application being made to "them in the manner prescribed by regulations under this Act "by a person having an interest in land sufficient to enable him "to carry out any such operations as aforesaid or to make any "such use as aforesaid, or by a person who satisfies them that "he is able to obtain such an interest, determine whether any "and if so what development charge is to be paid in respect of "those operations or that use: Provided that—(*a*) where planning "permission under Part III of this Act has not been granted "for the carrying out of the said operations or for the institution "or continuance of the said use, the board may postpone the "determination of the development charge to be paid in respect "thereof until such permission has been granted; (*b*) where the "application relates to the carrying out of any operations, the "board may refuse to determine the development charge payable "in respect thereof unless they are satisfied, after consultation "with the local planning authority, that the applicant is able to "carry out those operations, and that he will do so within such "period as the board consider appropriate." That seems to me an essential part of the working of the use provisions. Then in subsection (2) (which Mr. Buckley argued was the only provision dealing with the assessment of the value) it is provided: "In

"determining whether any and if so what development charge "is to be paid under this Part of this Act in respect of any "operations or any use of land, the board shall have regard to "the amount by which the value of the land with the benefit of "planning permission for those operations or that use (calculated "without regard to any charge payable in respect thereof under "this Part of this Act and on the assumption that the operation "or use can lawfully be carried out or made apart from the pro-"visions of this Act) exceeds the value which it would have "without the benefit of such permission, and shall not give any "undue or unreasonable preference or advantage to one applicant "over another."

Before turning to the Regulations, I think I should refer to the argument of Mr. Buckley on behalf of the board based on the contention that a development charge must be payable in this case on the provisions of that subsection. He says that the London County Council will have paid for the existing site value, and that by reason of the expropriation of the right to develop the land, compensation would have been paid to the previous owner appropriate to the value of development right. He says that anybody who obtains permission to develop this land will get an additional value for the right to develop that part of the land which can properly be developed without expenditure and he contends that there is no legal obligation upon the person who applies for permission to develop anything except the land which it is profitable to develop; and, therefore, it must be assumed that he would not develop the other land which it would be expensive to develop but which would still preserve its existing use value. Therefore, he says, a development charge was justified representing the difference between the existing use value of what I may call the good land and the value with permission to develop.

It is true that no legal obligation is cast upon the applicant to develop. On the other hand the board has to be satisfied, as it seems to me, under the provisions of section 70 (1) (*b*) not only that the applicant is able to carry out the operations but that he will carry out such operations within such period as the board consider appropriate, otherwise they can refuse to assess the development charge. It seems to me one operation which the board has to carry out is to determine whether the applicant is a person who can be trusted to carry out the development which he proposes, and if they were not so satisfied it would be their duty to refuse to assess the development charge or to refuse permission altogether. While it may be a matter of good faith and honesty, the actual basis of the valuation to be made under section 70 (2) is that the development the applicant proposes will be carried out, and, therefore, one has no right to assume that any part of the operation will not be carried out. It is to be observed that the value is to be based on the assumption that the operation will be carried out in regard to a particular portion, and is not merely

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the abstract value of the land with building or development permission. It seems to me that that makes quite a difference. One must regard the value bearing in mind the particular circumstances of the application for development which is made. Furthermore, it appears to me that "land" in this subsection means all the land in respect of which the application for permission is made.

Having made those remarks, I now propose to pass to the regulations and to certain comments which have been issued by the board which seem to me to support the same view. The Town and Country Planning (Development Charge) Regulations, 1948, No. 1189 of 1948, provide by paragraph 2: "Subject to the "provisions of the Act and of any regulations made thereunder "and for the time being in force, the general principles set out "in the Schedule to these regulations shall be followed by the "board in determining under Part VII of the Act whether any, "and if so what, development charge is to be paid thereunder in "respect of any operations or use of land." Then comes the Schedule which is the most important part of the document; paragraph 1 provides: "Development charge shall be determined so "as to secure, so far as is practicable, that land can be freely "and readily bought and sold or otherwise disposed of in the open "market at a price neither greater nor less than its value for its "existing use. This object is the governing principle by which "the board are to be guided in determining development charge." Paragraph 2 seems to me very important: "Development charge "shall not be more than the amount which, to the satisfaction of "the board, represents the additional value, measured by normal "processes of valuation, of the land due to planning permission for "a particular development." Therefore, it is plain that the "particular development" must be considered in regard to the amount of the charge. Paragraph 3 provides: "Development "charge shall not be less than the amount referred to in paragraph "2 of this Schedule, unless in the opinion of the board the charge "ought properly to be less in order to comply with the governing "principle." The construction which I have put upon the Act is borne out, I think, not only by the regulations, but also by certain comments which have been issued called "Practice Notes, being "notes on Development Charges" under the Act, and no doubt have been issued by the board for the assistance of persons who have to operate the Act. They have no force of law in any way, but are of interest as being the view which has been taken by the board and which Mr. Rowe has quite properly used as part of his argument. I do not think that I need go through the notes in detail, but perhaps I may say a word about the phrases "consent "value" and "refusal value." "Refusal value" means, roughly, the value without permission. "Consent value" is the enhanced value due to permission being obtained.

With that preliminary observation, I turn to paragraph 58 which

reads: "Consent value will thus be calculated on a suitable process of valuation and on the basis that: (1) any relevant operations or uses which are not in law 'development,' would be permitted to the owner. (2) any operations or uses which are mentioned in the Third Schedule and which will be available to the owner, after he has carried out the development permitted by the planning permission, would be permitted to the owner. . . . (4) the particular operations or uses permitted by an actual planning permission (and subject to any conditions in such permission) will be carried out." Then I turn to paragraph 93: "The board will be prepared to assess one development charge for a unit of development of a reasonable size. For the reasons given in Note XXIX, it is important that developers should apply to the board to assess the complete development charge for the unit before the first works are carried out on the land (e.g. road works or sewers). Application on Form D.1. should therefore be made before the first works are to be carried out. The board will normally (other than in very large estates) accept as the unit for fixing the development charge an area of land which is likely to comprise one continuous development comprised in one planning permission." Applying that to the present case, it is quite obvious that the result is that the whole of the estate, that is to say, the difficult portion as well as the portion which is easy to develop, is one unit for the purpose of the assesment of the development charge (if any).

Paragraph 108 is: "It will always be open to an applicant to ask that the determination of development charge should be related to a part only of the area of land (or buildings) covered by a particular planning permission. Question 6 on form D.1 is designed for this purpose. A planning permission is however given for a particular operation or change of use, and the development charge must be assessed upon the assumption that that permission will be fully operated on the area of land chosen by the applicant." Paragraph 120 reads: "Circumstances in which, and the time at which, a Determination of Development Charge can be made. The amount of a development charge has to be based on values current at the time the development take place. In addition, the consent value bears a direct relation, as the term suggests, to the planning consent. Before the board can determine a charge for a particular development, they will require to be satisfied, not merely that the applicant (or someone acting with his authority) is able to carry out that development within a reasonable period but also that the development will in fact be so carried out." That is a reference to section 70 (1) (*b*). Paragraph 121 reads: "The following is a summary of the conditions which the board consider necessary: (a) the applicant must be able to show that the development will take place within a reasonable time. The board are not prepared to generalize on the meaning of 'reasonable' in this connexion, but they are

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" unlikely to issue a determination if the development is improb-
" able within one year, unless the project is a very large one; or
" unless other valuations are necessary (e.g. monopoly value for
" licensed premises)."

Those comments are entirely sensible and right to the point, and appear to support exactly the view which has been put forward in this case by Mr. Rowe on behalf of the London County Council. The whole of the estate which the council has developed must be taken into consideration. The whole of the operations which they propose to carry out must be taken into consideration, difficult and easy altogether. It seems to me that the result of that is, as contended for on behalf of the council, that the enhanced value which they might have by virtue of permission in respect of part of the property included in the development plan is entirely wiped out by the heavy expenditure for drainage, and so on, which they have had to incur under the plan in respect of the land which required expenditure before it could be developed.

Mr. Buckley argued that, if no development charge were imposed, the London County Council would be getting the site for less than the existing use value. But that seems to me to be based upon a misapprehension. There is no doubt that the council have had to pay for the site, and I suppose that the amount paid would be in accordance with the use value. There is no doubt that the amount which they had to spend on the development of the land is money which is borne out of the moneys of the council or its ratepayers. It is true that the Central Land Board has presumably paid out something to the previous owner in respect of the development value of the property, or in respect presumably of the property which was available for development, and, if there is no development charge to be exacted, they will not get back that money paid out of the Exchequer. But that does not seem to me to alter the situation. It appears to me that it is quite irrelevant. What one has to consider is what is the increase in value to the London County Council by virtue of the permission to carry out the operations which they propose, and nothing else. It seems to me that the result is nil because of the heavy expenditure which they have had to make on a part of the estate which they were intending to develop. Consequently, I think that the contention on behalf of the London County Council should succeed on this application.

Declaration accordingly.

Solicitors: *Solicitor, London County Council; Treasury Solicitor.*

[COURT OF APPEAL.]

INLAND REVENUE COMMISSIONERS *v.* WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION). SAME *v.* BRANCEPETH COAL CO. LTD. (IN LIQUIDATION). SAME *v.* RAMSHAW COAL CO. LTD. (IN LIQUIDATION).

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Jan. 13, 14, 15, 16; *Feb.* 21; *Mar.* 12.

Jenkins, Romer and Ormerod L.JJ.

Revenue—Income tax—Basis of assessment—Case VI—Whether payments assessable in respect of year in which received or year in respect of which they were paid—Meaning of "arising"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI, r.* 2.

Revenue—Income tax—Crown—Payments by—Whether Case III can apply—Crown immunity—Income Tax Act, 1918, *r.* 21, *of General Rules, Sch. D, Case III, r.* 1 (*a*).

Revenue—Income tax—"Annual payment"—Coal nationalization—Interim income payments—Coal Industry Nationalization Act, 1946 (9 & 10 *Geo.* 6, *c.* 59), *ss.* 5 (1), 19, 21, 22—*Coal Industry (No.* 2) *Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 79), *s.* 1—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *r.* 21 *of General Rules, Sch. D, Case III, r.* 1 (*a*), *Case VI, r.* 2.

Revenue—Income tax—"Interest of money"—Statutory payment calculated as sum equal to interest on compensation to which it is added—Coal Industry Nationalization Act, 1946, *s.* 22 (2) (*a*)—*Income Tax Act*, 1918, *Sch. D, Case III, r.* 1 (*a*).

Mines and Minerals—Coal—Nationalization—Compensation—Interim income payments—Whether to be included in actual income of year of receipt or of year or period in respect of which it was paid—Coal Industry Nationalization Act, 1946, *s.* 5 (1).

The W. P. Coal Co. Ltd. carried on the trade of a colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Coal Industry Nationalization Act, 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied, and was an "investment company" within the meaning of section 20 (1) of the Finance Act, 1936. The company received from time to time payments from the Ministry of Fuel and Power of interim income under (1) section 22 (2) (*a*) of the Act of 1946, and (2) section 22 (3) thereof, and section 1 of the Coal Industry (No. 2) Act, 1949.

The company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51, and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

On the question whether, in computing the actual income of the company for the purpose of such apportionments, interim income should be included in the actual income of the year in which it was received (which it was conceded would be so if such payments were annual payments under Case III of Schedule D), or (as the company contended) of the year or period in respect of which it was paid:—

Held, (1) that interim income provided for by section 22 (2) (*a*) of the Act of 1946, though calculated as a sum equal to interest on the compensation to which it was added, was not interest thereon or "interest of money" within rule 1 (*a*) of Case III; nor was it an

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"annual payment" within the meaning thereof since it lacked the relevant quality of recurrence.

(2) That those payments made pursuant to section 22 (3) of the Act of 1946, and section 1 (2) of the Act of 1949, could properly be classed as annual payments within the meaning of rule 1 (*a*) of Case III.

Inland Revenue Commissioners v. *Butterley Co. Ltd.* [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411 considered.

But (3) that Case III of Schedule D was inapplicable since the payer of the annual sums in question was a Minister of the Crown, and the provisions relating to Case III in its application to annual payments were such as to preclude the construing of the word "person" in rule 21 of the General Rules, which was co-extensive with rule 1 (*a*) of Case III, as including the Crown.

Madras Electric Supply Corporation Ltd. v. *Boarland* [1955] A.C. 667; [1955] 2 W.L.R. 632; [1955] 1 All E.R. 753; sub nom. *Boarland* v. *Madras Electric Supply Corporation Ltd.*, 35 T.C. 612; *Constantinesco* v. *Rex* (1927) 43 T.L.R. 727; 11 T.C. 730, 745 considered.

(4) That the whole of the interim income payments fell within Case VI of Schedule D; but that, since the word "arising" in rule 2 of the rules applicable to Case VI must be construed as meaning "received," the payments in question must nevertheless be treated as income of the years in which they were received.

Observations of Lord Hanworth M.R. in *Dewar* v. *Inland Revenue Commissioners* [1935] 2 K.B. 351, 366; 51 T.L.R. 536; 19 T.C. 561; and *Leigh* v. *Inland Revenue Commissioners* [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590 approved.

Dicta of Finlay J. in *Lambe* v. *Inland Revenue Commissioners* [1934] 1 K.B. 178, 186; 18 T.C. 212, 220 considered.

Per curiam. Whether the immunity of the Crown is founded upon construction, or on prerogative overriding construction, the result appears to be the same, namely, that the charging provisions of Taxing Acts do not extend to the Crown unless the Crown is included therein by express terms.

Decision of Harman J. affirmed in the result.

APPEALS from Harman J.

These were appeals by three former colliery companies. The Whitworth Park Coal Co. Ltd., appealed from an order of Harman J. made on July 31, 1957, allowing an appeal by the Crown, from the decision of the Commissioners for the Special Purposes of the Income Tax Acts, who had allowed the company's appeal against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51 and against the apportionments of the actual income of the company made for each of the said three years in consequence of those directions.

The Ramshaw Coal Co. Ltd., and the Brancepeth Coal Co. Ltd., each appealed from an order of Harman J. made on July 31, 1957, allowing an appeal by the Crown, from the decision of the Commissioners for the Special Purposes of the Income Tax Acts, who had allowed (*a*) the Ramshaw Coal Co.'s appeal against a sub-apportionment, made for 1948–49 under section 32 of the Finance Act, 1927, among its members of an amount apportioned

to it by an apportionment of the income of the Whitworth Park Coal Co. under section 21 of the Finance Act, 1922; and (*b*) the Brancepeth Coal Co.'s appeal against a sub-apportionment made for 1948–49 under section 32 of the Act of 1927, among its members of an amount apportioned to it by the sub-apportionment made on the Ramshaw Coal Co. In each case the question for determination was whether the actual income of the Whitworth Park Coal Co. was correctly computed for the purpose of the apportionment made on it and whether in consequence the amount which was the subject of the sub-apportionment was correctly computed.

Accordingly, the appeal of the Whitworth Park Coal Co. Ltd. alone was argued since the decision in that case governed the other two appeals. The following facts relating to the appeal of the Whitworth Park Coal Co. Ltd. are taken from the case stated.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 28, 1955, the company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51 and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

The sole question for determination was whether, in computing the actual income of the company for the purpose of the apportionments, interim income received by the company under the provisions of the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949, should be included in the actual income of the year in which it was received or (as the company contended) of the year or period in respect of which it was paid, it being (for the purpose of the hearing) conceded by the company that authorities binding on the Commissioners would preclude them from holding that the sums received were of the nature of capital and should not be included in the company's actual income at all.

The company carried on the trade of colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Act of 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied and was an "investment company" within the meaning of section 20 (1) of the Finance Act, 1936.

The company received from time to time payments from the Ministry of Fuel and Power for or in respect of interim income under the provisions (in the case of some of such payments) of the Act of 1946 and (in the case of others of such payments) of that Act and of the Act of 1949. Those payments are set out in tabular form below, and were made under deduction of Income tax; each payment was accompanied by a letter from the Ministry and a certificate of deduction of income tax . . .

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Serial Number	Date of receipt	Gross amount of payment	Net amount paid	Period for which it is stated to be paid in accompanying letter
(1)	August 7, 1948.	£9,068	£4,987	Eighteen months ended June 30, 1948.
(2)	January 26, 1949.	£2,733	£1,503	Half-year ended December 31, 1948.
(3)	September 12, 1949.	£68	£37	From January 1 to September 12, 1949.
(4)	March 28, 1950.	£1,837	£1,011	For the year ended December 31, 1949.
(5)	July 14, 1950.	£1,616	£889	Half-year ended June 30, 1950.
(6)	August 11, 1950.	£5	£3	From July 1 to August 11, 1950.
(7)	November 11, 1950.	£7	£4	From July 1 to November 13, 1950.
(8)	February 21, 1951.	£1,519	£835	Half-year ended December 31, 1950.
(9)	May 25, 1951.	£1,343	£705	Two years ended December 31, 1948.
(10)	August 9, 1951.	£810	£425	Half-year ended June 30, 1951.

The payments numbered 3, 6 and 7 in the above table were payments of the interest addition under section 22 (2) (*a*) of the Act of 1946 made on the occasions of payment under section 21 (1) (*b*) of the Act of 1946 of partial compensation for transferred assets.

The payments numbered 1 and 2 in the above table were made under section 22 (3) of the Act of 1946 after deductions of £7 and £86 respectively in respect of adjustments for compensation already satisfied made under the provisions of regulation 20 of Statutory Rules & Orders, 1946 of 1947. The accompanying letters state: (in the case of payment No. 1) "It should be noted "that the gross amount allowed is an instalment subject to audit. "Any adjustment necessary will be made in a future payment," (and in the case of payment No. 2) "It should be noted that the "gross amount allowed is a provisional instalment subject to "audit of the statutory revenue payment. Any adjustments in "respect of over-payments or under-payments will be payable "forthwith to or by the Minister." An adjustment to the said two payments was made by deducting a sum of £1,394 in calculating the gross amount of payment No. 4. This deduction (referred to as an "Overpayment (provisonal)") was based on an estimate of the comparable ascertained revenue, and a further and final adjustment was made by payment No. 9, the accompanying letter to which states that the comparable ascertained revenue had been approved by the Minister.

Payments nos. 4, 5, 8 and 10 in the above table were made under the Act of 1949. In the case of 4, 5 and 8 the accompanying letters show that the payments were calculated with reference to a provisional calculation of the comparable ascertained revenue, and each such letter states: "It should be noted that where the "amount now payable is based on provisional comparable ascer-"tained revenue, any necessary adjustment will be made later, "after the comparable ascertained revenue has been finally "approved by the Ministry." Payment no. 10 was based on the comparable ascertained revenue as approved by the Ministry.

The payments nos. 4, 5, 8 and 10 were each expressed to be subject to the provision contained in section 1 (5) of the Act of 1949 to the effect that if the said payments should exceed the interim income towards satisfaction of which they were paid, the excess would be repayable by the company. The latter accompanying payment no. 5 (dated July 14, 1950, and in respect of the half-year to June 30, 1950) shows that in arriving at the gross sum of £1,616 a deduction was made in respect of interest at 3 per cent. per annum for the half-year in respect of compensation satisfied before June 30, 1950. A footnote to the letter states that "Any necessary adjustments as a result of S.I. 1950, No. "967, dated June 12, 1950, which prescribes an interest rate of "3 per cent. per annum for the period January 1, 1949, to June "30, 1949 and 3½ per cent. per annum for the period July 1, 1949, "to June 30, 1950, will be made at a later date." Adjustments were duly made in computing payment no. 8.

The company's accounts were made up to March 31 in each year. In the accounts for the year ended March 31, 1948, there appears on the credit side of the revenue account the item "interim "income provision (gross) £6,050 0s. 0d." In the accounts for the year ended March 31, 1949, there is credited to the revenue account "Interim income" (net) £2,500 7s. 3d. In the accounts for the year ended March 31, 1950, there is credited to the revenue account "interim income (net) £37 4s. 11d." In the accounts for the year ended March 31, 1951, there is credited to the revenue account "interim income (net) £2,741 11s. 8d."

For the purposes of the apportionments under appeal, each of the payments set out in paragraph 4 above was treated as forming part of the actual income of the company of the year in which such payment was received by the company. The said payments made by the Ministry were not payable out of profits or gains brought into charge to income tax.

The Commissioners held that the payments in question were chargeable to income tax under the provisions of Case VI of Schedule D to the Income Tax Act, 1918, and were not chargeable under Case III of the said Schedule nor under Schedule C. They further held that the payments formed part of the actual income of the company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods. They confirmed the directions under appeal and in due course adjusted the apportionments on the basis of an actual income (as agreed between the parties in accordance with their decision) of £5,422 14s. 0d., for 1948–49, £3,453 15s. 0d., for 1949–50 and £2,949 3s. 0d., for 1950–51.

Harman J. reversed the decision of the Special Commissioners, holding that the payments were chargeable to income tax under Case III, and from such reversal the company now appealed.

F. N. Bucher Q.C. and *Peter Rowland* for the company.

John Pennycuick Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown.

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The following cases, in addition to those referred to in the judgment, were cited in argument: *Humber Conservancy Board* v. *Bater* [1]; *Curtis Brown Ltd.* v. *Jarvis* [2]; *Stewart's Executors* v. *Inland Revenue Commissioners* [3]; *Inland Revenue Commissioners* v. *National Book League* [4]; *In re Green* [5]; *Champney's Executors* v. *Inland Revenue Commissioners* [6]; *Inland Revenue Commissioners* v. *Hawley* [7]; *Simpson* v. *Maurice's Executors* [8]; *Isaac Holden & Sons Ltd.* v. *Inland Revenue Commissioners* [9]; *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners.* [10]

Cur. adv. vult.

February 21. JENKINS L.J., read the following judgment of the court: The first of these three appeals is brought by the Whitworth Park Coal Co. Ltd. from a judgment of Harman J., dated July 31, 1957, whereby (reversing the determination of the Special Commissioners) he decided in favour of the Crown a question concerning the computation of the actual income of the company for the years 1948–49, 1949–50 and 1950–51, for the purposes of directions and consequential apportionments of the actual income of the company amongst its members given and made with respect to the company under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939.

Down to December 31, 1946, the company, which was under the control of not more than five persons, and consequently a company to which the provisions of section 21 of the Finance Act, 1922, applied, carried on the business of a colliery proprietor. So long as the company continued to trade, the position, to put it very shortly, was that the giving of directions and making of consequential apportionments with respect to the company under section 21 depended upon the discretion of the assessing Special Commissioners, such discretion being exercised in the event of it appearing to them that the company had not distributed a reasonable part of its actual income so as to make the amount distributed income of its members for surtax purposes.

By virtue of the provisions of the Coal Industry Nationalisation Act, 1946 (which we will for brevity term "the Coal Act of "1946"), the colliery assets of the company were on January 1, 1947 (the "primary vesting date", fixed pursuant to section 5 of the Act) compulsorily transferred to the National Coal Board, and the company became entitled in respect of the assets so transferred to compensation, which became due on the same date subject to the determination of the amount thereof, and also to "interim income" for the period between that date and the date on which such compensation should be fully satisfied.

[1] [1914] 3 K.B. 449; 6 T.C. 555.
[2] (1929) 14 T.C. 744.
[3] (1952) 33 T.C. 184.
[4] [1957] Ch. 488; [1957] 3 W.L.R. 222; [1957] 2 All E.R. 644.
[5] [1904] W.N. 105.
[6] (1934) 19 T.C. 375.
[7] [1928] 1 K.B. 578; 13 T.C. 327.
[8] (1929) 45 T.L.R. 581; 14 T.C. 580.
[9] (1924) 12 T.C. 768.
[10] (1927) 43 T.L.R. 476; 12 T.C. 927, 952.

The company accordingly became as from the primary vesting date an investment company within the meaning of section 20 (1) of the Finance Act, 1936, because it had ceased to trade and no longer had any income other than the " interim income " to which it was entitled under the Coal Act of 1946 (with certain modifications later introduced by the Coal Industry (No. 2) Act, 1949, hereinafter referred to as " the Coal Act of 1949 "), and which would not, if the company had been an individual, have been earned income as defined in section 14 (3) of the Income Tax Act, 1918. Accordingly, by virtue of section 14 of the Finance Act, 1939 (to put it very shortly), the whole of the actual income of the company was to be deemed to be the income of its members irrespective of the amounts of any distributions made, and the assessing Special Commissioners were enjoined to put into operation with respect to the company all machinery of direction and apportionment contained in section 21 of the Finance Act, 1922.

There is no dispute as to the applicability of section 21 of the Finance Act, 1922, and section 14 of the Finance Act, 1939. It is, moreover, accepted by the company that the " interim " income " to which it was entitled under the nationalization legislation was for tax purposes income and not capital. But the assessing Special Commissioners, in making their apportionments for the three years under appeal, treated each sum received by the company in respect of interim income as income of the company for the year in which it was actually so received, and Harman J. has held that they were right in so doing. The company contends that this method of computation was wrong and claims that (as held by the Special Commissioners who tried the case) each amount received in respect of interim income should be treated as accruing from day to day over the period in respect of which it was paid, and that the proportion of any such amount attributable to each of the three years under appeal should be ascertained on that footing.

That is the sole question in the appeal. The competing contentions in regard to it are these:

A. For the Commissioners of Inland Revenue it is said: (i) That the payments made in respect of interim income were annual payments within the meaning of rule 1 (*a*) of Case III of Schedule D in the Income Tax Act, 1918, and consequently payable (as they were in fact paid) under deduction of tax at the standard rate in force at the time of payment, as provided by rule 21 of the General Rules in that Act, with the result that by virtue of section 39 (2) of the Finance Act, 1927, each such payment was to be deemed to be income of the year in which it was paid; and (ii) that even if (contrary to their first contention) Case III of Schedule D is inapplicable and recourse must be had to the sweeping provisions of Case VI, the same result follows, that is to say, each payment in respect of interim income must be treated as income of the year in which it was paid.

B. For the company it is said: (i) That while the result of

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applying Case III of Schedule D and rule 21 of the General Rules would be as claimed by the Commissioners of Inland Revenue, those provisions are not applicable to the payments here in question because (a) their character was not such as to make them annual payments within the meaning of rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules; and (b) that even if they could in other respects properly be regarded as annual payments within the meaning of those provisions, the application to them of those provisions is excluded by the circumstance that the payer was the Crown as represented by the Minister of Fuel and Power; and (ii) that the appropriate head of charge was Case VI of Schedule D, and that proper assessments under that head would attribute to each year only such proportion of any payment in respect of interim income as would be appropriate on the footing that the amount of such payment was income of the period in respect of which it was paid, and accrued from day to day during that period.

In order to do justice to these contentions it is necessary to refer to the provisions of the Coal Act, 1946, and also to those of the Coal Act, 1949, relating to the right to interim income and the ways in which that right was to be satisfied.

By section 5 (1) of the Coal Act, 1946, the assets compulsorily acquired were to vest in the board on such date as the Minister (i.e., the Minister of Fuel and Power) should by order appoint. That date (as we have already mentioned) was fixed by the Minister as January 1, 1947.

By section 19 of the said Act: "(1) Compensation in respect of a transfer of transferred interests or of an overhead expenses "increase shall be due on the primary vesting date, subject to "determination of the amount thereof. (2) For the period "between the primary vesting date and the date on which any "such compensation is fully satisfied, there shall be a right to "interim income, to be satisfied in accordance with the provisions "of section twenty-two of this Act." Then (3): "Provision may "be made by regulations for authorizing the partial satisfaction "of such compensation before the determination of the amount "thereof has been completed."

By section 21 of the same Act compensation in respect of the assets transferred was to be satisfied by the issue of Government Stock, with certain exceptions (the only one applicable here being, we think, the value attributable to stocks of colliery products and consumable or spare stores) where it was to be satisfied by a money payment.

By section 22 of the same Act, subsection (1): "The right "conferred by subsection (2) of section nineteen of this Act to "interim income for the period between the primary vesting date "and the date of the satisfaction in full of compensation in "respect of a transfer of transferred interests, or of an overhead "expenses increase, shall be satisfied in accordance with the "provisions of this section." Then subsection (2): "Subject to

" the provisions of subsections (3) and (4) of this section as to the " revenue payments therein mentioned,—(*a*) the said right " conferred by subsection (2) of section nineteen of this Act shall " be satisfied, so far as regards interim income for the period " between the primary vesting date and the time when any " amount of compensation in respect of a transfer of transferred " interests or of an overhead expenses increase is satisfied, by " making, in addition to the issue of the stock then issued in " satisfaction of that amount of compensation or to the making " of the money payment then made in satisfaction of that amount " of compensation, as the case may be, a money payment of an " amount equal to interest for that period on that amount of " compensation at such rate or rates as may be prescribed as " respects that period or different parts thereof by order of the " Treasury. . . ." Subsection (3): " The following provisions of " this subsection shall have effect as to the making to colliery con- " cerns, and to subsidiaries within the meaning of the First " Schedule to this Act of such concerns, of payments in respect " of each of the two years beginning with the primary vesting " date and the first anniversary thereof respectively, that is to " say,—(*a*) a colliery concern or such a subsidiary shall be entitled " in respect of each of the said two years to a payment of an " amount equal to one half of the comparable ascertained revenue " of the concern, or of the subsidiary, as the case may be, " attributable to activities thereof for which the transferred " interests thereof were used or owned; (*b*) the payments to be " made under the last preceding paragraph are in this section " referred to as ' revenue payments,' and shall be money pay- " ments." Then sub-paragraph (*c*) provides a method of computing comparable ascertained revenue by reference to one of two alternative periods to be selected, to put it shortly, by the company concerned. Subsection (4) provides: " The provision made " by the last preceding subsection shall be deemed, in the case " of any colliery concern or of any such subsidiary, to be in " substitution for the provisions of subsection (2) of this section, " so far as regards additions thereunder for the said two years " or any part thereof to compensation for a transfer of trans- " ferred interests being compensation attributable to transferred " interests of that concern or subsidiary, except as to any excess " of the aggregate amount of such additions over the aggregate " amount of the revenue payments of that concern or subsidiary." And by subsection (5): " The Minister may by regulations make " such provision supplementary to or consequential on the " provisions of this section as appears to him to be necessary " or expedient, and in particular, but without prejudice to the " generality of this subsection, provision may be made by regula- " tions made thereunder for making adjustments requisite for " giving effect to the last preceding subsection and for making " good any underpayment or overpayment to a colliery concern " or such a subsidiary which may occur in consequence of the

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" making of additions or revenue payments under this section " before all the facts relevant for giving effect to the last preceding " subsection have become ascertainable."

We can now pass to section 1 of the Coal Act, 1949. Subsection (1) of that Act provides: " The following provisions of " this section shall have effect with respect to the making to " colliery concerns, and to subsidiaries of such concerns, of pay- " ments in respect of the year nineteen hundred and forty-nine " and subsequent years towards satisfaction of the right to interim " income conferred by subsection (2) of section nineteen of the " Coal Industry Nationalisation Act, 1946 (hereinafter referred to " as ' the principal Act '). (2) A colliery concern or a subsidiary " of a colliery concern shall, in respect of the year nineteen " hundred and forty-nine and in respect of any subsequent year " before that in which compensation under the principal Act in " respect of the transfer of the transferred interests of the concern " or subsidiary is satisfied in full, be entitled to a payment of an " amount equal to the amount by which one third of the com- " parable ascertained revenue of the concern, or of the subsidiary, " as the case may be, attributable to activities thereof for which " the transferred interests thereof were used or owned exceeds an " amount equal to interest for the year in question on the aggre- " gate amount of that compensation satisfied before the end of " that year." There follows a provision about the rate of interest, and there is reference to provisions about that in the Act of 1946 to which I have already referred. By subsection (3): " A pay- " ment to which a colliery concern or a subsidiary of a colliery " concern is entitled under the last foregoing subsection in respect " of any year shall be treated for the purposes of paragraph (*a*) " of subsection (2) of section twenty-two of the principal Act " as being made towards satisfaction of the aggregate of the pro- " portions attributable to that year of amounts which that para- " graph requires to be paid as additions to stock issued or money " payments made after the expiration of that year in satisfaction " of compensation in respect of transfers of transferred interests " of the concern or subsidiary." Then subsection (5) gives the Minister power to make regulations " making such provision " supplementary to or consequential on the foregoing provisions " of this section as appears to him to be requisite or expedient, " and in particular, but without prejudice to the generality of this " subsection, provision may be made by regulations made there- " under for requiring the repayment to the Minister of any " amount by which a payment made under this section in respect " of any year to a colliery concern or subsidiary may exceed the " aggregate towards satisfaction of which that payment is under " subsection (3) of this section to be treated as being made, and " as to the manner of recovery of that amount and the dis- " posal of sums recovered in or towards satisfaction of repayment " thereof: Provided that in a case where provision is made for " recovering the excess or any part thereof by way of deduction

"from compensation in respect of transfers of transferred "interests of the concern or subsidiary, provision shall be made "for setting off against the deduction the aggregate of—(*a*) an "amount which bears to the amount of the deduction the same "proportion that the amount of income tax ultimately borne "by the concern or subsidiary for the income tax year the begin- "ning of which falls within the year in respect of which the excess "arises bears to the amount which its total income for income "tax purposes for that income tax year would be if it were com- "puted without regard to any relief or deduction in respect of "profits tax; and (*b*) an amount which bears to the amount of the "deduction the same proportion that the amount of profits tax "ultimately borne by the concern or subsidiary (as determined "in accordance with rules laid down by the regulations) in respect "of the aggregate (as so determined) of its profits which are "attributable to the year in respect of which the excess arises "bears to that aggregate." By subsection (6) "Nothing in the "last foregoing subsection or in regulations made thereunder shall "be construed as implying that a payment made under this "section to a colliery concern or subsidiary, or a part of any "such payment, is for any purpose anything but a payment of "income to the concern or subsidiary, or as precluding the distri- "bution as income of a payment so made."

It will be seen that these provisions prescribe three methods of satisfying the right to interim income viz:

(i) Under section 22 (2) (*a*) of the Coal Act, 1946, by making in respect of the period from primary vesting date to the time of payment or satisfaction of any compensation, in addition to the compensation then paid or satisfied, a money payment of an amount equal to interest for that period on that amount of compensation at the rate or rates prescribed by the Treasury;

(ii) Under section 22 (3) of the same Act, in respect of each of the calendar years 1947 and 1948, by a revenue payment equal to one half of the comparable ascertained revenue of the concern attributable to the activities thereof for which the transferred interests thereof were used or owned, this mode of providing for interim income being by subsection (4) in substitution for the provisions of subsection (2) so far as regards additions thereunder for those two years in respect of like subjects of compensation, except as to the excess of the aggregate amount of such additions over the aggregate amounts of the revenue payments made in the same case; and

(iii) Under section 1 (2) of the Coal Act of 1949, in respect of the year 1949 and subsequent years, by making, in respect of each year down to the year in which the relevant compensation was satisfied in full, a modified form of revenue payment consisting of an amount equal to the excess of one-third of the comparable ascertained revenue over an amount equal to interest for the year in question (at the rate or rates referred to in section 22 (2) (*a*) of the Coal Act, of 1946) on the aggregate amount of

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that compensation satisfied before the end of that year, payments under section 1 (2) of the Coal Act of 1949 in respect of any year being treated (by subsection (3) of the same section) as made towards satisfaction of the proportions attributable to that year of the additions in respect of interim income falling to be made under section 22 (2) (*a*) of the Coal Act, 1946, to compensation paid or satisfied after the end of that year, with power for the Minister under section 1 (5) of the Coal Act of 1949, to provide by statutory instrument (inter alia) for the repayment to him of any amount whereby a payment under that section exceeded the aggregate towards satisfaction of which such payment was under subsection (3) to be treated as being made.

The right to interim income and the three methods of satisfying it under the Coal Mines Acts of 1946 and 1949 being as above described, the first matter for consideration is whether payments made towards satisfaction of such right in the three ways prescribed or any of them were of such a nature that (apart from the fact that the payer was a Minister of the Crown) they can properly be classed as annual payments within the meaning of rule 1 (a) of Case III of Schedule D.

The income tax provisions directly relevant to this point appear to be:

(i) Paragraph 1 of Schedule D in the Income Tax Act, 1918, which provides that: "Tax under this Schedule shall be charged "in respect of . . . (b) All interest of money, annuities, and other "annual profits or gains not charged under Schedule A, B, C or "E, and not specially exempted from tax;"

(ii) Paragraph 2 of the same Schedule which provides that: "Tax under this Schedule shall be charged under the following "cases respectively; that is to say, . . . Case III Tax in respect of "profits of an uncertain value and of other income described in "the rules applicable to this Case; . . . and subject to and in "accordance with the rules applicable to the said Cases respectively."

(iii) Rule 1 of the rules applicable to Case III of Schedule D which provides that: "The tax shall extend to—(*a*) any interest of "money, whether yearly or otherwise, or any annuity, or other "annual payment, whether such payment is payable within or "out of the United Kingdom, either as a charge on any property "of the person paying the same by virtue of any deed or will or "otherwise, or as a reservation thereout, or as a personal debt or "obligation by virtue of any contract, or whether the same is "received and payable half-yearly or at any shorter or more "distant periods."

(iv) The Miscellaneous Rules applicable to Schedule D which provides that: "Tax under this Schedule shall be charged on and "paid by the persons or bodies of persons receiving or entitled to "the income in respect of which tax under this Schedule is "hereinbefore directed to be charged."

(v) Rule 21 (1) of the General Rules, which provides that:

" Upon payment of any interest of money, annuity, or other " annual payment charged with tax under Schedule D, or of any " royalty or other sum paid in respect of the user of a patent, not " payable, or not wholly payable out of profits or gains brought " into charge, the person by or through whom any such payment " is made shall deduct thereout a sum representing the amount " of the tax thereon at the rate of tax in force at the time of " the payment."

Reference should also be made to paragraph 6 of the First Schedule to the Finance Act, 1922, which provides that in computing the actual income from all sources of a company for any year or period for the purposes of section 21 of that Act: " The income " from any source shall be estimated in accordance with the " provisions of the Income Tax Acts relating to the computation " of income from that source; except that the income shall be " computed by reference to the income for such year or period as " aforesaid and not according to an average of more than one year " or by reference to any year or period other than such year or " period as aforesaid."

So far as we are aware there has been no reported case concerning the assessment to income tax of interim income under the Coal Acts, 1946 and 1949, but the relevant provisions of those enactments have been the subject of close consideration in this court and the House of Lords in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[1] in relation to profits tax.

The effect of that decision will be sufficiently indicated by the following citation from the headnote of the report[2]: " *Held*, that " these sums were not to be included in the computation of the " company's profits for the purposes of assessment to profits tax. " To bring a payment within the scope of profits tax as ' profits " ' arising in each accounting period from any trade or business ' " it was not enough that it should be income derived from the " property of the company without regard to the question whether " it arose from a trade or business carried on by the company " during the relevant period. The payments, though income, " were not ' income received from investments or other property ' " within the meaning of Schedule IV, paragraph 7, to the Finance " Act, 1937. Neither was the capital asset (viz., the right to " receive compensation) an asset so related to any trade or busi- " ness carried on by the company that it fell within paragraph 7, " nor (if it were) were the payments in question ' income ' of that " asset."

Mr. Bucher, for the company, cited a number of passages from the judgments and speeches in this Court and the House of Lords in the *Butterley Co.'s* case.[3] It will suffice to refer to the following observations from the speech of Lord Radcliffe[3]: " In " my opinion, the determining factor is the very special nature

[1] [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411, H.L.

[2] [1957] A.C. 32.

[3] Ibid. 57.

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" of the receipts involved. The Coal Industry Nationalisation " Act, 1946, legislated for a revolution in the coal industry of this " country and in the system of ownership, management and " working upon which the industry was based. It was inevitable " that the far-reaching disturbance of rights which this involved " should require a period of several years for the adjustment of " its consequences. These interim income payments which are " now in question are the product of that disturbance and adjust- " ment, and it does not seem to me at all surprising that they " cannot well be related to any of those other kinds of receipt " which normally come into the accounts of a company con- " ducting a trade or business. They are sui generis and it would, " I think, lead to confusion if they were described in any terms " except those which are strictly applicable to their own special " circumstances." Lord Radcliffe also said [4]: " I said before " that I regard these payments as sui generis. The main feature " of them which impresses me is that they were not income which " arose from any disposable source under the respondents' " control."

There have been many judicial pronouncements as to the scope of rule 1 (*a*) of Case III and the following propositions can be regarded as established:

(1) To come within the rule as an " other annual payment " the payment in question must be ejusdem generis with the specific instances given in the shape of interest of money and annuities: see *Hill* v. *Gregory*,[5] *per* Hamilton J. and *Howe* (*Earl*) v. *Inland Revenue Commissioners* [6] *per* Scrutton L.J. Mr. Bucher submitted that this requirement could not well be fulfilled by the interim income here in question consistently with Lord Radcliffe's description of it in the *Butterley Co.'s* case [7] as " sui generis." He said in effect that if interim income under the Coal Acts, 1946 and 1949, was in truth " sui generis " it could not be " ejusdem generis " with any other form of payment, and that the natural home of " sui generis " income was Case VI of Schedule D. We can attach no great weight to this line of argument, for Lord Radcliffe was, as we think, directing himself to the peculiarity of interim income as income not arising from any trade or business or from any contractual obligation or from any income-bearing asset, but payable simply because (as he put it [8]) " the nationalisation statute decreed that " it " should be paid." The fact that it is " sui generis " in these respects does not appear to us to preclude its inclusion in rule 1 (*a*) of Case III if it possesses the essential characteristics on which the application of the rule depends, which are in effect those appearing from the further propositions stated below.

(2) The payment in question must fall to be made under some binding legal obligation as distinct from being a mere voluntary

[4] [1957] A.C. 32, 62.
[5] [1912] 2 K.B. 61, 70, 71; 6 T.C. 39, 47.
[6] [1919] 2 K.B. 336, 352, 353; 35 T.L.R. 461; 7 T.C. 289.
[7] [1957] A.C. 32.
[8] Ibid. 58.

payment: see *Smith* v. *Smith* [9] *per* Lord Sterndale M.R., and Warrington L.J. That requirement is clearly satisfied in the present case.

(3) The fact that the obligation to pay is imposed by an order of the court and does not arise by virtue of a contract does not exclude the payment from rule 1 (*a*) of Case III. "The words in "Case III 1 (*a*), 'whether such payment' and so forth do not in "my opinion limit the annual payments to those there mentioned, "but merely provide that they at all events shall be included." See Warrington L.J. in *Smith* v. *Smith* [10] and Lord Sterndale M.R. to the same effect.[11] We should add a reference to *Inland Revenue Commissioners* v. *City of London* (*as Conservators of Epping Forest*),[12] where a payment made under an Act of Parliament in the shape of the Epping Forest Act, 1878, was held to be an annual payment within rule 1 (*a*) of Case III. It would seem to follow that the interim income in the present case is not excluded from the application of the rule by the circumstance that the obligation under which it is paid is a statutory obligation.

(4) The payment in question must possess the essential quality of recurrence implied by the description "annual." But that description has been given a broad interpretation in the authorities. For example, in *Smith* v. *Smith* [13] Warrington L.J. said: "Again the fact that the payment is to be made weekly "does not prevent it from being annual provided the weekly pay-"ments may continue beyond the year." See also the case in the House of Lords of *Moss' Empires Ltd.* v. *Inland Revenue Commissioners* [14] where the payments in question fell to be made under a guarantee by the appellants of the payment of a fixed preferential dividend at a specified rate on the ordinary shares of another company, and were therefore in their nature contingent. Lord Macmillan said [15]: "At your Lordships' Bar it "was argued for the appellants that the payments were not "annual payments inasmuch as they were casual, independent, "not necessarily recurrent, and throughout subject to a con-"tingency. This argument commended itself to Lord Moncrieff, "but I am unable to accept it. There was a continuing obligation "extending over each and all of the five years to make a pay-"ment to the trustees for the shareholders in the event of the "company earning no profits or insufficient profits. The fact that "the payments were contingent and variable in amount does not "affect the character of the payments as annual payments. Rule "21 is not primarily a charging section, but is part of the "machinery of collection. The charging enactment is to be "found in rule 1 of Case III, Schedule D, whereby tax is imposed "on 'any interest of money whether yearly or otherwise or any

[9] [1923] P. 191, 197, 202; 39 T.L.R. 632.
[10] [1923] P. 191.
[11] Ibid. 191, 197.
[12] [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075; 34 T.C. 293.
[13] [1923] P. 191, 201.
[14] [1937] A.C. 785; 53 T.L.R. 867; 21 T.C. 264, 295; [1937] 3 All E.R 381.
[15] [1937] A.C. 785, 793.

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" ' annuity or any other annual payment . . . payable . . . as a " ' personal debt or obligation by virtue of any contract.' I am " of opinion that the payments in question fall within these " words."

Lord Maugham said [16]: " It is, I think, to be noted that we " are not concerned here with the case of annual profits or gains " arising from a trade, as to which the decision in *Martin* v. " *Lowry* [17] would be decisive to show that in that context " ' annual ' means ' in any one year.' In rule 21 ' annual ' " must be taken to have, like interest on money or an annuity, " the quality of being recurrent or being capable of recurrence. " The payments we are concerned with were to continue for five " years, subject to their being required to make up the guaranteed " annual dividend, and were plainly payments intended to supple- " ment so far as necessary the income of the recipients during " each of the years in question. In these circumstances I am of " opinion that they had the necessary quality of recurrence and " are within the terms of rule 21. In so deciding I apprehend " that your Lordships are not travelling in any way beyond the " existing decisions with regard to ' annual payments ' in that " rule."

Having regard to these authorities we cannot view the revenue payments in the present case as lacking in the necessary quality of recurrence. Those falling to be made under section 22 (3) of the Coal Act of 1946, were expressly required to be made " in " respect of each of the two years beginning with the primary " vesting date and the first anniversary thereof respectively," and it is plain that the amount of the revenue payment in respect of each of those two years was to be the same. Those falling to be made under section 1 of the Coal Act of 1949 were expressly required to be made in respect of the year 1949 and subsequent years. It seems to us that the requirement of recurrence is amply satisfied here. We feel more difficulty as regards the interim income payable under section 22 (2) (*a*) as an addition to the compensation satisfied on any occasion and comprising a sum equal to interest at the prescribed new rate or to the compensation then payable, and will return to that relatively small matter later in this judgment.

(5) The payment in question must be in the nature of a " pure " income " profit in the hands of the recipient. By way of authority for this proposition we need only refer to *Howe (Earl)* v. *Inland Revenue Commissioners* [18] where Scrutton L.J. said: " It " is not all payments made every year from which income tax can " be deducted. For instance, if a man agrees to pay a motor " garage £500 a year for five years for the hire and upkeep of a " car, no one suggests that the person paying can deduct income " tax from each yearly payment. So if he contracted with a

[16] [1937] A.C. 785, 793, 795.
[17] [1927] A.C. 312; 43 T.L.R. 116; 11 T.C. 297, 320.
[18] [1919] 2 K.B. 336, 352.

" butcher for an annual sum to supply all his meat for a year. The " annual instalment would not be subject to tax as a whole in the " hands of the payee, but only that part of it which was profits," and to the case of *In re Hanbury* [19] where Lord Greene M.R. said: " There are two classes of annual payments which fall to be con- " sidered for income-tax purposes." Then I think there is a misprint. I think it should read: " There is, first of all, that " class of annual payment which the Acts regard and treat as " being pure income profit of the recipient "—and those words are repeated by mistake—" undiminished by any deduction. Pay- " ments of interest, payments of annuities, to take the ordinary " simple case, are payments which are regarded as part of the " income of the recipient and the payer is entitled in estimating " his total income to treat those payments as payments which go " out of his income altogether. The class of annual payment " which falls within that category is quite a limited one. In the " other class there stand a number of payments, none the less " annual, the very quality and nature of which make it impossible " to treat them as part of the pure profit income of the recipient, " the proper way of treating them being to treat them as an " element to be taken into account in discovering what the profits " of the recipient are."

We should add that the payments held in *Howe (Earl)* v. *Inland Revenue Commissioners* [20] not to be within the provisions corresponding to rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules consisted of premiums covenanted to be paid on certain policies of insurance effected in connexion with a mortgage, and that the payments similarly excluded in *In re Hanbury* [21] were payments in respect of the use of certain chattels. It seems to us that the interim income payments in the present case were what Lord Greene M.R. termed " pure income profit " in *In re Hanbury*.[21] Mr. Bucher argued the contrary on the ground that the company was put to expense in the shape of the cost of the work necessary to be done by or on behalf of the company in connexion with the quantification of the compensation. But we do not see why this expense should prevent the interim income from being " pure income profit " in the sense intended by Lord Greene M.R. in that case. So far as attributable to the interim income as distinct from the compensation itself, it was expense incurred in fixing the amount of the annual payment to be made, and not expense to be set against the annual payment as representing the cost of earning it, so as to convert it from an annual payment within rule 1 (*a*) into a mere element in the ascertainment of a balance of profit. If a continuing partner agreed to pay an outgoing partner an annuity based on the average profits of the partnership business for the last three years, the outgoing partner to pay the cost of ascertaining the amount, we apprehend that the outgoing partner could not claim that the annuity was prevented

[19] (1939) 20 A.T.C. 333, 334.
[20] [1919] 2 K.B. 336.
[21] 20 A.T.C. 333.

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by his expenditure in ascertaining its amount from being in his hands pure income profit.

Mr. Bucher raised various other points, in addition to those already indicated, against the inclusion of interim income under the Coal Acts of 1946 and 1949 in the category of annual payments within rule 1 (*a*) of Case III of Schedule D.

He said that no time was fixed for payment save in so far as payments under section 22 (2) (*a*) of the Coal Act of 1946 fell to be made at the same time as the payment or satisfaction of the relative compensation. We do not regard this as material. The revenue payments under both Acts were to be made in respect of each of the years to which the relevant provisions of the Acts respectively applied. An obligation to pay a given sum in respect of each of a series of years implies in the absence of some provision to the contrary that the payment in question is to be made yearly, and an obligation in those terms would to our minds clearly possess the quality of recurrence required by the rule. In *Cunard's Trustees* v. *Inland Revenue Commissioners*,[22] payments made from time to time under a discretionary power conferred on trustees were held to fall within rule 1 (*a*) of Case III of Schedule D.

Mr. Bucher further took the point as to the payments to be made under section 22 (2) (*a*) of the Coal Act of 1946 that their amount was variable at the will of the payer, inasmuch as the Treasury was to prescribe the rate or rates of interest by reference to which those payments were to be quantified. We think this point is met by *Cunard's Trustees* v. *Inland Revenue Commissioners*,[22] where the amounts of the payments depended on the discretion of the trustees.

Mr. Bucher also submitted that the revenue payments under the Coal Act of 1949 were not annual payments within the rule because under that Act the recipient might be called upon to repay some part of the amounts received in the event of his turning out to have received more than the prescribed aggregate amount. We think *Williamson* v. *Ough* [23] is, so far as it goes, against him, but it dealt with provisions in a will for the recoupment to capital of payments made thereout to beneficiaries on account of income which, in the view of the House of Lords, did not impose on the beneficiaries a personal obligation to repay. Obviously a mere series of loans would not be annual payments within the meaning of the rule, but we hardly think a contingent obligation to repay such as we are concerned with here would suffice to exclude the payments in question from the operation of the rule. However that may be, we think this point is concluded against Mr. Boucher by section 1 (6) of the Coal Act of 1949 which with reference, inter alia, to the provisions as to repayment contained in subsection (5) says this, and I have already referred to it: " Nothing in the last foregoing subsection " or in regulations made thereunder shall be construed as implying

[22] [1946] 1 All E.R. 159; 27 T.C. 122. [23] [1936] A.C. 384; 20 T.C. 194.

" that a payment made under this section to a colliery concern " or subsidiary, or a part of any such payment, is for any purpose " anything but a payment of income to the concern or subsidiary, " or as precluding the distribution as income of a payment so " made."

We do not think that the provisions of section 22 (5) of the Coal Act of 1946 as to repayment, which are confined to overpayments made owing to mistakes of fact, affect the matter.

Returning to the interim income provided for by section 22 (2) (*a*) of the Coal Act of 1946, we would observe that this interim income, though calculated as a sum equal to interest at the prescribed rate on the compensation to which it is added, is not described as interest of, or interest on, the compensation, and was held by the House of Lords in the *Butterley Co.'s* case [24] not to be such.

It cannot, therefore, well be brought within rule 1 (*a*) of Case III of Schedule D as " interest of money." Accordingly, we do not think it is covered by *Riches* v. *Westminster Bank Ltd.*,[25] where interest on damages, although paid uno flatu with them, was within the rule as being " interest of money." If it was not interest of money was it at all events an " annual payment " for this purpose? With some doubt we conclude it was not. It is true that it is calculated at an annual rate, but the section requires it to be paid, as regards each item of compensation with reference to which it is payable, at the same time as and by way of addition to the compensation in question. We find difficulty in discerning here the relevant quality of recurrence and therefore conclude that this relatively small part of the interim income with which this case is concerned is a proper subject of tax under Case VI of Schedule D.

For the reasons we have endeavoured to state we conclude that, apart from the question whether rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules have any application at all where, as here, the payer is a Minister of the Crown, the revenue payments received by the company under the Coal Acts of 1946 and 1949 would be taxable as annual payments under rule 1 (*a*) of Case III of Schedule D and subject accordingly to rule 21 of the General Rules, whereas the payments of interim income received by the company under section 22 (2) (*a*) of the former Act are taxable under Case VI.

The next point for consideration is whether a payment made by a Minister of the Crown can fall within rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules. I have already referred to paragraph 1 of the rule. Paragraphs (2), (2A) and (2B) added to rule 21 of the General Rules in the Income Tax Act, 1918, by the Finance Act, 1927, s. 26, are in these terms:

[24] [1957] A.C. 32.

[25] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469; sub nom. *Westminster Bank Ltd.* v. *Riches*, 28 T.C. 159.

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"Where any such payment as aforesaid is made by or through "any person, that person shall forthwith deliver to the Com- "missioners of Inland Revenue, for the use of the Special "Commissioners, an account of the payment, or of so much "thereof as is not made out of profits or gains brought into "charge, and of the tax deducted out of the payment or out of "that part thereof, and the Special Commissioners shall assess "and charge the payment of which an account is so delivered on "that person." Then (2A): "The Special Commissioners may, "where any person has made default in delivering an account "required by this rule, or where they are not satisfied with the "account so delivered, make an assessment according to the best "of their judgment, and if any person neglects or refuses to "deliver an account so required, he shall forfeit the sum of one "hundred pounds over and above the tax chargeable." Then (2B): "All the provisions of the Income Tax Acts relating—(*a*) to "persons who are to be chargeable with income tax and to income "tax assessment; (*b*) to appeals against such assessments; (*c*) to "the collection and recovery of income tax; (*d*) to cases to be "stated for the opinion of the High Court, shall, so far as they "are applicable, apply to the charge, assessment, collection and "recovery of income tax under this rule, and the Special Com- "missioners shall, for the purpose of an assessment under this "rule, have any powers of a surveyor, and, for the purpose of "the representation of the Crown before the Special Commis- "sioners on any appeal under this rule, any person nominated in "that behalf by the Commissioners of Inland Revenue shall have "all such powers as a surveyor has at and upon the determination "of an appeal."

It will be observed that under paragraph (2) the person by or through whom the relevant payment is made is enjoined to deliver an account of the payment and of the tax deducted thereout, and the Special Commissioners are enjoined to assess and charge the payment of which an account is so delivered on that person.

It will be observed further that under paragraph (2A) the Special Commissioners may make an estimated assessment on any person who has made default in delivering the prescribed account, and any person who neglects or refuses to deliver the prescribed account is to forfeit £100 over and above the tax chargeable.

Finally, it will be observed that the provisions of the Income Tax Acts as to the collection and recovery of tax applied by paragraph (2B) to tax under the rule include section 169 (1) of the Income Tax Act, 1918, which provides that "Any tax charged "under the provisions of this Act may be sued for and recovered, "[with full costs of suit,] from the person charged therewith in "the High Court as a debt due to the Crown . . ."

In view of these provisions we cannot construe the word "person" in rule 21 as including the Crown. The obligation to deduct tax imposed by paragraph (1), and the other obligations and

penal provisions laid upon the person by or through whom the payment is made by paragraphs (2), (2A), and (2B), seem to us to show quite clearly that the word " person " in the rule is not to be construed as including the Crown.

This conclusion we think accords in its result with the views expressed in the House of Lords in *Madras Electric Supply Corporation Ltd.* v. *Boarland*.[26] The actual decision in that case was that the words " If at any time . . . any person succeeds to any " trade . . . which until that time was carried on by another " person " in rule 11 (*a*) of Cases I and II of Schedule D included the case of succession by the Crown, because the rule did not operate to charge the person succeeding with any tax. But the principles underlying the immunity of the Crown from tax imposed by any statute were discussed, and there was some divergence of opinion amongst their Lordships on that subject. Lords Reid and Macdermott preferred the view that the word " person " in a provision imposing tax on the " person " referred to should, as a matter of construction, be held not to include the Crown, but that there was no reason for denying the word " person " its ordinary meaning (which would include the Crown) in a provision which did not operate to impose any tax on the person referred to. Lord Keith, on the other hand, preferred the view that the word " person " must be construed as including the Crown even in a charging provision, but that where the effect of that construction would be to charge the Crown with tax, the Royal Prerogative operated to exempt the Crown from its application.

Lord Tucker said[27]: " My Lords, I am not persuaded that " the decision of this appeal calls for an historical investigation of " the true nature of the royal prerogative or its precise impact " upon parliamentary legislation. It is beyond dispute that the " Income Tax Acts do not operate to charge the Crown with pay- " ment of tax—in other words, the immunity derived from the " prerogative has not been affected by express words or by neces- " sary implication. This being the position, I can see no reason " why the word ' person ' in those parts of the Acts which do not " impose a charge to tax should be construed otherwise than in its " ordinary and natural meaning, which clearly includes the " Crown."

Lord Oaksey said[28]: " My Lords, I agree with my noble and " learned friend, Lord Tucker, that it is unnecessary in this case " to decide whether the Crown's admitted immunity from taxa- " tion depends upon the construction of the statute or arises " from the prerogative in some other way," and he concluded his speech thus: " The words ' the tax payable for all years of assess- " ' ment by the person succeeding ' must, I think, be construed " to mean the tax, if any, and not to deprive the taxpayer of

[26] [1955] A.C. 667; [1955] 2 W.L.R. 632; [1955] 1 All E.R. 753; sub nom. *Boarland* v. *Madras Electric Supply Corporation Ltd.*, 35 T.C. 612, 633.

[27] [1955] A.C. 667, 691, 692.

[28] Ibid. 667, 682.

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" balancing allowances to which he would have been entitled " because his successor is not taxable."

Whether the immunity of the Crown is founded upon construction, or on prerogative overriding construction, the result appears to us to be the same, namely, that the charging provisions of Taxing Acts do not extend to the Crown unless the Crown is included therein by express terms.

The only possible difference might be that if the exemption is assigned to prerogative, it is arguable that the Crown could submit to be bound by waiver. No such argument was, however, addressed to us, and we find it difficult to hold that categorical provisions such as those here in question, couched in language which is in terms appropriate to taxpayers and taxpayers only, are to be considered as binding upon the Crown unless and until the Crown asserts the prerogative, so that the Crown can elect to be bound or not by asserting or refraining from the assertion of the prerogative, and having asserted the prerogative once more become bound by waiving it.

We think that whether construction or prerogative is the true basis of the immunity, the result must be that the Crown is excluded ab initio from the application of provisions such as those now under consideration.

We should add a reference to *Coomber* v. *Justices of the County of Berks*,[29] where Lord Watson said: " The exemption " of the Crown from the incidence of rating statutes is a general " privilege, and is nowise dependent upon the local or imperial " character of the rate. It takes effect in all cases when the " Crown is not named in the statute, or, I should prefer to say, " in all cases where the enactments do not take away the " privilege, either in express terms or by plain and necessary " implication."

In *Constantinesco* v. *The King*[30] the House of Lords, in refusing to entertain the contention that rule 21 did not apply to the Crown because it had been raised too late, said nothing to suggest that if it had been raised in time it might not have succeeded.

Rules 19 and 21 of the General Rules on the one hand, and rule 1 (*a*) of Case III of Schedule D on the other, are co-extensive, so that everything to which rule 1 (*a*) applies must also fall within rule 19 or 21, and nothing can fall within rule 1 (*a*) unless it falls either within rule 19 or within rule 21.

Rule 19, which deals with interest, annuities, etc., payable wholly out of profits or gains brought into charge to tax, cannot apply to the Crown, because the Crown, not being liable to tax, has no profits or gains answering that description. This suggests that the complementary provisions of rule 21 are similarly limited in their application to persons other than the Crown. Moreover, rule 21 contemplates that a person to whom it applies may have

[29] (1883) 9 App.Cas. 61, 76; 2 T.C. 1.

[30] (1927) 43 T.L.R. 727; 11 T.C. 730, 745.

some profits or gains brought into charge, and make payments partly out of such profits or gains and partly otherwise, a position which for the same reason could not arise in the case of the Crown.

It may further be noted that certain payments out of public funds are separately provided for in the rules applicable to Case III of Schedule D, which indicates that rule 1 (*a*) was not intended to include them. Reference may also be made, for example, to the special machinery provided in Schedule C to deal with the deduction of tax from various kinds of payments made out of the public revenue. One may also contrast with the Coal Acts of 1946 and 1949 the special provisions as to tax which are to be found in sections 10 and 23 of the Transport Act, 1947, and sections 11 and 28 of the Electricity Act, 1947.

For these reasons we conclude that the revenue payments with which this case is concerned, while otherwise possessing the characteristics requisite for their inclusion in rule 1 (*a*) of Case III of Schedule D, are excluded from that rule by the circumstance that the payer is the Crown, represented by one of Her Majesty's Ministers.

It follows in the view we take that the whole of the interim income payments fall within Case VI of Schedule D, and it only remains to consider whether such payments are nevertheless, as contended by Mr. Pennycuick for the Special Commissioners, taxable as income of the years in which they were received, or, on the other hand are, as contended by Mr. Bucher, to be treated as accruing from day to day over the period in respect of which they were paid, the amount attributable for tax purposes to each of the three years under appeal being ascertained on that footing.

Case VI of Schedule D comprises "Tax in respect of any "annual profits or gains not falling under any of the foregoing "Cases, and not charged by virtue of any other Schedule." Rule 2 of the rules applicable to Case VI provides that "The "computation shall be made, either on the full amount of the "profits or gains arising in the year of assessment, or according "to an average of such a period, being greater or less than one "year, as the case may require . . ."

Mr. Pennycuick relied on the general principle that for income tax purposes a payment in the nature of income must be treated as income of the year in which it is received. He admitted that exceptions to the general rule were to be found in cases involving the assessment of the profits of a trade or profession under Case I or Case II, but claimed that no similar exception existed, whereas here the receipt in question is in the nature of a pure income profit as distinct from an element to be brought into computation for the purpose of arriving at a balance of profits and gains.

Mr. Pennycuick referred to the judgment of Rowlatt J. in *Grey* v. *Tiley*,[31] where the taxpayer had become entitled to a commission in 1920–21 and received only part of it in that year

[31] (1932) 16 T.C. 414.

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and the balance in subsequent years and Rowlatt J. held that for the purposes of tax under Case VI the income arose when the payments on account of the commission were received. Rowlatt J. said [32]: "Now the position that the Solicitor-General takes up, "as I understand it, is this. He does not contend that at the "end of the year, in this case 1920–21, there was a right on the "part of the Revenue to assess this gentleman to this tax because "he earned the money. I take it he does not say that, and it "would be very remarkable if that was the law because it would "mean that a man was taxed before he had got anything to pay "it out of. As I understand the position, and this is what I am "addressing myself to all the time, the position taken is this, that "if and when the money is paid, then arises the right to assess "and that right, then, relates back to the year when the money "was earned. I am bound to say, I think, that it strikes one as "a somewhat curious proposition, looking at the Special Case "which I have referred to, that when the end of the year comes "it becomes ruled out and the question is whether the accounts "ought to be rectified or anything of that kind. When the end "of the year comes is it not the case that a man either has or has "not incurred tax for that year? It seems to me that a very "great confusion and very great difficulty arises if, as overdue "payments of interest on foreign securities or profits of this "kind fall due, a series of back assessments in respect of back "years are to be made, not because there is a mistake about what "ought to have been assessed in that year but because, by rela-"tion back, the facts of that year have become different facts "afterwards, because that is what it must mean. I do not myself "feel that that is right but I think in this case I really am bound, "for what it is worth, by my own decision in *Leigh's* case.[33] "The whole thing may, of course, be opened elsewhere but I "think I am really bound by my own decision in that case. "That was a clean case. It was the case of a man who had "bonds and had bought them, it does not matter whether he "bought them or not but he had them, on which there were many "years of arrears of interest. They were foreign bonds or "colonial bonds but an agent paid them in this country and, "therefore, they were not taxed as foreign securities but they "were taxed under the special provisions of the Act, which I need "not refer to, by a section dealing with the matter and were "liable to suffer deduction of the tax in force at the date of "payment. Those six years of arrears were paid at once and the "tax was deducted at the rate of the year of payment. That "has no significance because, even if they fall into the six Income "Tax years by reason of the provisions which I have indicated, "the rate of tax ought to be the rate of tax in the year of pay-"ment. That is artificially provided for by the legislature. "That does not help the argument, but without the help of that

[32] (1932) 16 T.C. 414, 422.

[33] [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590.

" decision I came to say this, that for super-tax purposes he must " be held to have received all those instalments of interest in " one year. The struggle in that case was—Mr. King was the " struggler—to put them back to the previous years by virtue of " the word ' receivable,' just as here the struggle is to put them " back by virtue of the word ' arising.' I said in that case that " ' receivable ' did not affect the matter at all, but the substance " of the thing was that I thought and held that those receipts " must be treated as all appertaining—I used that word—to the " year in which they were actually received. I am bound to say " that I think I ought to follow that in this case, though I still " remain of the opinion independently that in dealing with these " matters I want it to be understood that I say nothing more than " this, that in dealing with these casual profits coming under Case " VI, you must look at the time when the casual profits come in " and not go back to the year ex post facto in which the contract " was made and when the profits subsequently come in."

Mr. Pennycuick also referred to *Dewar* v. *Inland Revenue Commissioners*,[34] where tax was claimed upon unpaid interest on a legacy and it was held that inasmuch as the interest in question had not been received, it was not chargeable to tax. Lord Hanworth M.R. said[35]: " Then I come to *Leigh* v. *Inland Revenue Commissioners*,[36] in which Rowlatt J., whose experience " and knowledge of the Income Tax Acts is quite unrivalled, says: " ' It is to be remembered that for income tax purposes " ' " receivability " without receipt is nothing. Before a good " ' debt is paid there is no such thing as income tax upon it.' " I agree with those words. It appears to me that the reason " why you make up the return for the particular year is that you " look to see in the course of that twelve months what has been " received, and it may be that a good debt will be paid in a " subsequent twelve months and not in the twelve months in " respect of which you are making your declaration, and you " cannot anticipate that the money will come in in its proper " place in the following twelve months. I think Rowlatt J. was " right in saying that for income tax purposes receivability without " receipt is nothing." We need not make further reference to *Leigh's* case,[36] the effect of which is sufficiently indicated in the citations made above.

We were also referred to *Johnson* v. *W. S. Try, Ltd.*,[37] where Lord Greene M.R., after referring to the practice of including in the accounts of a trade for the purpose of computing its profits debts due but unpaid, said: " But I venture to think in one sense " that is an anomaly, because it is a departure from what I have " always understood to be the fundamental conception of Income " Tax legislation—that you ascertain your profits in reference to " your receipts. The reason why that exception is brought in is

[34] [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561.
[35] [1935] 2 K.B. 351, 366.
[36] [1928] 1 K.B. 73, 77.
[37] (1946) 27 T.C. 167, 181; 62 T.L.R. 355; sub nom. *Try (W. S.) Ltd.* v. *Johnson* [1946] 1 All E.R. 532.

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" that it is in accordance with ordinary commercial practice to " treat debts in that way."

Mr. Bucher placed some reliance on *Lambe* v. *Inland Revenue Commissioners*,[38] where it was held that interest on certain debentures which was due and payable but unpaid should not be included in the taxpayer's total income for surtax purposes because it had not been received. That accords with the cases to which we have already referred, and does not help Mr. Bucher. But Finlay J. used language [39] suggesting that if and when the interest was in fact paid it should not be treated as income of the year of payment but should be spread over the years in respect of which it was payable and charged to tax accordingly. But this expression of opinion was unnecessary for the purpose of Finlay J.'s decision and we cannot regard it as outweighing the views to the contrary expressed in the other cases to which we have referred.

Mr. Bucher's argument involves construing the word " arising " in rule 2 of the rules applicable to Case VI of Schedule D as meaning " arising in point of entitlement " and treating the iterim income as accruing in point of entitlement from day to day. If that were right then logically the amount arising in each year in the sense attributed to that expression by Mr. Bucher although not in fact paid would have been taxable as income of that year. That conclusion seems contrary to the effect of the cases to which we have referred, and Mr. Bucher did not seek to support it. His contention was that the interim income, although arising (in his sense of the expression) year by year, did not become taxable until it was received and then was not taxable as income of the year of receipt but as income of the years over which it was accruing in point of entitlement. This would involve the reopening of assessments and the raising of additional assessments at any distance of time from the year 1947–48 onwards according to the period taken to work out the compensation provisions under the Coal Acts of 1946 and 1949. We cannot think this is right, and in our view the expression " arising " in rule 2 of the rules applicable to Case VI must be construed as meaning " received."

Mr. Bucher pointed out the reference to Case VI of Schedule D in section 35 of the Finance Act, 1926, which by subsection (1) provides as follows: " Where in the case of any profits or gains " chargeable under Case I, Case II, . . . or Case VI of " Schedule D it is necessary, in order to arrive at the profits " or gains or losses of any year of assessment or other period, " to divide and apportion to specific periods the profits or gains " or losses for any period for which the accounts have been made " up, or to aggregate any such profits or gains or losses or any " apportioned parts thereof, it shall be lawful to make such a " division and apportionment or aggregation: . . ."

But we take this provision to be directed to cases in which it is necessary to compute profits and losses for the purpose of

[38] [1934] 1 K.B. 178; 18 T.C. 212. [39] [1934] 1 K.B. 178, 186.

arriving at a balance of gains, as in the ordinary case of a trade under Case I of Schedule D. That necessity might arise under Case VI when applied to activities analogous to but not actually constituting a trade. Compare *Forth Conservancy Board* v. *Inland Revenue Commissioners*.[40] Accordingly we do not think section 35 (1) of the Act of 1926 advances Mr. Bucher's argument in the present case, where the only income in question is in the nature of a pure income profit.

We should also refer to *In re Sebright*,[41] on which Mr. Bucher to some extent relied. The question with which Vaisey J. was there concerned was at what rate tax should be deducted from arrears of a jointure in the adjustment of the rights of beneficiaries inter se, and we do not think it really touches the point at issue in the present case, which concerns the years to which the interim income received by the company should for tax purposes be held to belong.

We are conscious that we have not referred in detail to all the points raised in the exhaustive arguments presented to us, but we hope we have dealt adequately with the essential matters.

For the reasons we have endeavoured to state we conclude that the apportionments under appeal in the first of the three cases should have been made on the footing that the interim income was taxable under Case VI of Schedule D and not under Case III of that Schedule, but that this will not affect the actual result.

The other two cases concern sub-apportionments to the two companies concerned under the provisions of section 21 of the Finance Act, 1922, of their appropriate proportions of the total income of the first appellant company, and accordingly involve precisely the same question, which must be answered with respect to the second and third appellant companies in the same way.

F. N. Bucher Q.C. for the company (on the question of costs): As the court has held that the payments fall within Case VI and not Case III and tax has therefore been improperly deducted by the Crown in making the payments, the company should be assessed on the amounts actually received as contended by the Crown, i.e., the net amounts and not the grossed up amounts, and the apportionments made by the Special Commissioners were therefore excessive.

JENKINS L.J. This point was not raised in the argument. The best way of dealing with this will be to postpone the drawing up of the order for, say, a week for the parties to consider the matter and failing agreement for the case to be put in the list again for further argument.

[40] [1931] A.C. 540; 47 T.L.R. 429; sub nom. *Inland Revenue Commissioners* v. *Forth Conservancy Board*, 16 T.C. 103, H.L.

[41] [1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547.

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March 12. After further argument the court held that, on the case stated, and in the circumstances of the case, this point was not open to the company and it dismissed the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Tamplin, Joseph & Flux; Solicitor, Inland Revenue.*

J. A. G.

[HOUSE OF LORDS.]

H. L. (E.)†
1958
March 3, 4; *April* 24.

LONDON INVESTMENT AND MORTGAGE CO. LTD. . . . . APPELLANT;
AND
WORTHINGTON (INSPECTOR OF TAXES) . RESPONDENT.
[TWO APPEALS.]

SAME . . . . . APPELLANT;
AND
INLAND REVENUE COMMISSIONERS . RESPONDENTS.
[TWO APPEALS.]

Revenue—Income tax—War damage—Value payments—Property dealing company—Whether profits or gains for income tax purposes—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case I—War Damage Act*, 1943 (6 & 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79, 80—*War Damage (Public Utility Undertakings, etc.) Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4).
War Damage.

A company which carried on the trade of property dealing received value payments under the provisions of the War Damage Act, 1943,[1] in respect of some of its properties which had been damaged and destroyed by enemy action:—

† VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

[1] War Damage Act, 1943, s. 36 (1): "The contributions to be made "towards the expense of making payments under this Part of this Act "in respect of war damage shall, "subject to the provisions of this Part "of this Act, be made in respect of "the properties, being units for the "purposes of Schedule A or for rating "valuations, which are specified in "section 39 of this Act; and a "property in respect of which such "a contribution is to be made is in "this Act referred to as a 'contributory property.' (2) The said "contributions shall be made by the "payment of five instalments, falling "due on the first day of July in the "year 1941 and each of the four "following years. (3) The amount "of an instalment shall, subject to "the provisions of this Part of this "Act, be computed as mentioned in "sections forty to forty-three of this "Act by reference to the assessment "of the contributory property for the "purposes of Schedule A or the "annual value of the property shown "in a valuation list in force for "rating purposes; and the value by

Held (Lord Reid dubitante), that the payments should be treated as trading receipts in computing the profits or gains of the company for the purposes of assessments to income tax and profits tax.

It was not a matter of necessary implication in section 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949, that, since expenditure on making good war damage was not allowable as a deduction for tax purposes so far as it was covered by a war damage payment, such payments must in no circumstances be treated as trading receipts for tax purposes.

Per Lord Reid. Section 28 cannot (*semble*) be applied literally to traders in land in that it must so be interpreted as to authorize the trader to omit from his tax account a cost of works payment.

J. Gliksten & Son Ltd. v. *Green* [1929] A.C. 381; 45 T.L.R. 274 and *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners* (1927) 96 L.J.K.B. 745; 43 T.L.R. 476 considered.

Decision of the Court of Appeal [1957] 1 W.L.R. 116; [1957] 1 All E.R. 277 affirmed.

CONSOLIDATED APPEALS from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

The two first appeals related to assessments to income tax made on the appellant company, London Investment and Mortgage Co. Ltd., and were respectively appeals by the appellant company from orders of the Court of Appeal dated December 6, 1956, allowing appeals by the respondent, F. N. Worthington (H.M. Inspector of Taxes), from orders of the High Court (Upjohn J.) dated May 10, 1956. By his orders an appeal of the appellant company on a case stated by the Commissioners for the Special

" reference to which an instalment is " computed is in this Act referred to " as the ' contributory value ' of the " property."

S. 66 (1): " Contributions made " and indemnities given under this " Part of this Act shall be treated for " all purposes as outgoings of a " capital nature . . ."

S. 113: [This section was amended and substantially re-enacted by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949:— see below.]

S. 79 (1): " Payments by the " Commission in respect of war " damage, and payments of interest " on value payments and on pay- " ments to be made under section 18 " of this Act, shall be made out of " moneys provided by Parliament."

War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28: " (1) In computing the amount of the " profits or gains, or of the income " from any source, of any person for " any purpose of the Income Tax " Acts, or the amount of the profits " of any person for the purposes of " the profits tax or for the purposes " of excess profits tax, no sum shall " be deducted in respect of any pay- " ment or expenditure to which this " section applies . . . (4) Expendi- " ture to which this section applies " is—(*a*) any expenditure on repairing " or otherwise making good war " damage to land in so far as any " person has received or is entitled to " a payment in respect of the damage " by virtue of any of the provisions " of the principal Act (whether alone " or as applied or modified by or " under any provision of this Act), " and any expenditure on making " good detriment to an interest in " goods caused by war damage in so " far as any person has received or " is entitled to a payment in respect " of the detriment by virtue of any of " those provisions or of a policy issued " under either of the schemes operated " under Part II of the principal Act " or by virtue of section ten of this " Act; and (*b*) any expenditure on " repairing or otherwise making good " war damage being damage of a " class mentioned in any of para- " graphs (*a*) to (*d*) of subsection (1) " of section one of this Act, or on " measures for meeting the circum- " stances created by any such obstruc- " tion as is mentioned in section " eighteen of this Act."

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Purposes of the Income Tax Acts from the determination of those commissioners was allowed and a cross-appeal by the respondent was dismissed. The two last appeals related to assessments to profits tax made on the appellant company, and the proceedings in relation thereto, mutatis mutandis, were of the same nature and effect as those in relation to the first two appeals.

The facts are fully stated in the report of the case before the Court of Appeal [1957] 1 W.L.R. 116 to 120.

John Senter Q.C. and *Desmond Miller* for the appellant company.

A. G. N. Cross Q.C. and *Alan Orr* for the respondents.

Besides the cases referred to in their Lordships' opinions, the following authorities were cited in argument: *Morley* v. *Tattersall* [2] and *Forth Conservancy Board* v. *Inland Revenue Commissioners*.[3]

Their Lordships took time for consideration.

April 24. VISCOUNT SIMONDS. My Lords, this appeal relates to assessments to income tax made upon the appellant company for the years 1948–49 and 1949–50 and to profits tax for the chargeable accounting periods April 1, 1947, to March 31, 1948, and April 1, 1948, to March 31, 1949. Upon each of the assessments the same question arises.

The material facts as found by the Commissioners for the Special Purposes of the Income Tax Acts are that the appellant company was at the relevant times a property-dealing company, that during the war certain of its properties suffered war damage and that under the provisions of the War Damage Acts, 1941, 1943 and 1949, it received value payments from the War Damage Commission in respect of a number of these properties. The short question is whether these value payments ought to be treated as trading receipts in computing the profits or gains of the company for the purpose of the assessments in question. The respondents contend that they should, the appellants that they should not.

The commissioners held that such payments ought prima facie to be brought in as receipts of the company's trade, as the properties formed part of its stock-in-trade and "on well-known "principles any sum received as compensation for their loss is a "trading receipt," but they further held, in view of certain provisions of the War Damage Acts, to which I shall refer, that "where a property has been, is being or intended to be repaired "or rebuilt, sums received in respect of it should not be included "as receipts, but should be deducted from the amount expended "on rebuilding." This determination may well appear to produce an equitable result, but it has not been found possible to support

[2] (1938) 54 T.L.R. 923; [1938] 3 All E.R. 296.

[3] [1931] A.C. 540; 47 T.L.R. 429.

it in any court, and there is in fact no via media. The value payments as a whole are to be treated as trading receipts or as a whole are not. Upjohn J. has held that they are not, the Court of Appeal that they are. I agree with the Court of Appeal.

My Lords, I have no doubt that the commissioners were right in saying that the payments were prima facie trading receipts. It was the business of the company to dispose of its stock-in-trade and to receive a cash equivalent or other compensation in return, and for the purpose of income tax law such cases as *J. Gliksten & Son Ltd.* v. *Green* [1] and *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners* [2] show that it is irrelevant whether the disposition is by sale, voluntary or compulsory, or by an involuntary loss attended by subsequent compensation. The company had one asset, lost it, and acquired another. I think it is incontrovertible that the asset it acquired was acquired in the course of its business, and not the less so because the war damage scheme was universal and compulsory and applied equally to all property owners whether or not they carried on the business of dealers in property. I do not deal at greater length with this part of the case because I am in complete agreement with the judgment of the Court of Appeal.

But the strength of the company's case lay in the special provisions of the War Damage Acts and in particular section 66 of the Act of 1943 and section 28 of the Act of 1949.

Section 66 of the 1943 Act provided that contributions made and indemnities given under that part of the Act should be treated for all purposes as outgoings of a capital nature. The contributions here referred to are the contributions which under the Act property owners were required to make towards the expense of making the payments in respect of war damage as therein provided. They might be regarded as analogous to premiums paid upon insurance with the State acting as insurer, but making a contribution of its own towards the necessary payments. The argument was that, since the contribution was for all purposes to be treated as an outgoing of a capital nature, including, no doubt, a computation of profits for tax purposes, it should be implied that any payment must also be regarded as of a capital nature for the same purpose. I should not be disposed to give much weight to this argument in any case, but what weight it has is lost upon a consideration of section 80. That section authorized the Treasury from time to time to make estimates of the net receipts of the Exchequer under that part of the Act, on the one hand, and the expected payments, on the other hand, and to increase or reduce the contributions accordingly. It would therefore appear reasonable that the total net contribution to the Exchequer should not be in effect reduced by allowing the contributor to bring it into account as an income payment for income tax purposes.

A more serious argument was founded on section 28 of the

[1] [1929] A.C. 381; 45 T.L.R. 274. [2] (1927) 43 T.L.R. 476.

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Act of 1949, which replaced section 113 of the Act of 1943. Section 28 was made retrospective and is applicable to the present case. It is a section which relates to income tax and profits tax and excess profits tax and nothing else, and I think that I must cite a substantial part of it. It provides that, in computing the amount of the profits or gains or of the income from any source of any person for any purpose of the taxes I have mentioned, no sum shall be deducted in respect of any payment or expenditure therein mentioned. It then provides, by subsection (2), that no sum shall be included in respect of any payment or expenditure to which the section applies in computing (inter alia) " (*b*) the cost to " any person of maintenance, repairs, insurance and management " in respect of which relief may be claimed under or by reference " to Rule 8 of No. V of Schedule A " and by subsection (4) (so far as relevant) that the expenditure to which the section applies is any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act (i.e., the Act of 1943). It is to be observed that the section does not purport to deal in any way with the manner in which receipts are to be treated for tax purposes. It is concerned only with deductions. " No sum shall be " deducted " are the governing words. But it is said that it is a matter of necessary implication that, if expenditure on repairing or otherwise making good war damage is not allowable as a deduction so far as it may be covered by a war damage payment, then such payments must in no circumstances be treated as trading receipts for tax purposes.

My Lords, I cannot accede to this argument. I hesitate in any case to introduce by way of implication in a taxing statute a provision which cries aloud for express statement if it is intended. But I am not satisfied of any such intention. No doubt it operates hardly against the taxpayer if, having brought into account a payment as a trading receipt, he is disallowed an equivalent amount of expenditure in repair. But equally it is for him an uncovenanted benefit if he does not bring into account a sum which, had it been the proceeds of sale of his property instead of compensation for its loss, he must have brought into account, and which he may dispose of as he thinks fit, whether in repair or rebuilding or otherwise. It might be possible, I do not say it would, to come to a different conclusion if the property owner, receiving a value payment, was bound to apply it in repair. But he is under no such obligation and I cannot write into the Act words which are not there so as to divest of its normal fiscal consequence the receipt by him of a sum of money which he prima facie receives as a trading receipt. In this case we are concerned with a value payment, not with a cost of works payment. The latter payment is only made after the cost has been incurred and we were told that in practice it was usually made direct to the building contractor. It may be that different considerations apply

to it. I do not intend to say anything that would prejudice such a case, but, so far as value payments are concerned, whether deliberately or through inadvertence, the case of the property dealer being overlooked or incompletely regarded, there is, in my opinion, no provision, express or implied, which enables him to exclude them from his computation of profits.

In the course of the argument there was some discussion of rule 3 (K) of the General Rules of Schedule D to the Income Tax Act. It was suggested that it provides a useful analogy to section 28. Perhaps it does. But I am content to abide by what appears to be the plain meaning of the statute.

I would dismiss this appeal with costs.

LORD MORTON OF HENRYTON. My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack and I have nothing to add.

LORD REID. My Lords, I regard this as a difficult case. Apart from the provisions of section 28 (4) of the War Damage (Public Utility Undertakings, etc.) Act, 1949, I should have no difficulty. It may be true that a person who does not trade in property, but carries on another trade within property owned by him, may pay or receive money in his capacity of owner and not in his capacity of trader. But when the property, in respect of the ownership of which he receives money, is part of his stock-in-trade, I find it difficult to imagine a case where that money would not be a trading receipt. In this case the money was received because the value of the stock-in-trade had been diminished by enemy action, and it must certainly be treated as a trading receipt unless the statute requires it to be treated in some other way.

Section 28 (4) applies to all payments made in respect of war damage to land. Its provisions are intelligible and just in all cases where the owner was not trading in land and did not hold the land as part of his stock-in-trade, but they are so ill-designed and lead to such unjust and anomalous results if one tries to apply them literally where the land was stock-in-trade of a trader that it was admitted and seems clear that the draftsman did not have in mind the case of a trader who deals in land.

As I recently ventured to point out in *Income Tax Special Commissioners* v. *Linsleys (Established 1897) Ltd.*[3]: "We are "therefore confronted with the not unusual problem of applying "statutory provisions to circumstances which they were not "designed to meet. In such a case it appears to me to be neces- "sary to make a rather wide survey, because one can easily reach "a wrong conclusion if attention is concentrated only on those "provisions which are immediately applicable to the particular "case."

I therefore think it necessary to examine the operation of section 28 (4) not only in relation to value payments but also in

[3] [1958] 2 W.L.R. 292, 298; [1958] 1 All E.R. 343.

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relation to cost of works payments. This matter was not fully developed in argument and I state my views with some hesitation. But a decision of this House as to the meaning and effect of a statute is none the less final though some relevant argument was not developed in the case, and I therefore feel bound to state my views as briefly as I can.

Under the War Damage Act, 1943, a payment made in respect of war damage may be either a cost of works payment or a value payment, the latter being made where war damage involves total loss. But total loss does not mean that the property is incapable of repair or reinstatement: it means broadly that the cost of reinstatement would be more than the amount by which the value of the property as a site and in its damaged state would be increased if reinstatement was carried out. And the Act goes on to provide that in certain cases value payments shall be made although the general rule would require a cost of works payment, and vice versa. Both kinds of payment are normally payable to the owner; but a cost of works payment can only be made when the sum involved has already been expended on the property, whereas a person receiving a value payment is free to do as he likes with it—he may, but need not, spend it on repairing the property. I should add that 1939 values are used in these calculations, but there is provision for increasing value payments so calculated by 45 per cent. It appears to me that, if a value payment received by an owner who is a trader in land is a trading receipt, then a fortiori a cost of works payment received by such owner must be a trading receipt. But I need not elaborate that because I understood that that was not disputed by counsel for the respondent.

Section 28 of the 1949 Act, which replaced an earlier provision in the 1943 Act, is designed to deal with the income tax position of owners who receive war damage payments. It applies alike to value payments and cost of works payments, and it provides that in computing income no sum shall be deducted in respect of any payment or expenditure to which the section applies, and that in computing cost of repairs, etc., no such sum shall be included in any claim for relief. The expenditure to which the section applies includes (subsection (4) (*a*)): "any expenditure on "repairing or otherwise making good war damage to land in "so far as any person has received or is entitled to a payment "in respect of the damage by virtue of any of the provisions of "the principal Act (whether alone or as applied or modified by or "under any provision of this Act). . . ."

Where damage is suffered by land which is not part of a trader's stock-in-trade, the diminution in value of the land does not enter into his account of profits for income tax purposes, and, when he receives a value payment or cost of works payment, that payment also does not enter into that account. But without section 28 (4) he might as a result of spending the payment on

repairs be able to diminish his income tax liability. That would plainly be wrong and section 28 (4) prevents it.

But the position is very different if the land is part of the trader's stock-in-trade. The value of the stock-in-trade (at cost or market price, whichever is the lower) at the beginning and also at the end of the year must enter the income tax account. Apart from section 28 (4) the position, as I see it, would be that, if land is damaged and its value after damage is less than the value at which it stood in the valuation of stock-in-trade at the beginning of the year, only its damaged value can be included in the valuation of stock-in-trade at the end of the year. That will either diminish the profits for the year or produce a loss which it may be possible to carry forward. Then later, when the cost of works payment or value payment is received, it is a trading receipt and must enter the account as such, and the cost of works payment, being spent on repairing the property, or any part of the value payment so spent, will enter the account as an expense. And, finally, the valuation of the damaged property in the valuation of stock-in-trade will have to be written up to the value of the repaired property. I did not understand counsel for the respondent to deny that.

Where a trader in land receives a cost of works payment there appears to be no need for section 28, and it would introduce confusion and injustice if it were applied literally. The 1943 Act contemplates that he, like other owners of war-damaged land, will carry out and pay for the reinstatement, and will then receive the cost of works payment. Apart from section 28 the trader in land would in his tax account enter the cost of reinstatement as an outgoing and enter the cost of works payment as a receipt. That would produce a just result. But section 28 prevents him from showing as an outgoing the cost which he has incurred and paid, but contains no express authority for excluding the cost of works payment from the other side of his account. And, being a trading receipt, it must be included unless there is authority to exclude it. If it is not excluded, then a fictitious profit will result. I understood counsel for the respondent to admit that this is an impossible result, that in practice the payment is always omitted and that section 28 must be so interpreted as to authorize this omission. He pointed out that in many cases the owner does not in fact receive the payment because the payment is often made directly to the contractor who has carried out the reinstatement. In such a case neither the cost of reinstatement nor the cost of works payment would appear in the trader's account because he did not in fact pay the one or receive the other, and section 28 would have no application. But section 28 does apply to cases where in fact the trader pays for the reinstatement and receives the cost of works payment, and it could not be right that its application should increase the trader's tax liability merely by reason of the fact that the cost of works

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payment was paid to the trader and passed on by him to the contractor instead of being paid directly to the contractor.

So this question arises. It being admitted, and I think rightly admitted, that section 28 cannot be applied literally to traders in land, and that it must be so interpreted as to authorize the trader to omit from his tax account one kind of war damage payment, a cost of works payment, ought the section to be interpreted so as to authorize a similar omission of the other kind of war damage payment, a value payment? There is no hard and fast line between the two. Both are payments in respect of war damage and both appear to me to be trading receipts when received by a trader in land. The only relevant difference is that, whereas a cost of works payment must be spent on reinstatement, a value payment may but need not be so spent. If the value payment is so spent then the reason for interpreting section 28 so as to exclude it is just as strong as in the case of a cost of works payment. But it is said that if the trader chooses not to spend his value payment on the property he will make an untaxed gain if it is omitted from his trading account. For the moment that might be so. But if later on he spends money on making good the damage, or if he sells the property in its damaged state and the purchaser spends money for that purpose, section 28 still applies to prevent credit being taken for such expenditure in so far as it does not exceed the amount of the value payment.

For these reasons I find great difficulty in reading into section 28 an implied provision with regard to cost of works payments but refusing to read in a similar provision with regard to value payments. But, in the peculiar circumstances of this case, I do not find it necessary to dissent from the conclusion at which your Lordships have arrived.

LORD TUCKER. My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

LORD SOMERVELL OF HARROW. My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. C. Bartlett & Co.; Solicitor of Inland Revenue.*

[CHANCERY DIVISION.]

RAYFIELD *v.* HANDS AND OTHERS.

[1957 R. No. 603.]

1958
Mar. 25, 26;
April 2.

Vaisey J.

Company — Shares — Articles of association — Enforcement between members—Provision that every member intending to transfer shares should inform directors who "will take the said shares equally "between them," and who "will pay a fair value therefor"— Meaning of "will"—Whether directors liable to take up member's shares—Construction—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 20 (1).

Contract—Parties—Enforcement by third party—Company's articles of association—Enforcement between members inter se.

Contract—Construction—Ut res magis valeat quam pereat—Company's articles of association.

The plaintiff was a shareholder in a company, article 11 of the articles of association of which required him to inform the directors of his intention to transfer shares in the company, and which provided that the directors "will take the said shares equally between "them at a fair value." In accordance with article 11 the plaintiff so notified the directors, who contended that they need not take and pay for the plaintiff's shares, on the ground that the articles imposed no such liability upon them. On the plaintiff's claim for the determination of the fair value of his shares, and for an order that the directors should purchase such shares at a fair value:—

Held, (1) that upon their true construction the articles required the directors to purchase the plaintiff's shares at a fair price.

(2) That article 11 was concerned with the relationship between the plaintiff as a member and the defendants, not as directors, but as members of the company.

(3) That it was not necessary, for the plaintiff to succeed in his action, that he should join the company as a party in addition to the directors.

Judgments of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179; *Drive Yourself Hire Co. Ltd.* v. *Strutt* [1954] 1 Q.B. 250; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1474; and *Dean* v. *Prince* [1954] Ch. 409; [1954] 2 W.L.R. 538; [1954] 1 All E.R. 749 considered.

ACTION.

Field-Davis Ltd. (hereinafter called "the company") was a private company carrying on business as builders and contractors, incorporated in 1941 under the Companies Act, 1929, as a company limited by shares, having a share capital of £4,000, divided into 4,000 ordinary shares of £1 each, of which 2,900 fully-paid shares had been issued. The plaintiff, Frank Leslie Rayfield, was the registered holder of 725 of those shares, and the defendants, Gordon Wyndham Hands, Alfred William Scales and Donald Davies were at all material times the sole directors of the company. In so far as is material the articles of association of

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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the company provided by article 6: "No shares in the company "shall be transferred to a person not a member of the company so "long as any member of the company may be willing to purchase "such shares at a fair value." Article 9 provided: "The "directors may at any time in their absolute discretion refuse "to register any transfer of shares." Under the general heading of "Directors" were the following articles: "10. The number of "directors of the company shall not be more than four. The "following persons shall be the first directors of the company. . . . "11. Every member who intends to transfer shares shall inform "the directors who will take the said shares equally between "them at a fair value but subject to the above no person shall "hold more than 1,000 shares in the capital of the company. "12. In the event of death of any director his shares are to be "taken up equally between the remaining directors who will pay "a fair value therefor together with all moneys due to the "deceased up to the time of his death."

On April 4, 1955, the plaintiff by a notice in writing informed the defendants, as directors of the company, of his intention to transfer his 725 shares to them as provided by article 11. The defendants denied any liability to take up and pay for the shares, and the plaintiff, by his statement of claim asked (1) that the fair value of the plaintiff's said shares might be determined by the court, (2) that the defendants be ordered to purchase such shares at their fair value in such proportions as they might agree upon, or in default of agreement, then equally, and (3) that an inquiry be ordered if necessary to ascertain such fair value.

R. B. S. Instone for the plaintiff.
Michael Albery Q.C. and *Paul Baker* for the defendants.

In addition to the cases cited in the judgment, the following cases were referred to in the course of argument: *In re London Sack and Bag Co. Ltd.*[1]; *In re Greene, decd.*[2]

Cur. adv. vult.

April 2. VAISEY J., reading his judgment, stated the facts and continued: It is article 11 with which I am mainly concerned in the present case, in the following circumstances. On or about April 4. 1955, the plaintiff, by a notice in writing bearing that date, informed the defendants as the directors of the company of his intention to transfer his shares to them as provided by article 11. The defendants were and are, however, unwilling and contend that they are not liable to take and pay for the plaintiff's shares. They say that article 11 imposes no enforceable liability upon them, and they base their contention first on the wording of article 11 itself, arguing that on its true construction it does not purport to impose any liability on the company's directors. It is

[1] [1943] 2 All E.R. 763.

[2] [1949] Ch. 333; [1949] 1 All E.R. 167.

admitted that the words " every member . . . shall inform " the directors does create an obligation but it is argued by the defendants that the words " the directors . . . will take the " shares " imports in some way the idea of an option or choice or volition on the part of the directors having regard to the inherent difference (not always observed) in the English language between the words " shall " and " will."

I appreciate the force of that argument, but I cannot accept it. In this context, while the word " shall " clearly imports compulsion and obligation, the word " will " indicates as it seems to me a resultant prospective eventuality, in which the member has to sell his shares and the directors have to buy them, each being under an obligation to bring that eventuality into effect. I think there is thus in the language of article 11 a mutual obligation. It has been said that articles of association ought not to be construed too meticulously. See *per* Wynn-Parry J. in *In re Hartley Baird Ltd.*,[1] where he said: " In the interpretation of " such a commercial document as articles of association, the " maxim ut res magis valeat quam pereat should certainly be " applied, and I propose to interpret these articles in the light of " that maxim." I am not aware that this maxim has ever been put into English, but I suggest that it directs us to " validate if " possible." And see also *per* Jenkins L.J. in *Holmes* v. *Keyes*,[2] where he is reported as saying that in his view the " articles of " association of the company should be regarded as a business " document and should be construed so as to give them reasonable " business efficacy . . . in preference to a result which would " prove unworkable."

I hold that the defendants' case so far as it depends on the construction of the company's articles of association fails, but I have not overlooked the arguments based on the undoubted difficulty of giving effect to article 11 in other circumstances, for example, where the member desiring to transfer his shares is himself a director, or where several intimations of intention to sell are given simultaneously. But, in my judgment, the article ought not to be invalidated for the purposes of a case (such as this) where it is perfectly easy to give effect to it.

Another point was taken which I hold to be equally insubstantial, namely, that the plaintiff has not in terms pleaded his ability and willingness to carry out his part of the bargain. That is a rule of pleading which applies principally, if not exclusively, to actions between vendors and purchasers of real estate. See Halsbury, 2nd ed., vol. 31, p. 421. I should, in the circumstances, have allowed the statement of claim to be amended to comply with the rule, if it had seemed to me to be necessary, which I do not think it is.

The next and most difficult point taken by the defendants,

[1] [1955] Ch. 143, 146; [1954] 3 W.L.R. 964; [1954] 3 All E.R. 695.

[2] Ante, p. 783.

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as to which it would appear that there is no very clear judicial authority, is that article 11, as part of the company's articles of association, does not do what it looks like doing, that is, to create a contractual relationship between the plaintiff as shareholder and vendor and the defendants as directors and purchasers. This depends on section 20 (1) of the Companies Act, 1948, which reads as follows: "Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles." This re-enacted corresponding provisions in the earlier Companies Acts, but it seems that such provisions are for the purposes of the present case substantially identical with the subsection which I have just read. In the circumstances, I was referred to what the textbooks have to say on the subject, and I think I ought to summarize their statements.

In the 12th edition of Buckley on the Companies Acts at p. 52 allusion is made to the "large number of apparently conflicting judicial decisions and dicta as to the exact nature of the contractual relations established by the memorandum and articles both as between the company and the members and as between the members inter se," and it is further expressly pointed out that there are decisions or dicta both to the effect that the articles do, and also to the effect that they do not, constitute a contract between the members inter se.

The variety of the judicial views on the matter is not I think overstated here. Gore-Browne's Handbook on Joint Stock Companies, 41st ed., at p. 45, states the effect of section 20 in these words: "[It] is to create an obligation binding alike on the members in their dealings with the company, on the company in its dealings with the members as members, and on the members in their dealings with one another as members . . . and even a member cannot enforce provisions for his benefit in some other capacity than that of member: for example he cannot assert a right to be appointed solicitor, secretary, or director by reason of provisions contained only in the articles."

In Palmer's Company Precedents, 16th ed., Part I, at p. 458, the matter is discussed on general lines, and the effect of some of the cases is summarized, and the following quotation is cited from the speech of Lord Herschell in *Welton* v. *Saffery*[3]: "It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se." I find that statement somewhat cryptic.

In Halsbury's Laws of England, 3rd ed., vol. 6, at p. 129, under the sub-heading of "Memorandum and Articles," there

[3] [1897] A.C. 299, 315; 13 T.L.R. 340.

is a paragraph in these words: "While the articles regulate the "rights of the members, inter se, they do not, it would seem, "constitute a contract between the members, inter se, but only a "contract between the company and its members, and, therefore, "the rights and liabilities of members as members under the "articles can only be enforced by or against the members through "the company." I will consider this proposition later on.

Now the question arises at the outset whether the terms of article 11 relate to the rights of members inter se (that being the expression found in so many of the cases), or whether the relationship is between a member as such and directors as such. I may dispose of this point very briefly by saying that, in my judgment, the relationship here is between the plaintiff as a member and the defendants not as directors but as members.

In *In re Leicester Club and County Racecourse Co.*,[4] Pearson J., referring to the directors of a company said that they "continue members of the company, and I prefer to call them "working members of the company," and on the same page he also said: "directors cannot divest themselves of their character of "members of the company. From first to last, . . . they are doing "their work in the capacity of members, and working members of "the company. . . ." I am of opinion, therefore, that this is in words a contract or quasi-contract between members, and not between members and directors.

I have now to deal with the point for which there is considerable support in the cases, that the notional signing and sealing of the articles creates a contractual relation between the company on the one hand and the corporators (members) on the other, so that no relief can be obtained in the absence of the company as a party to the suit. The defendants' case in so far as it is based on this point seems to be met by two recent decisions of the Court of Appeal. I refer first to *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*,[5] and to the judgment of Denning L.J. in that case, which was a case of a covenant made, not by or with but for the benefit of the plaintiffs, and thereby enabling them to sue without the intervention of the covenantee. Section 56 of the Law or Property Act, 1925, was referred to in terms which it is not necessary for me to repeat here. This same principle is further exemplified by the case of *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*,[6] see especially the judgment of Denning L.J. as there reported.

The case of the plaintiff may also be said to rest upon the well-known decision of *Carlill* v. *Carbolic Smoke Ball Co.*,[7] to which I need not refer except to say that it seems to me to be relevant here. To the like effect is *Clarke* v. *Earl of Dunraven*,[8] upon which the plaintiff here also relied.

[4] (1885) 30 Ch.D. 629, 633; 1 T.L.R. 658.

[5] [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179.

[6] [1954] 1 Q.B. 250; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1474.

[7] [1893] 1 Q.B. 256; 9 T.L.R. 124.

[8] [1897] A.C. 59; 13 T.L.R. 58.

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In general discussions on the effect of section 20 to be found in the cases, I have, of course, considered the dissentient speech of Lord Herschell in *Welton* v. *Saffery*,[9] and the comprehensive review of the earlier authorities by Astbury J. in *Hickman* v. *Kent & Romney Marsh Sheepbreeders' Association*.[10] Among the numerous dicta in the judgment in that case, one which seems to me to be helpful and convincing is the one which reads as follows[11]: "the articles of association are simply a contract as "between the shareholders inter se in respect of their rights as "shareholders. They are the deed of partnership by which the "shareholders agree inter se."

Strangely enough the case which comes perhaps nearest to the present is one in which the point under section 20 of the Act was not taken, and either disregarded or ignored, but I cannot say that it was overlooked, as the decision was a decision of the Court of Appeal. I will read the headnote from the report of the case, the name of which is *Dean* v. *Prince*[12]: "The articles of associa- "tion of a private company carrying on a light engineering "business provided that a deceased director's shares should be "purchased by the surviving directors at a price to be certified "by an auditor as a fair value. A director who held a controlling "interest in the company died. The auditor, having made a "certified valuation, stated in writing that for the purpose of his "valuation he had not regarded the company as a going concern "but that he had valued on a 'break-up' basis, because in his "opinion the shares had no value on any other basis, having "regard to the losses made by the company. On appeal from "Harman J., who held that the valuation was invalid and not "binding because the auditor had proceeded on the wrong basis "and had not attributed any special value to the shares in "question although they carried control of the company:— "*Held* (1) that the auditor was right in not attributing a special "value to these shares on account of their carrying control. The "shares of the company should be valued as a whole and the "total then divided rateably amongst all the shares equally; "(2) that the auditor had correctly rejected the 'going concern' "basis of valuation, as the company had no expectation of profit- "making."

The decision of Harman J. was reversed on the question of valuation, and in the course of his reserved judgment, Wynn-Parry J., sitting as a member of the court, said this[13]: ". . . the "auditor, in my view, has to have regard to the realities of the "situation, he must take into account that the other directors, "and not merely one of them, are bound to purchase the shares "in question."

To show how close is the similarity between that case and the

[9] [1897] A.C. 299, 315; 13 T.L.R. 240.

[10] [1915] 1 Ch. 881.

[11] Ibid. 881, 891.

[12] [1954] Ch. 409; [1954] 2 W.L.R. 538; [1954] 1 All E.R. 749.

[13] [1954] Ch. 409, 431.

present, I will read from the report of the case before Harman J.[14] the article which was in question there: "In the event of the "death of any member his shares shall be purchased and taken "by the directors at such price as is certified in writing by the "auditor to be in his opinion the fair value thereof at the date of "death, and in so certifying the auditor shall be considered to "act as an expert and not as an auditor and accordingly the "Arbitration Act, 1889, shall not apply. Unless otherwise agreed "the directors shall take such shares equally between them."

I will refer, but only in passing, to another case closely bearing on the point now under consideration of *Borland's Trustees* v. *Steel Bros & Co. Ltd.*[15] There, there was a provision in a company's articles of association compelling a shareholder at any time during the continuance of the company to transfer his shares to particular persons at a particular price. It was held that these provisions were not void as being repugnant to absolute ownership nor as tending to perpetuity, and it was also held that there was nothing in such a provision to defeat the rights of a trustee in bankruptcy. The case was decided by Sir George Farwell J., who made a number of remarks which bear on this question. I do not propose to refer to them in detail except one remark, where he says[16]: "these articles are nothing more or "less than a personal contract between Mr. Borland "—that was the director who went bankrupt—"and the other shareholders in "the company under the 16th section of the Companies Act, "1862," that section being the section which corresponded at that date to section 20 of the present Act which is now in force.

On the whole, if the proper way to construe the articles of association of a company is as a commercial or business document to which the maxim "validate if possible" applies, I think that the plaintiff in this action ought to succeed. Not one of the judges in the case to which I have already referred, *Dean* v. *Prince*,[17] showed any signs of shock or surprise in the assumption there made of a contract between directors being formed by the terms of a company's articles. I am encouraged, not I hope unreasonably, to find in this case a contract similarly formed between a member and member-directors in relation to their holdings of the company's shares in its articles. The conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership; see the well-known passages in *In re Yenidje Tobacco Co.*[18]

Nobody, I suppose, would doubt that a partnership deed might validly and properly provide for the acquisition of the share of

[14] [1953] Ch. 590; [1953] 3 W.L.R. 271; [1953] 2 All E.R. 636.
[15] [1901] 1 Ch. 279; 17 T.L.R. 45.
[16] [1901] 1 Ch. 279, 290.
[17] [1954] Ch. 409.
[18] [1916] 2 Ch. 426; 32 T.L.R. 709.

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one partner by another partner on terms identical with those of article 11 in the present case. I do not intend to decide more in the present case than is necessary to support my conclusion, though it may be that the principles upon which my conclusion is founded are of more general application than might be supposed from some of the authorities on the point.

I will make an appropriate declaration of the plaintiff's rights, or will order the defendants to give effect to them, and if necessary there must be an inquiry to ascertain the fair value of the shares. I am asked not to decide what is the proper date at which the value of the shares is to be fixed, as to which indeed there be no question, but to leave these to be either agreed or decided hereafter. There must be liberty to apply.

Declaration accordingly.

Solicitors: *Simpson, Palmer & Winder; Mark Lemon.*

[COURT OF APPEAL.]

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March 10, 11, 31.

Jenkins, Romer and Ormerod L.JJ.

KORES MANUFACTURING CO. LTD. *v.* KOLOK MANUFACTURING CO. LTD.

[1957 K. 358.]

Restraint of Trade—Employment—Agreement—Agreement between two companies that neither company would engage servants of the other—No provision giving power to determine contract—Duration—Reasonableness—Public policy—Validity.
Contract—Termination.

By letters dated August 30, 1934, and September 3, 1934, respectively, two companies agreed that neither company would, without the written consent of the other company, employ at any time any person who had been a servant of the other company during the period of five years previous to that time. The letters were silent as to the duration of the proposed agreement. Both companies were engaged in manufacturing similar products involving chemical processes, including exceedingly dirty work, in relation to which their respective technical employees might become possessed of confidential information and trade secrets. It was contemplated at the time of the agreement that their factories would be adjoining.

In an action commenced in 1957 by one of the companies against the other company claiming (1) a declaration that the agreement was a valid and subsisting agreement; (2) an injunction to restrain the defendants from employing a certain employee of the plaintiffs without the plaintiffs' consent in writing contrary to the agreement and (3) an injunction to restrain the defendants from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the employment of the plaintiffs:—

Held, (1) that a contract which is in restdaint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public.

(2) That the mere fact that parties dealing on equal terms had entered into an agreement subjecting themselves to restraints of trade did not preclude the court, where the restraints were clearly unreasonable in the interests of the parties, from holding it bad on that ground.

Dictum of Lord Haldane L.C. in *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* [1914] A.C. 461, 471 considered.

(3) That, assuming that the agreement of 1934 was not impliedly terminable on reasonable notice, the restraint to which each party subjected itself was grossly in excess of what was adequate to protect that for which the other party required protection from the dangers against which protection was required; and that the agreement accordingly was unreasonable in the interests of the parties to it.

(4) That, even assuming that the agreement of 1934 was terminable by six months' notice on either side, it was still unreasonable in the interests of the parties; it spread its blanket over all employees irrespective of the nature and terms of their employment or the circumstances in which they left it.

(5) That, accordingly, the agreement failed to satisfy the first of the two conditions which a contract in restraint of trade must satisfy in order to be held valid, and it was void and unenforceable.

Quaere. Whether the contract was impliedly terminable by reasonable notice.

Mineral Water Bottle Exchange & Trade Protection Society v. *Booth* (1887) 36 Ch.D. 465; *Herbert Morris Ltd.* v. *Saxelby* [1916] 1 A.C. 688; 32 T.L.R. 297, and observations of Lord Birkenhead L.C. in *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.* [1919] A.C. 548, 562, 563; 35 T.L.R. 354 applied.

Per curiam. It is open to question whether an agreement directed to preventing employees of the parties from doing that which they could not, by individual covenants with their employers, validly bind themselves to do, should be accorded any greater validity than individual covenants by the employees themselves would possess.

Decision of Lloyd-Jacob J. [1957] 1 W.L.R. 1012; [1957] 3 All E.R. 158 affirmed.

APPEAL from Lloyd-Jacob J.[1]

On August 30, 1934, a letter was written by Koreska (Gt. Britain) Ltd. (the name of which company was subsequently changed to Kores Manufacturing Co. Ltd.) to Kolok Manufacturing Co. Ltd. in the following terms: "In consideration of "your agreeing not without our written consent to, at any time, "employ any person who, during the then past five years, shall "have been a servant of ours, we undertake not, without your "written consent, to, at any time, employ any person who, during "the then past five years, shall have been a servant of yours."

In answer to that letter Kolok Manufacturing Co. Ltd. wrote to Kores Manufacturing Co. Ltd. the following letter, dated September 3, 1934: "We acknowledge receipt of your letter of "the 30th ultimo with reference to the employment of our "respective employees. We welcome this suggestion from which

[1] [1957] 1 W.L.R. 1012; [1957] 3 All E.R. 158.

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" it is understood that your company and our own will refrain " from engaging any person or persons who have been in the " employ of either firm during the previous period of 5 years. " As such an arrangement has our fullest support we hereby " agree to the terms of your letter of the above date. We are " sure that this arrangement will prove to be of mutual benefit, " and we shall be happy at any time to consider other proposals " which have for their objects similar safeguards."

In 1957, as a result of negotiations between Hugh Anthony O'Neill and Kolok Manufacturing Co. Ltd., relating to an application by him for a position on their staff, an agreement of July 1, 1957, was entered into between him and that company (he being at that time in the employment of Kores Manufacturing Co. Ltd.) under which Kolok Manufacturing Co. Ltd. appointed him as chief research chemist for two years and thereafter " unless and " until this agreement is determined by six months' prior notice " in writing given by either party to the other and so that such " notice in writing may be given so as to expire at or at any time " after the conclusion of the said period of two years."

During the negotiations, notice was given by O'Neill to Kores Manufacturing Co. of his wish to resign from the service of that company, and a dispute arose between the two companies as to whether, having regard to the letters of August 30, 1934, and September 3, 1934, Kolok Manufacturing Co. Ltd. were entitled to employ him.

A writ was, therefore, issued in May, 1957, by Kores Manufacturing Co. Ltd. claiming (1) a declaration that an agreement contained in the letters of August 30, 1934, and September 3, 1934, was a valid and subsisting agreement; (2) an injunction to restrain the defendants themselves or by their servants or agents from employing without the plaintiffs' consent in writing one Hugh Anthony O'Neill contrary to the terms of the said agreement; (3) an injunction to restrain the defendants themselves or by their servants or agents from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the employment of the plaintiffs.

On motion made on May 21 and 24, 1957, for an injunction, an order was made that (it being agreed that the issues between the parties were those formulated in the schedule to the order and that those were the only issues between them in this action) the action should be set down forthwith for trial in Middlesex before a judge alone and that delivery of pleadings be dispensed with.

The schedule to the order was as follows:

" 1. Whether (as the plaintiffs contend and the defendants " deny) the letters mentioned in the indorsement on the writ of " summons were of contractual effect.

" 2. If the answer to (1) be ' yes '—whether (as the defendants " contend and the plaintiffs deny) such contract was and is void

" as being in unreasonable restraint of trade and contrary to " public policy.

" 3. If the answer to (2) be ' no '—whether (as the defendants " contend and the plaintiffs deny) such contract was terminated " by the tacit mutual consent of the plaintiffs and the defendants " in or about 1941 or alternatively in or about June, 1955.

" 4. If the answer to (3) be ' no '—whether (as the defendants " contend and the plaintiffs deny) such contract contains an " implied term that the same is terminable by reasonable notice " given by either party to the other and that 6 months' notice " is reasonable."

Lloyd-Jacob J. held that the contract was void on the grounds that it was in restraint of trade and contrary to public policy, in that on the facts the period of five years was longer than was required to protect the parties' legitimate interests, imposed an unreasonable fetter on the freedom of a workman to offer his labour, and could in certain circumstances produce a public mischief. He held further that it was reasonable to imply a term that the contract should be terminable on 12 months' notice.

The plaintiffs appealed.

Charles Russell Q.C. and *Peter Oliver* for the plaintiffs.

F. W. Beney Q.C. and *R. S. Lazarus* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *English Hop Growers Ltd.* v. *Dering*[2]; *Palmolive Co. (of England) Ltd.* v. *Freedman*[3]; *Connors Bros. Ltd.* v. *Connors*[4]; *Evans (Joseph) & Co. Ltd.* v. *Heathcote*[5]; *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[6]; *Leng (Sir W. C.) & Co. Ltd.* v. *Andrews.*[7]

Cur. adv. vult.

March 31. JENKINS L.J. The judgment that I am about to deliver is the judgment of the court. [His Lordship stated the facts and continued:] It is not now disputed that the letters constituting the agreement of 1934 were of contractual effect, and that the agreement of 1934 was not at any time terminated by the tacit consent of the plaintiffs and the defendants. The first and third issues are thus eliminated. On the second issue, Lloyd-Jacob J., by whom the action was tried, held that the agreement of 1934 was void as being in unreasonable restraint of trade, and contrary to public policy; while on the fourth issue he held that the agreement of 1934 did contain an implied term making it terminable by reasonable notice by either party, but that the reasonable period to be allowed was twelve months, and not six

[2] [1928] 2 K.B. 174; 44 T.L.R. 443.
[3] [1928] Ch. 264; 44 T.L.R. 86.
[4] [1940] 4 All E.R. 179; 57 T.L.R. 76.
[5] [1918] 1 K.B. 418; 34 T.L.R. 247.
[6] [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657.
[7] [1909] 1 Ch. 763; 25 T.L.R. 93.

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months as claimed by the defendants. In conformity with his finding to the effect that the agreement of 1934 was void as being in unreasonable restraint of trade and contrary to public policy, the judge by his order dated July 26, 1957, dismissed the action with costs, and from that order the plaintiffs now appeal to this court.

As to the fourth issue—that is to say, the terminability of the agreement of 1934 by reasonable notice—both parties accept the view that it was so terminable, and that the length of notice to be regarded as reasonable must be assessed by reference to the circumstances existing at the time when any purported notice of determination is given or proposed. The plaintiffs further accept the judge's assessment of twelve months as the reasonable period of notice. On the other hand, the defendants, who have in fact given (or purported to give) six months' notice which expired on November 24, 1957, to terminate the agreement on that date, adhere to the contention raised by them on the fourth issue to the effect that the reasonable period of notice was and is no more than six months. Accordingly, the defendants served a respondents' notice of their intention to contend, in the event of the appeal being allowed, that the judge ought to have held six months' notice to be reasonable for the purpose of determining the agreement of 1934.

If the point was before us for decision, we would, as at present advised, have some difficulty in collecting from the terms of the 1934 agreement any implication of an intention that it should be terminable by reasonable notice. The agreement expressly imposes an obligation on either party not to employ at any time any person who, during the then past five years, shall have been a servant of the other, the then past five years clearly meaning the period of five years immediately preceding the date on which the question of engaging the person concerned comes under consideration. That surely means that any person at any time leaving the employment of one of the contracting parties is to be disqualified for the period of five years certain commencing on that date from entering the service of the other of them. We find it hard to reconcile the express application of the five years' period of disqualification to every employee leaving the service of either of the contracting parties with an implied condition for determination of the agreement by reasonable notice, for example, six or twelve months, which, as it seems to us, might well be regarded as inconsistent with its express terms.

Be that as it may, we must take the case as we find it, and accordingly, in considering the second issue—that is to say, the question whether the agreement of 1934 is void as being in unreasonable restraint of trade and contrary to public policy—we must assume that it was from its inception subject to an implied provision for its determination on reasonable notice. In doing so, however, we think it must be right to make the further assumption that the period to be regarded as reasonable notice

in 1934 could be no shorter than the period of six or twelve months, as the case may be, to be regarded as reasonable in 1957.

In their notice of appeal, the plaintiffs relied on two grounds of appeal, the first being to the effect that the judge was wrong in holding that the agreement of 1934 was and is void as being in unreasonable restraint of trade and contrary to public policy; and the second being to the effect that the agreement of 1934 constituted a trade union as defined by section 16 of the Trade Union (Amendment) Act, 1876, and was a valid and subsisting agreement by reason of the provisions of the Trade Union Act, 1871. Mr. Beney, for the defendants, objected to this second ground as not being open to the plaintiffs on the issues as formulated in the schedule to the order of May 28, 1957, and as being a ground which was not relied on below. We upheld Mr. Beney's objection, and accordingly Mr. Russell, for the plaintiffs, confined his submissions to the first ground of appeal.

In the course of the argument on this issue, we were referred to many of the long array of decisions bearing upon the tests to be applied in determining whether a contract which is in restraint of trade, and therefore prima facie void, should nevertheless be upheld as a valid and enforceable contract. We do not propose to cite these authorities at any great length. The general principles to be applied are not in doubt; the difficulty lies in their application to the facts of particular cases.

As to the general principles, it will suffice to refer to the following well-known passages. In *Herbert Morris Ltd.* v. *Saxelby* [1] Lord Parker of Waddington, after referring [2] to the speech of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* [3] and to *Attorney-General of Australia* v. *Adelaide Steamship Co.*,[4] continued as follows [5]: "It "will be observed that in Lord Macnaghten's opinion two con- "ditions must be fulfilled if the restraint is to be held valid. "First, it must be reasonable in the interests of the contracting "parties, and, secondly, it must be reasonable in the interests of "the public. In the case of each condition he lays down a test "of reasonableness. To be reasonable in the interests of the "parties the restraint must afford adequate protection to the "party in whose favour it is imposed; to be reasonable in the "interests of the public it must be in no way injurious to the "public. With regard to the former test, I think it clear that "what is meant is that for a restraint to be reasonable in the "interests of the parties it must afford *no more than* adequate "protection to the party in whose favour it is imposed." In a subsequent passage Lord Parker said [6]: "My Lords, it appears "to me that Lord Macnaghten's statement of the law requires "amplification in another respect. If the restraint is to secure

[1] [1916] 1 A.C. 688; 32 T.L.R. 297.
[2] [1916] 1 A.C. 688, 706.
[3] [1894] A.C. 535; 10 T.L.R. 636.
[4] [1913] A.C. 781; 29 T.L.R. 743.
[5] [1916] 1 A.C. 688, 707.
[6] Ibid. 708.

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" no more than ' adequate protection ' to the party in whose " favour it is imposed, it becomes necessary to consider in each " particular case what it is for which and what it is against which " protection is required. Otherwise it would be impossible to pass " any opinion on the adequacy of the protection." He went on to draw the well-known distinction between a covenant against competition entered into by the vendor with the purchaser of the goodwill of a business, which will be upheld as necessary to protect the subject-matter of the sale provided that it is confined to the area within which competition on the part of the vendor would be likely to injure the purchaser in his enjoyment of the goodwill he has bought; and a covenant between master and servant designed to prevent competition by the servant with the master after the termination of his contract of service. With respect to such restrictive covenants between master and servant Lord Parker said [7]: " The employer in such a case is not endeavouring " to protect what he has, but to gain a special advantage which " he could not otherwise secure. I cannot find any case in which " a covenant against competition by a servant or apprentice has, as " such, ever been upheld by the court. Wherever such covenants " have been upheld it has been on the ground, not that the " servant or apprentice would, by reason of his employment or " training, obtain the skill and knowledge necessary to equip him " as a possible competitor in the trade, but that he might obtain " such personal knowledge of and influence over the customers " of his employer, or such an acquaintance with his employer's " trade secrets as would enable him, if competition were allowed, " to take advantage of his employer's trade connection or utilize " information confidentially obtained."

In *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[8] Lord Haldane L.C. said: " My Lords, when the contro- " versy is as to the validity of an agreement, say for service, by " which some one who has little opportunity of choice has pre- " cluded himself from earning his living by the exercise of his " calling after the period of service is over, the law looks jealously " at the bargain; but when the question is one of the validity of " a commercial agreement for regulating their trade relations, " entered into between two firms or companies, the law adopts a " somewhat different attitude—it still looks carefully to the " interest of the public, but it regards the parties as the best " judges of what is reasonable as between themselves. In the " present case I see no reason for doubting that in entering into " the contract on which this action was brought the respondents " were probably acting in their own best interest. It may well " be that such a contract was, in view of the powerful position of " the appellants, the respondents' best way of securing a market " and adequate prices. And if this be once conceded I find " nothing else in the detailed provisions of the contract excepting " machinery for working out the bargain. If the general object

[7] [1916] A.C. 688, 709.

[8] [1914] A.C. 461, 471.

" was lawful, then these provisions were, in my opinion, free from " objection on the score of illegality. Nor do I find that the " public interest was necessarily or even probably injured." That case was concerned with a third type of restraint, not between master and servant, or between the vendor and purchaser of the goodwill of a business, but between traders for the purpose of regulating their trade to their mutual advantage. On Lord Parker's principle, that for which protection was required would, we suppose, be the trade of the parties, and that against which protection was sought would, we suppose, be injury to their trade through fluctuations in supplies and prices.

In *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*[9] Lord Birkenhead L.C. said: " A contract " which is in restraint of trade cannot be enforced unless (a) it is " reasonable as between the parties; (b) it is consistent with the " interests of the public. Your Lordships have recently laid down " rules as to where the onus lies in these matters. Such considera- " tions however do not arise in the present case. Every contract " therefore which is impeached as being in restraint of trade must " submit itself to the two standards indicated. Both still survive. " The observation made by the Judicial Committee in the " *Attorney-General of the Commonwealth of Australia* v. *Adelaide* " *Steamship Co.*[10]: ' Their Lordships are not aware of any case " ' in which a restraint though reasonable in the interests of the " ' parties has been held unenforceable because it involved some " ' injury to the public '; is not, in my view, to be construed as if " both the tests indicated were not still in existence. It is indeed " not difficult to conceive of a case in which a contract in restraint " of trade might be adjusted to safeguard the reasonable interests " of the contracting parties, and yet might be opposed to the " public interest."

The onus of showing that a contract in restraint of trade is reasonable as between the parties lies upon the party alleging it to be such; see *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[11] *per* Lord Haldane. The onus of showing that a contract in restraint of trade is injurious to the public interest similarly lies on the party alleging it to be such; and " if once the " court is satisfied that the restraint is reasonable as between the " parties the onus will be no light one "; see *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.*[12] *per* Lord Parker. " The question whether a restraint of trade is " reasonable either in the interest of the parties or in the interest " of the public is a question for the court, to be determined after " construing the contract and considering the circumstances " existing when it was made. It is really a question of public " policy and not a question of fact upon which evidence of the " actual or probable consequences, if the contract be carried into

[9] [1919] A.C. 548, 562, 563; 35 T.L.R. 354.
[10] [1913] A.C. 781, 795.
[11] [1914] A.C. 461, 470.
[12] [1913] A.C. 781, 797.

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"effect, is admissible"; see *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.*[13] *per* Lord Parker.

We should next endeavour to apply these general principles to the facts of the present case. The facts relevant to this issue are in small compass. Down to the date of the agreement of 1934 the plaintiffs had been carrying on their business in Britannia Street, City Road, Hoxton, London, N. 1, while the defendants were carrying on their business at a factory in Tariff Road, Tottenham, London (about five miles away) where they have since remained. The plaintiffs were, however, at the date of the agreement of 1934 in the course of moving to a factory in Tottenham adjoining the defendants' factory. The plaintiffs' move to Tottenham was duly completed, and they remained at their Tottenham factory until 1955, when they moved to Harlow in Essex, perhaps twenty miles away from Tottenham. The proximity of the two factories at Tottenham would obviously make it easy for the staff of either party, of whatever grade, to pass from the employment of one into that of the other under the lure of higher wages or better working conditions. If no obstacle to such transfers was provided, the parties might well find themselves involved in a competition for staff to the detriment of both, and with undesirable effects on the discipline and stability of their respective complements of employees. Moreover, the business of manufacturing carbon paper, typewriter ribbons and kindred products in which the plaintiffs and defendants were both engaged involved chemical processes in relation to which their respective technical employees might, in the course of their employment, become possessed of confidential information and trade secrets. The unrestricted transferability of technical staff would thus entail the risk of trade secrets and confidential information gained in the service of one party being divulged to the other.

It should be added that the chemical processes included exceedingly dirty work for which it was not always easy to find staff, and any scarcity of employees prepared to undertake this dirty work would make competition for their services all the more likely, and accentuate its undesirable consequences.

At the date of the agreement of 1934 the plaintiffs had in their employment 100 persons of whom 47 were unskilled manual workers, 14 were semi-skilled and skilled manual workers, 7 were technical staff consisting of departmental managers and foreman, 12 were executive, administrative and sales staff, and 20 were clerical staff. Figures were also produced for 1955 and 1957 showing totals of 424 and 408 respectively, with 232 unskilled manual workers in 1955, and 221 in 1957.

At the date of the agreement of 1934 the defendants had in their employment 128 persons, but this total is classified by departments without showing separately the numbers of unskilled, semi-skilled and skilled manual workers. It is, however, legitimate to assume that a substantial proportion of the entire complement

[13] [1913] A.C. 781, 797.

of employees consisted of unskilled manual workers and others who had no access to trade secrets or confidential information. In 1957 the total number of persons in the employment of the defendants had risen to 347, to which complement the same observation applies.

In 1957 there were throughout this country (in addition to the defendants) some twenty concerns manufacturing carbons and ribbons. About half of them are in or near London, and above five may be described as being within easy reach of Tottenham.

It is not clear from the evidence how far, if at all, the risk of trade secrets or confidential information gained by an employee in the service of one of the parties being divulged by that employee to the other party upon his passing into the service of the latter, as distinct from the more general risk of competition arising between the parties for the services of employees of any grade, was a matter to which the agreement of 1934 was consciously directed, but its terms are, of course, such as to extend to all employees of every grade, whether or not possessed of trade secrets or confidential information.

Such being the circumstances in which the agreement of 1934 was made, we must next, in accordance with Lord Parker's principle, ask and endeavour to answer the two questions (1) What was it for which protection was required? and (2) What was it against which protection was required?

As to the first question, we take the answer to be that protection was required by both parties for (a) the adequacy and stability of their respective complements of employees and (b), as we are prepared to assume, trade secrets and confidential information of which any of their respective employees might have become, or might thereafter become, possessed in the course of their employment. As to the second question, we take the answer to be that the dangers against which protection was required were (a) the unimpeded secession of employees of any grade from the employment of either of the parties to that of the other of them in the competing concern " next door " under the inducement of higher wages or better working conditions, or merely for the sake of change, and (b) the divulging to their new employer by employees so seceding of any trade secrets or confidential information of which they might have become possessed in the course of their employment with the other party.

These being the matters for which protection was required, and the dangers against which they required protection, were the reciprocal restraints imposed by the agreement of 1934 reasonable as between the parties, or in other words, did the restraint imposed on the defendants by the agreement of 1934 in the words of Lord Parker " afford no more than adequate protection " to the plaintiffs, and vice versa? We propose in the first instance to consider this question without regard to the effect of the assumption that the agreement of 1934 was impliedly terminable on reasonable notice.

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Mr. Russell, for the plaintiffs, points out that the agreement of 1934 was an agreement between two employers, and not between employer and employee. He submits that where, as here, two employers, dealing at arms length and on equal terms, choose to agree, for reasons which seem to them sufficient, to subject themselves to reciprocal restraints upon their business activities, then the parties themselves are to be regarded as the best judges of what is reasonable in their interests; see, for example, the passage already quoted from the speech of Lord Haldane L.C. in the *North Western Salt Co.'s* case.[14] It is only in exceptional cases, says Mr. Russell, that the court would be justified in overruling the parties' own judgment of what is reasonable where agreements of this type are concerned, and there is no sufficient ground for treating the present case as an exception from the general rule. He seeks to surmount the difficulty that under the agreement of 1934 the five-year period of disqualification applies to every employee of whatever grade, however long or however short his service with the plaintiffs or defendants may have been, and whether or not he has in the course of such service become possessed of trade secrets or confidential information, by an argument to the effect that the parties wished to give each other complete protection in all cases, and took five years as an adequate period of disqualification in the case of an employee of the highest grade, with perhaps most important trade secrets or confidential information in his possession, and for the sake of simplicity applied the same period to all employees without exception on the footing that it was too difficult to fix different periods for different categories of employees, and that all cases would be covered by what he termed a "blanket" if the period considered appropriate in the highest case was applied indiscriminately to all.

We cannot accept these arguments. It is for the court to judge whether an agreement in restraint of trade is reasonable in the interests of the parties. We agree that where traders dealing on equal terms have become parties to (for example) a scheme for maintaining prices or for central selling, and there is nothing in its provisions which is obviously unreasonable in the interests of the parties, the court will be slow to set it aside at the instance of a party who has freely agreed to it. But the mere fact that parties dealing on equal terms have entered into an agreement subjecting themselves to restraints of trade does not preclude the court from holding the agreement bad where the restraints are clearly unreasonable in the interests of the parties. In the present case, the restraint reciprocally imposed on the plaintiffs and the defendants by the agreement of 1934 was such as to preclude the plaintiffs from employing at any time any person who had, during the then past five years, been a servant of the defendants, and vice versa.

[14] [1914] A.C. 461, 471.

To put the matter from the defendants' point of view, since they are asserting the invalidity of the agreement of 1934, they placed it out of their power to take into their service any person who had during the preceding five years been in the service of the plaintiffs for any period however short, and in any capacity however humble. The five-year ban was equally applicable to an unskilled manual labourer who had been for a single day in the employment of the plaintiffs, and to a chief chemist with many years' service. It would also, so far as we can see, be just as much applicable to a person whom the plaintiffs had dismissed from their service as to a person who had left their service of his own accord. There is no doubt that the real raison d'etre of the agreement of 1934 was the proximity of the two factories owing to the plaintiffs' removal to Tottenham. Yet there was no provision limiting its duration to the period during which such proximity might continue. The agreement of 1934 is in terms applicable to all employees without exception, and without any distinction between employees possessed of trade secrets or confidential information and employees not so possessed, and not in the remotest degree likely to be so possessed. It is, therefore, quite obviously impossible to sever the agreement of 1934 in an attempt to uphold it as regards employees likely to be possessed of trade secrets or confidential information even though bad as regards employees not in that category.

Stating the matter again from the defendants' point of view, though, of course, the converse applies equally to the plaintiffs, it appears to us that the restraint to which the defendants subjected themselves by the agreement of 1934 was grossly in excess of what was adequate to protect that for which the plaintiffs required protection from the dangers against which protection was required.

Accordingly, for the reasons we have endeavoured to state, we are of opinion that (apart from the effect of the assumption that it was impliedly terminable by reasonable notice) the reciprocal restraints imposed by the agreement of 1934 were unreasonable in the interests of the parties to it, and that the agreement accordingly failed to satisfy the first of the two conditions which a contract in restraint of trade must satisfy in order to be held valid, and was, therefore, void and unenforceable.

We would add this. It is true that the agreement of 1934 was between two employers, and not between employer and employee. Nevertheless, it was wholly and solely directed to preventing the employees of either contracting party, on ceasing to be employed by them, from entering the employment of the other contracting party. Apart from the question of trade secrets and confidential information, we have described the matter requiring protection as being the adequacy and stability of the plaintiffs' and defendants' respective complements of employees. That, no doubt, is an interest which employers are entitled to protect by all legitimate means, as by paying good wages and making their employment

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attractive. We have further described the danger against which that interest required protection as being the unimpeded secession of employees of either of the parties to that of the other of them under the inducement of higher wages or better working conditions. But an employer has no legitimate interest in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that the new employer is a competitor. The danger of the adequacy and stability of his complement of employees being impaired through employees leaving his service and entering that of a rival is not a danger against which he is entitled to protect himself by exacting from his employees covenants that they will not, after leaving his service, enter the service of any competing concern. If in the present case the plaintiffs had taken a covenant from each of their employees that he would not enter the service of the defendants at any time during the five years next following the termination of his service with the plaintiffs, and the defendants had taken from their employees covenants restraining them in similar terms from entering the employment of the plaintiffs, we should have thought that (save possibly in very exceptional cases involving trade secrets, confidential information and the like) all such covenants would on the face of them be bad as involving a restraint of trade which was unreasonable as between the parties. Here the plaintiffs and the defendants have, as it seems to us, sought to do indirectly that which they could not do directly by reciprocal undertakings between themselves not to employ each other's former employees, entered into over the heads of their respective employees, and without their knowledge. It seems to us to be open to question whether an agreement such as that, directed to preventing employees of the parties from doing that which they could not by individual covenants with their respective employers validly bind themselves not to do, should be accorded any greater validity than individual covenants by the employees themselves would possess. We prefer, however, to leave that question open, and to found our conclusions as to the invalidity of the agreement of 1934 on the reasons given earlier in this judgment.

There appears to be no case in the books exactly comparable to this one. The nearest in point is, we think, *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth*.[15] In that case, to quote the headnote: "A society established for the "protection of a particular trade contained a rule that no member "should employ any traveller, carman, or outdoor employé who "had left the service of another member without the consent in "writing of his late employer till after the expiration of two "years." It was held by this court, affirming the decision of

[15] (1887) 36 Ch.D. 465.

Chitty J. "that the rule was unreasonable, in restraint of trade, "and void." In the Court of Appeal it was argued for the appellants (inter alia) that the covenant did not go beyond what was reasonable for the mutual protection of the members. Cotton L.J. said [16]: "The 44th article of the association provides that 'No "'member shall employ any traveller, carman, or outdoor "'employé who has left the service of another member, without "'the consent in writing of his late employer, until after the "'expiration of two years from his leaving such service.' That "is perfectly general. It is not even limited in its application to "any particular employees who, from their position, might have "confidentially acquired any knowledge in their employment. It "is not confined to servants who, having been put in places of "confidence, have been long enough in the service to obtain any "information which they ought not to disclose, and which might "be used to the detriment of their employer. So that generally "if any outdoor employé were in the service of any member of "this society even for a week and then left he could not be "employed, if this covenant is a good one, by any other member "of the association. That of itself might be used most oppressively, and although in the present case (we have not heard the "circumstances) it might be proper, if the covenant were aptly "framed, to restrain the defendants from employing a particular "individual so as to prejudice his late employer by using knowledge he had got confidentially, yet there is no restriction or "limitation in this covenant at all."

Fry L.J. said [17]: "I am entirely of the same opinion. It "appears to me that a covenant might have been framed which "possibly might have been good, that is to say, that the masters "might have contracted not to use in competition with one another "knowledge confidentially obtained. It is said the object of this "clause is to give effect to that intention. But it has gone far "beyond it because it applies to every traveller, every carman, "and every outdoor employé, whether they have or have not "acquired such knowledge. It applies to those who may have "acquired knowledge although they may have been employed in "distant localities where their knowledge is of no avail. I think "therefore the restraint of trade and of the liberty of Her "Majesty's subjects in gaining employment is far in excess of any "legitimate purpose of the contracting parties."

That case turned to some extent on the widespread character of the society whose members, numbering 179 (with a possibility of increase), covered a great part of the country, which made the restraint there in question very much more oppressive from the point of view of the employees than the restraint in the present case, concerning, as it does, only two manufacturers of carbons and ribbons out of a total of twenty or thereabouts; and the court appears to have regarded that degree of oppression as sufficing to

[16] 36 Ch.D. 465, 471. [17] Ibid. 472.

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make the agreement void as contrary to public policy. But the observations we have quoted also have a bearing on the question of reasonableness between the parties, and do, we think, afford some support to the conclusion to which we have come on that aspect of the present case: see also *Davies* v. *Thomas*.[18]

The view we have formed on the question of reasonableness between the parties makes it unnecessary for us to form any conclusion on the question of reasonableness in the public interest. Mr. Russell points out that the effect of the agreement here was only to prevent employees of the plaintiffs from finding employment with the defendants, and vice versa; that is to say, one factory only out of twenty was closed to employees of either. Moreover, he says that the presence within easy reach of Tottenham of five of the other factories makes it improbable that the living or travelling arrangements of any employee would be interfered with if, having left the employment of one of the parties, he found that he could not be accepted for employment with the other, and consequently had to go elsewhere. He says that to be contrary to the public interest an agreement such as the agreement of 1934 in the present case must create something in the nature of a monopoly of employment in the particular trade, as the agreement in the *Mineral Water Bottle* case [19] may be said to have done. We are not wholly convinced by this argument; but in view of our conclusion to the effect that the agreement of 1934 was unreasonable in the interests of the parties, we prefer to pass no opinion upon it.

As to the effect of the assumption that the agreement of 1934 was impliedly terminable by reasonable notice, we have already expressed our doubts as to the validity of that assumption. Accepting it, as we must, as well founded, we feel difficulty in forming any reasoned preference for twelve months rather than six months, or six months rather than twelve months as the reasonable period. However, in the view that we take, the agreement of 1934 will still be unreasonable in the interests of the parties even if terminable by six months' notice on either side. In other words, to put this aspect of the case in the form most favourable to the plaintiffs, we think that even if six months had been substituted for five years as the period of disqualification provided for in the agreement of 1934, that agreement would still be unreasonable in the interests of the parties. It must be remembered that the agreement spreads its "blanket" (in Mr. Russell's phrase) without exception over all employees of either party, irrespective of the nature and terms of their employment, or the circumstances in which they left the service of the party by whom they were employed. In some cases and some

[18] [1920] 1 Ch. 217 (D.C.); [1920] 2 Ch. 189; 36 T.L.R. 571 (C.A.).

[19] 36 Ch.D. 465.

circumstances six months might be reasonable; in others it might be wholly excessive, while in others again there might be no warrant for any period of disqualification at all.

For these reasons, we would dismiss this appeal.

Appeal dismissed.

Solicitors: *Hardman, Phillips & Mann; Richards, Butler & Co.*

J. A. G.

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[QUEEN'S BENCH DIVISION.]

HAMILTON AND ANOTHER *v.* WEST SUSSEX COUNTY COUNCIL AND ANOTHER.

1958 *Mar.* 25, 28.

Donovan J.

[1957 H. No. 992.]

Town and Country Planning—Planning permission—Outline permission—Application for permission to build cottage on "part of "approximately 40 acres" of farm—Application accompanied by plan showing site of cottage—Outline permission subject to approval of "matters reserved"—Further application for permission to build cottage and garage—Site of cottage 400 yards from site on original plan—Different means of access—Whether new application—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 16 (3)—*Town and Country Planning General Development Order and Development Charge Applications Regulations*, 1950 (*S.I.* 1950, *No.* 728), *reg.* 5 (1), (2), (9) (*a*).

On February 12, 1955, the owners of a farm, Court Farm, applied to the local planning authority for development permission in respect of, inter alia, the erection of a replacement cottage. In the application, which was made on the prescribed printed form, the answer to a question asking for the address or location of the land to be developed was given as "Court Farm . . . " and the area of land to which the application related was stated to be "part of approximately 40 acres." The application was accompanied by a plan showing the proposed lay-out of the farm, including features not the subject of the application, and on it an outline of a cottage with a path leading to it from a private road across the farm was marked "New replacement cottage here." On April 27, 1955, the planning authority gave an outline permission under regulation 5 (2) of the Town and Country Planning General Development Order, 1950,[1] subject, inter alia, to the following

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

[1] Town and Country Planning General Development Order, 1950, reg. 5: "(1) An application to a "local planning authority for planning permission shall be made on a "form issued by the local planning "authority . . . and shall include "the particulars required by such "form to be supplied, and be accompanied by a plan sufficient to "identify the land to which it relates "and such other plans and drawings "as are necessary to describe the "development which is the subject of

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conditions: "(c) any departure from the approved proposals being "made the subject of a fresh application" and "(1) . . . approval ". . . is required in respect of matters reserved in this permission "before any development is commenced; (2) the permission shall "become null and void unless satisfactory plans and elevations "giving details of the design and siting of the building are sub- "mitted to and approved by the local planning authority within "two years . . ." On October 17, 1956, the landowner submitted to the planning authority a further application stated to relate to "3.21 acres," for permission to erect a cottage and garage in accordance with specifications, plans and elevations attached to the application; those plans showed the new cottage on a site about 400 yards away from the site shown on the plan accompanying the first application and with a curved gravel path leading to the farm road. On November 19, 1956, the planning authority refused that application, stating the following reasons for the refusal: "The "development is contrary to the planning proposals for the area "in that (a) the land is not allocated for residential development "and (b) the proposal conflicts with the local planning authority's "intentions regarding residential development as set out in the "written statement accompanying the development plan."

In an action by the landowner alleging that, since the refusal made no reference to the matters reserved in the outline permission, those matters must by inference be deemed to have been approved, she claimed a declaration that the outline permission of April 27, 1955, was a good and valid permission within the meaning of the Town and Country Planning Act, 1947, which now entitled her to proceed with the erection of the cottage and garage in accordance with detailed plans submitted on October 17, 1956. The planning authority alleged that the application of October 17, 1956, was a fresh application which had been considered on its merits and refused:—

Held, (1) that the land which had been the subject of the

"the application, . . . and a local "planning authority may by a direc- "tion in writing . . . require such "further information to be given to "them in respect of an application "for permission made to them under "this paragraph as is requisite to "enable them to determine that appli- "cation. (2) Where an applicant so "desires, an application, expressed to "be an outline application, may be "made under the preceding paragraph "for permission for the erection of "any buildings subject to the subse- "quent approval of the authority with "respect to any matters relating to "the siting, design or external "appearance of the buildings, or the "means of access thereto, in which "case particulars and plans in regard "to those matters shall not be "required and permission may be "granted subject as aforesaid (with "or without other conditions) or "refused, provided that:—(i) Where "such permission is granted, it shall "be expressed to be granted under "this paragraph on an outline appli- "cation and the approval of the "authority shall be required with "respect to the matters reserved in "the permission before any develop- "ment is commenced; (ii) where "the authority are of opinion that ". . . the application for permission "ought not to be considered "separately from the siting, design "or external appearance of the "buildings, or the means of access "thereto, they shall within . . . one "month . . . notify the applicant that "they are unable to entertain such "application, specifying the matters "as to which they require further "information for the purpose of arriv- "ing at a decision in respect of the "proposed development, and the "applicant may either furnish the in- "formation so required . . . or appeal "to the Minister under section 16 (3) "of the Act . . . as if his outline "application had been refused by the "authority. . . . (9) (a) in the case "of an application for planning per- "mission or approval, where the local "planning authority decide to grant "such permission or approval subject "to conditions or to refuse it, they "shall state their reasons in "writing. . . ."

outline application in February, 1955, and the grant of the outline permission in April, 1955, included the whole of Court Farm, and not merely the land on which the replacement cottage had originally been sited.

(2) That regulation 5 (2) of the Town and Country Planning General Development Order, 1950,[1] had no application to a private road; and that it was, accordingly, immaterial that the position of the private road was not the same in the 1956 application as it had been in the original application.

(3) That the 1956 application was not, accordingly, a new application; and that therefore the planning authority's reasons for refusing the 1956 application were wrong and could not be sustained. Since the planning authority had already considered the matters reserved in the outline permission, and had found nothing to which they wished to object, they were not entitled to consider the reserved matters a second time.

ACTION.

On February 12, 1955, written application was made on behalf of the first plaintiff, Audrey Joyce Hamilton, the owner in fee simple of Court Farm, West Wittering, Sussex, to the second defendants, the Chichester Rural District Council, which exercised planning functions delegated by the first defendants, the West Sussex County Council, the local planning authority, for development permission. The application was made on the prescribed printed form and stated "I/We hereby apply for permission to "carry out the development described in this application and on "the attached plans and drawings"; the form contained a number of questions to which answers were given, which included the following: "(2) Address or location of the land to be developed. "Please give enough detail for it to be easily identified (e.g., in "the case of undeveloped land give name or classification number "of adjoining roads and quote Ordnance field parcel number). "—Court Farm, West Wittering. (4) Particulars of the proposed "development . . .—(a) Conversion of two old cottages into one "sound ditto and (b) erection of one replacement cottage. "(5) Area of land to which the application relates.—Part of "approximately 40 acres. (7) If the application involves any "new access to a road or any alteration of an existing access give "particulars . . .—No new access. (8) Particulars of the exact "position at which new or altered access is required . . .—See "plan attached." The application was accompanied by a covering letter stating "I enclose herewith plan showing the ultimate "layout of [Court Farm] which as you will see is being treated "as an orchard farm. Further fields will possibly be laid down "in due course particularly to the south of the estate. There are "two cottages . . . at the position marked 'A' on the town "planning application plan enclosed, which are in poor order. "I am proposing to turn these two cottages into one first-class "ditto and to build a replacement cottage at the position marked "'B.' The new cottage would be constructed of old bricks, flints "and tiles to blend with the existing house and other cottages "on the land. I would be grateful, therefore, to receive your

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" approval so that detailed plans can be prepared for building " by-laws. Although it is not a subject of this application, at a " later date I hope to be able to allow the villagers . . . to play " cricket on the field shown on the layout plan."

The plan attached to the application bore the legend " Layout " of Cottages, Gardens and Orchards Proposed at Court Farm " House, West Wittering " and showed details of the farm house and outbuildings, cottages, gardens, lawns, paddock orchards and roads; on the plan, marked " A " and " The two old cottages to " be made into one good ditto " were the outlines of a building and garden, and marked " B " and " New replacement cottage " here " was the plan of a cottage and garden with a pathway leading to it from a private road running through the farm. There was also shown on the plan a cricket field, pavilion and car park, and various fields and farmlands, the outer farmlands being shown by broken lines which did not continue to the margins of the plan.

On April 27, 1955, the second defendants gave written " Permission For Development of Land subject to Conditions " which was stated to be subject to the following printed conditions: " (a) due compliance with the by-laws and general statutory pro- " visions in force in the district; (b) the proposed development " being carried out strictly in accordance with the detailed draw- " ings and written particulars approved by the council; (c) any " departure from the approved proposals being made the subject " of a fresh application; " and the following additional conditions: " (1) The permission hereby granted is an outline permission " under regulation 5 (2) of the Town and Country Planning " General Development Order, 1950,[1] and the approval of the " local planning authority is required in respect of matters " reserved in this permission before any development is com- " menced (2) The permission shall become null and void unless " satisfactory plans and elevations giving details of the design " and siting of the building, are submitted to and approved by the " local planning authority within two years of the date hereof. " The above conditions are imposed to comply with the provisions " of regulation 5 (2) of the Town and Country Planning General " Development Order, 1950." [1]

On December 8, 1955, the plaintiff executed a legal charge of her interest in Court Farm to secure an advance made by the second plaintiffs, the Rowland Hill Permanent Building Society, and it was admitted that the society, in granting the advance, had relied on the outline planning permission and had valued the land on the footing that it had the benefit of the permission.

On October 17, 1956, a further application was made on behalf of the second plaintiffs for permission to erect a cottage with a garage on the land in accordance with specifications, plans and elevations attached to the application which gave details of the design and siting of the building. That application was made on a printed form similar to the one used for the application of

[1] For footnote 1 see p. 873.

February 12, 1955, and the following were the material answers given: question 4 "Cottage and garage," question 5 "3·21 "acres," question 7 "Vehicular access to new garage" and question 8 "Entry to site." Accompanying the application were a layout plan, a block plan and ground plans of the proposed building. On the first two plans the proposed new cottage was shown as in the same orchard but in a different site, from the cottage which had been marked "B" on the plan accompanying the application of February 12, 1955, and with a curved gravel path giving access to the farm road.

On November 19, 1956, the second defendants, by a written notice, refused that application, giving the following as their reasons for the refusal: "The development is contrary to the "planning proposals for the area in that (a) the land is not "allocated for residential development and (b) the proposal con- "flicts with the local planning authority's intentions regarding "residential development as set out in the written statement "accompanying the development plan."

The plaintiff sued the defendants for a declaration (1) that as a necessary inference from the reasons stated by the refusal of permission dated November 19, 1956, the defendants were to be deemed to have approved the plans and elevations submitted with the application of October 17, 1956, and (2) that the outline permission of April 27, 1955, was a good and valid permission within the meaning of the Town and Country Planning Act, 1947, which now entitled them (the plaintiffs) to proceed with the erection of the cottage and garage the plans, elevations and details of which were submitted to the defendants with the application of October 17, 1956.

The defendants alleged, inter alia, that the site of the proposed cottage and garage as delineated on both the layout and block plans submitted with the application of October 17, 1956, was considerably different from the site of the cottage marked on the plan submitted with the application of February 12, 1955, the two sites being 400 feet or more apart, and that the proposal contained in the application of October 17, 1956, contained a departure from the proposal approved by them on April 27, 1955, and constituted a fresh proposal which they had considered on its merits and refused. They also alleged that no plans or elevations giving details of the design and siting of the building referred to in the application of February 12, 1955, had been submitted to or approved by the planning authority and that the period of two years referred to in condition 2 of the permission of April 27, 1955, had expired, and they denied that the plaintiffs were entitled to the relief sought. The plaintiffs in reply denied that the application of October 17, 1956, was a fresh proposal and alleged that the outline permission of April 17, 1955, was a permission to erect one cottage on the area of land mentioned in the application of February 12, 1955, subject only to the stipulations and conditions therein contained; that, since the application of October

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17, 1956, was for the erection of a cottage on that area of land it was within the outline permission; and that the siting of the cottage within the area of land was one of the matters reserved by the conditions of the outline permission, and in that respect they relied upon the fact that no objection was raised to the proposed siting in the reasons stated for the refusal. They also contended that the plans, elevations and specifications which accompanied the application of October 17, 1956, gave the required details of the cottage to be erected pursuant to the outline permission.

Further facts are stated in the judgment.

Lionel A. Blundell for the plaintiffs.

Nigel Bridge for the defendants.

The following case was referred to in argument: *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government.*[2]

Cur. adv. vult.

March 28. DONOVAN J. read the following judgment. The first issue in this case is the identity of the land in respect of which the outline application was made on behalf of the first plaintiff in February, 1955. She says that it was Court Farm, West Wittering, as shown on the plan accompanying the application. Both defendants say it is only a very small part of that farm as so shown, namely, a small plot on which the proposed new cottage was to be erected (hereinafter called " the small plot ").

The importance of the issue is this. If the land the subject of the outline application were Court Farm, the defendants admit that the reasons given for refusing the further application for planning permission made in October, 1956 (hereinafter called " the 1956 application "), were wrong and cannot be sustained. The 1956 application was submitted on behalf of the second named plaintiffs consequent upon the grant of outline permission to the first plaintiff, and it comprised the detailed drawings called for by the terms of the outline permission. If, on the other hand, the land the subject of the outline application were the small plot alone, then the reasons given for the refusal of the 1956 application were not wrong. The reason is that the new cottage was shown in the 1956 application as sited upon a different portion of Court Farm, so that the 1956 application would, upon the above hypothesis, be a new application in respect of different land.

Under the Town and Country Planning Act, 1947, and the Town and Country Planning General Development, etc., Regulations, 1950 (hereinafter called " the regulations "), it is for the person who wishes to develop land to make application for planning permission; and under regulation 5 of the regulations it is for him to indicate what land it is that he wishes to develop. He must do this by means of particulars and a plan. The particulars are to be those required by a form to be issued by the local planning authority, and the plan is to be sufficient to identify the land.

[2] [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.

The first plaintiff complied with these requirements when making application for outline permission. On the form her agent, Mr. Hamilton, gave particulars of the land the subject of the application, describing it as Court Farm, and he annexed the plan of that farm. The form also required the applicant to state the area of land to which the application related, and Mr. Hamilton gave as the answer "part of approximately 40 acres." If the application related only to the small plot all he need have given was the acreage of that plot, namely, some 2 acres.

The application also sought outline planning permission to convert two old cottages into one in a different part of Court Farm, these two old cottages being also shown on the same plan. There is some doubt whether planning permission was really necessary for this work, but that is beside the point. The fact that it was sought reinforces the view that the land the subject of the application was Court Farm and not merely the small plot. The terms of Mr. Hamilton's covering letter of February 14, 1955, indicating the owner's intentions with regard to Court Farm generally, have the same effect.

The defendants say that if one looks at the plan submitted with the outline application, the small plot has its own curtilage marking it off from the rest of Court Farm; and if a purchaser of the small plot had bought it with the benefit of the outline permission he would have had a real grievance if final permission were eventually refused because the planning authority thought the cottage ought to be sited elsewhere on Court Farm.

It is agreed by the defendants that if their view be right there should have been two outline applications, one for the small plot and the other in respect of the two cottages to be modernized into one (assuming that planning permission was necessary for this latter work). But it is argued that this is a slip that can be overlooked.

The difficulties in the way of these contentions are first that there is no evidence that the small plot was in fact at the time of the outline application contained in its own curtilage, even assuming this to be relevant. The letter of February 14, 1955, which accompanied the plan, says expressly that the plan shows "the ultimate layout," and to this day there may be, for all I know, no such curtilage of the small plot as the defendants assert. Secondly, so far as the hypothetical purchaser of the small plot is concerned, he would see from the document granting outline permission that it referred to a cottage on Court Farm, and was subject to a condition that satisfactory plans giving details, inter alia, of the siting had to be submitted to and approved by the planning authority within two years. He could hardly complain, therefore, if he took the risk that the planning authority would eventually approve the particular site shown on the outline application.

In all the circumstances it seems to me quite clear that the

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Donovan J.

land the subject of the outline application and of the grant of outline permission was Court Farm and not the small plot.

The defendants then raise a further point, also designed to show that the 1956 application was really a new application altogether. They say that on the plan submitted for outline permission a form of access from the proposed cottage to a road was shown, whereas on the final plans a different form of such access is shown. It is said that this alone makes the 1956 application a new one, and regulation 5 (2) is relied upon in this connexion. The point is not foreshadowed in the defence, at least with any particularity, but no objection was raised on this score on behalf of the plaintiffs. The defendants, however, in their outline permission of 1955 made no reservations whatever on the subject of access. And in any event, say the plaintiffs without contradiction, the new access merely connects with the same road at a different point, and the road itself is a private road on the farm and not a public road at all. Obviously where a public road is concerned, matters of access from new buildings concern the planning authority very much. But they hardly do so where the access is simply to a private road on the same land; and I do not think that regulation 5 (2) has any application to such a road. It may be that the planning authority took the same view originally, and that this explains why no reservation whatsoever on the subject-matter of access was made when outline permission was granted. In any event I think the point without substance for the reason that I have given.

The defendants concede that if they fail in their contention that the 1956 application was really a fresh application altogether, then their reasons for withholding planning permission were misconceived and wrong. What follows, it is said, is this: that they have never considered the right question, namely, whether the matters reserved in the outline permission have been satisfactorily arranged, and that therefore they should now be given the opportunity of considering whether this is so.

The matter needs careful consideration, first, because of the extra burden involved for the plaintiffs, who have proceeded quite correctly throughout, and, second, because the two years specified in the outline permission as the time within which detailed plans had to be approved, have now expired. The defendants say that they would not take any point on this in the circumstances, seeing that the plans were submitted in time, but this very proper attitude does not of itself confer jurisdiction.

When the detailed plans called for by the outline permission were submitted with the 1956 application one of two things happened: either the reserved matters, such as design and siting, were not considered at all, because the defendants decided to reject the application on principle; or they were considered and while the defendants found them unobjectionable they nevertheless decided to reject the application, again on principle. Which of these two things occurred it would have been quite easy for the

defendants to prove, but no one went into the witness-box on their behalf, and I am thus left to draw a conclusion from the facts revealed by the documents before me. They are these. (1) The same officers as considered the outline application considered also the 1956 application. (2) With that latter application the second plaintiffs submitted plans and elevations giving details of design and siting of the cottage pursuant to the conditions contained in the outline permission. (3) The previous documents relating to the outline permission were in front of the aforesaid officers when they considered these plans and elevations. They must have known, therefore, that what they were being asked to do was to say whether they approved them pursuant to the aforesaid conditions. The case is not one where the officers concerned for the planning authority inadvertently overlooked the previous grant of outline permission subject to conditions. They had this outline permission and its conditions well in mind at the time. (4) The defendants say in their defence that they considered the application on its merits and decided to refuse. In these circumstances regulation 5 (9) (*a*) imposed on the defendants the obligation to state their reasons in writing, which means all their reasons and not some, and the reason given was simply that the development proposed was contrary to the planning proposals for the area. (5) From start to finish no objection has ever been raised to the design or siting of the cottage, or to the details as shown on the plan submitted with the 1956 application. The defendants in their defence refer to the different siting of the cottage not as something that still awaits approval but simply as a fact supporting the argument that the 1956 application was a new application altogether.

On these facts I draw the conclusion that the defendants, through their officers, considered those matters, when the 1956 application was before them, which had been reserved in the 1955 outline permission—as indeed was their duty—and found nothing to which they wished to object. The attitude they took was that, while the applicant's proposals were unobjectionable with regard to reserved matters, the work of converting the two old cottages into one had not been done and that this entitled them to consider the whole matter afresh and to refuse permission on grounds of principle. As soon as the defendants came into court this claim was abandoned. They are not now entitled to consider the reserved matters a second time. It is true that they have not formally said, " We approve ", but there is nothing which obliges them to use any such particular expression. If they could find no objection after examining the applicant's proposals they could not properly withhold approval.

In these circumstances I grant the second declaration asked for by the plaintiffs, which seems to me to cover the whole matter.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Lees & Co.*

[COURT OF APPEAL.]

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1958
April 18.

Jenkins,
Parker and
Pearce L.JJ.

BAILEY *v.* AYR ENGINEERING AND CONSTRUCTIONAL CO. LTD. AND ANOTHER.

[1955 B. 1142.]

Building — Safety regulations — Falling material — Place of habitual employment—Electrician working in open shaft injured by part of shaft falling upon him—Meaning of "material"—Whether breach of regulations — Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 90 (1).

Causation—Breach of statutory duty.

Regulation 90 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, requires that any "place on the site of the "operations at which any person is habitually employed shall be "covered in such manner as to protect any person who is working "in that place from being struck by any falling material or "article."

The plaintiff, an apprentice electrician employed by the first defendants, was working in an open shaft in a block of flats, which were under construction, when he was struck and injured by a falling block of masonry forced out of the side of the shaft by a heavy piece of iron stair rail which had got out of the control of workmen employed by the second defendants who were attempting to place it in position on the stairway. The plaintiff claimed against the first defendants, inter alia, that they were in breach of regulation 90 of the Building (Safety, Health and Welfare) Regulations, 1948:—

Held, (1) that the shaft in which the plaintiff was working at the time of the accident was an "habitual" or contemplated place of employment where men would work, and that, accordingly, regulation 90 was applicable to the place in question.

Kearns v. *Gee, Walker & Slater Ltd.* [1937] 1 K.B. 187; 53 T.L.R. 38; [1936] 3 All E.R. 151 applied.

But that (2) regulation 90 was designed to protect men working at sites where they habitually did work from falling materials and debris and not from a collapse of the structure itself, whether it be a chimney, a roof or (as in this case) part of a shaft; and that, although it could not be said that the first defendants were not in breach of the regulation at all, since it was their duty to put up some "umbrella," albeit only one designed to prevent materials, debris and tools from falling down, nevertheless it was not that breach which caused the injury to the plaintiff, because the injury was caused by the fall of a block of masonry which was not within the contemplation of the regulation, and, therefore, they were under no liability to the plaintiff.

Decision of Lloyd-Jacob J. reversed in part.

APPEAL from Lloyd-Jacob J. sitting as an additional judge of the Queen's Bench Division.

On June 16, 1954, the plaintiff, William Bailey, an apprentice electrician employed by the first defendants, Ayr Engineering & Constructional Co. Ltd., went with one Evans, who was in charge of him, to a large block of flats which were being erected

at Highbury New Park, London, for the purpose of installing the electric supply wires.

There were a number of contractors on the site, and, amongst others, the first defendants, who were electrical engineers, and the second defendants, General Iron Foundry Co. Ltd., who were supplying and installing iron railings for the staircases.

The building in question was of some five storeys of which the brickwork had been almost entirely completed and the staircases erected. The staircases, which went from half-landing to half-landing, went round something like a brick chimney, into which there were openings at each half-landing. The object of this brick chimney was twofold: first that it should serve the purpose of a chute for the disposal by the tenants of the flats of their refuse and this was to go down an earthenware pipe, access to which was obtained by means of a door at each half-landing. Behind the earthenware pipe, forming, as it were, the back part of this chimney, was an open shaft with an entrance at the bottom on the half-landing between the ground floor and the first floor. The back of this shaft was designed to carry up the electric supply wires, the gas piping, and the plumbing for the service of the different flats. At the material date, this chimney did not go completely up to the roof, as it was ultimately going to do, but went up to the fifth floor. It did not end flush with that fifth floor, but was built up rather like a parapet for a further 18 inches.

On the day in question the plaintiff entered the shaft through the opening on the half-landing between the ground floor and the first floor, and inserted a ladder and began to rawl-plug the interior of the shaft to carry up the conduit pipe. Evans, who apparently was a rather stout man, was unable to get into the shaft, and he remained outside giving directions. After some twenty minutes or half an hour had elapsed, the plaintiff was struck on his back by a large block of masonry, something like 8 or 10 bricks still firmly joined together with cement, and in consequence suffered injuries.

It was later found that the cause of this fall was that three employees of the second defendants had meanwhile been taking up to the fifth floor a section of iron railings, to form part of the staircase railing. The section was some 2½ cwts. in weight and some 13 or 14 ft. long: what they did was to raise it outside the building by means of a pulley and bring it into the building on the fourth floor: then their intention was to manhandle it from the fourth floor on to the fifth floor, from which it was going to be erected. Apparently in the process of manhandling this object up the last flight of stairs they lost control (as the judge found) of this heavy piece of metal, and acting as a sort of battering ram it broke down the top of the shaft and this block of masonry thereby fell upon the plaintiff.

In those circumstances, the plaintiff brought these proceedings. He claimed against the first defendants, as his employers, that they had been guilty of a breach of their duty at common law, and

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also that they were in breach of a statutory duty under regulation 90 of the Building (Safety, Health and Welfare) Regulations, 1948. He also joined the second defendants, alleging that they had been guilty of a breach of their common law duty and also that they were in breach of regulation 94 of the regulations. Lloyd-Jacob J. awarded the plaintiff £573 1s. 9d. by way of damages. His Lordship found that the second defendants were guilty of negligence, but he also held that the first defendants were guilty both of a breach of their common law duty, and their statutory duty, and as between them and the second defendants, held them 30 per cent. to blame.

The first defendants appealed against the finding of liability to the plaintiff, and the second defendants appealed in regard to costs only as between themselves and the other defendants.

H. I. Nelson Q.C. and *R. E. Hopkins* for the first defendants.

D. P. Croom-Johnson Q.C. and *John Hornsby* for the second defendants.

F. B. Purchas for the plaintiff.

The following cases were cited in argument: *London and North Eastern Ry. Co.* v. *Berriman* *; *Kearns* v. *Gee, Walker & Slater Ltd.*†

JENKINS L.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. stated the facts and found that the first defendants were not in breach of their duty at common law, and continued: There remains the claim under regulation 90 (1). [His Lordship read it, and continued:] Although that regulation is by no means clearly worded, it has remained in that form since 1926, when it first appeared as paragraph 31 of the building regulations of that year, made then under the Factory and Workshop Act, 1901.

Two questions really arise on that regulation: one, whether the place where the plaintiff was working was a "place on the "site of the operations at which any person is habitually em- "ployed," and, secondly, whether this block of masonry which was broken off from the structure of the building can be said to be "any falling material or article" within that regulation. As regards the meaning of the word "habitually," the matter was considered by this court in *Kearns* v. *Gee, Walker & Slater Ltd.*,[1] when the court approached the matter on the basis that the regulation was defining the place, and not the person, which was to be protected; and the question here is not whether this plaintiff

* [1946] A.C. 278, 295, 312, 313; 62 T.L.R. 170; [1946] 1 All E.R. 255.

† [1937] 1 K.B. 187; 53 T.L.R. 38; [1936] 3 All E.R. 151.

[1] [1937] 1 K.B. 187; 53 T.L.R. 38; [1956] 3 All E.R. 151.

was "habitually employed" there but whether this was (if I may put it in this way) an "habitual" place of employment, or a contemplated place of employment, where men would work, not casually, but habitually. Looked at in that way, it is a question of degree, and I do not think that I would be prepared to differ from the judge, who held that, in the circumstances of this case, the place of work of the plaintiff was a place of work to which that regulation applied. After all, this shaft was intended to be used for electrical wires, gas piping, and water pipes, and that would entail the various trades concerned going, as part of their job, from time to time into the shaft to effect the necessary work.

But the matter does not end there, because the question remains whether this block of masonry can be said to be "any falling material or article" within that regulation. There is no doubt that those words are wide and, on the face of them, unqualified; but I find it impossible to construe this regulation as applying to material which has become part of the structure and affixed to the freehold. It seems to me that this regulation is applying to things such as scaffold materials, and tools, and also to materials such as bricks and the like, which have not become affixed to the structure but which it is intended should be affixed to the structure—and, of course, the ordinary builders' debris.

It is, I think, relevant to glance at regulation 90 (2), which is referring to "materials, tools, and other objects and material "(including waste material)." It is provided that that "shall "not be thrown, tipped or shot down from a height where they "are liable to cause injury, but shall be properly lowered." Then when it goes on to deal with demolition it deals specifically with "part of a structure," because it goes on: "in any place where "proper lowering is not practicable and also where any part of "a structure is being demolished or broken off adequate steps "shall be taken, where necessary, to protect persons employed "from falling or flying debris." Finally, it is to be observed that in regulation 94 provision is made for safeguarding workmen from the collapse of the structure.

In my judgment, regulation 90 is designed to protect men working at sites where the men habitually do work from what I may call falling materials and debris of that kind and not from a collapse of the structure, whether it be a chimney, a roof, or (as in this case) part of a shaft. At the same time, it seems to me that if in fact this plaintiff had been hit by a hammer or a loose brick falling down the shaft, the first defendants would have been liable to him in that they were in breach of that regulation. Accordingly, as it seems to me, this is a case where they cannot say they were not in breach of the regulation at all, because it was their duty to take steps to put up some umbrella, albeit only an umbrella designed to prevent materials and debris and tools from falling down. But

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be that as it may, and assuming, as I do, that they were in breach, it was not that breach which caused the injuries in this case but the fact that this block of masonry, something which is completely outside the regulation, fell in the way I have described.

In those circumstances, I have come to the conclusion that the first defendants' appeal succeeds and that they are under no liability to the plaintiff, whether at common law or under the regulation. That being so, the second defendants' appeal —which was an appeal in regard to costs—does not, in the form presented, arise in this case.

For those reasons, I would allow the first defendants' appeal and dismiss the second defendants' appeal.

PEARCE L.J. I agree.

JENKINS L.J. I also agree; and although we are differing from the judge, I find nothing that I can usefully add to the reasons given by Parker L.J.

Appeal of first defendants allowed with costs. Judgment to be entered for first defendants against plaintiff with costs in both courts, direct. Appeal of second defendants dismissed. Plaintiff's and first defendants' costs of appeal to be paid by second defendants direct.

Solicitors: *Hextall, Erskine & Co.; Watson, Sons & Room; Rowley, Ashworth & Co.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

1958
April 17, 30.
Lord Goddard C.J., Hilbery and Donovan JJ.

EASTBOURNE CORPORATION *v.* FORTES ICE CREAM PARLOUR (1955) LTD.

Town and Country Planning—Enforcement notice—Justices' jurisdiction—Question whether development occurred—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 12, 23 (2) (4).

In or about June, 1956, a company placed an automatic coin-operated ice-cream sales machine on the forecourt outside its premises, which it used as an ice-cream parlour. There were holes in the base of the machine whereby it could be bolted to the ground when in use; the refrigeration plant in the machine was operated by electricity supplied through a cable. No planning permission was sought or obtained for the machine and by an

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

enforcement notice dated May 16, 1957, served by the local planning authority, the company was required to remove the machine. The company appealed to the justices against the notice under section 23 (4) of the Town and Country Planning Act, 1947.[1] The justices held that there had been no development within section 12 (2) of the Act and quashed the notice. On appeal by the local authority:—

Held (Lord Goddard C.J. dissenting), that the justices had no

[1] Town and Country Planning Act, 1947, s. 12: "(1) Subject to the "provisions of this section and to the "following provisions of this Act, per- "mission shall be required under this "Part of this Act in respect of any "development of land which is "carried out after the appointed day. "(2) In this Act, except where the "context otherwise requires, the "expression 'development' means "the carrying out of building, "engineering, mining or other opera- "tions in, on, over or under land, or "the making of any material change "in the use of any buildings or other "land:

"Provided that the following "operations or uses of land shall not "be deemed for the purposes of this "Act to involve development of the "land, that is to say:—(*a*) the "carrying out of works for the main- "tenance, improvement or other "alteration of any building, being "works which affect only the interior "of the building or which do not "materially affect the external "appearance of the building; . . .

"(3) For the avoidance of doubt it "is hereby declared that for the pur- "pose of this section . . . (*b*) the "deposit of refuse or waste materials "on land involves a material change "in the use thereof, notwithstanding "that the land is comprised in a site "already used for that purpose, if the "superficial area or the height of the "deposit is thereby extended:

"Provided that nothing in para- "graph (*b*) of this subsection shall be "deemed to require permission in "respect of the deposit of refuse or "waste materials on a site already "used for that purpose if the height "of the deposit does not exceed the "level of the land adjoining such site, "and the superficial area of the "deposit is not thereby extended. . . .

"(5) Notwithstanding anything in "this section, permission shall not be "required under this Part of this "Act—(*a*) in the case of land which, "on the appointed day, is being used "temporarily for a purpose other "than the purpose for which it is "normally used, in respect of the "resumption of the use of the land "for the last-mentioned purpose; "(*b*) in the case of land which, on "the appointed day, is normally used "for one purpose and is also used on "occasions, whether at regular inter- "vals or not, for any other purpose, "in respect of the use of the land for "that other purpose on similar "occasions after the appointed day; "(*c*) in the case of land which on the "appointed day is unoccupied, in "respect of the use of the land for the "purpose for which it was last used:

"Provided that—(i) in determining "for the purposes of paragraph (*a*) "of this subsection the purposes for "which land was normally used and "in determining for the purposes of "paragraph (*c*) of this subsection the "purposes for which land was last "used no account shall be taken of "any use of the land begun in con- "travention of previous planning "control within the meaning of "section seventy-five of this Act; "(ii) paragraph (*c*) of this subsection "shall not apply to land which was "unoccupied on the seventh day of "January nineteen hundred and "thirty-seven and has not been "occupied since that date."

S. 23: "(1) If it appears to the "local planning authority that any "development of land has been "carried out after the appointed day "without the grant of permission "required in that behalf under this "Part of this Act, or that any con- "ditions subject to which such per- "mission was granted in respect of "any development have not been "complied with, then, subject to any "directions given by the Minister, "the local planning authority may "within four years of such develop- "ment being carried out, if they "consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section.

"(2) Any notice served under this "section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged to "have been carried out without the "grant of such permission . . .

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jurisdiction under section 23 (4) of the Act of 1947 to determine whether in fact development within section 12 of the Act of 1947 had taken place; they must assume that it had and their jurisdiction was strictly limited to ascertaining whether permission had been granted or whether the alleged development fell within the class of development for which permission was not required.

Keats v. *London County Council* [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303 applied.

Norris v. *Edmonton Corporation* [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801 not followed.

East Riding County Council v. *Park Estate* (*Bridlington*) *Ltd.* [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669 considered.

CASE STATED by Eastbourne justices.

On June 13, 1957, a complaint was preferred by the respondents, Fortes Ice Cream Parlour (1955) Ltd., for an order to quash or vary a notice dated May 16, 1957, of the appellants, the Eastbourne Corporation, relating to premises at 247, Terminus Road, Eastbourne, and expressed to be an enforcement notice served pursuant to section 23 of the Town and Country Planning Act, 1947. The notice was in the following terms: "Whereas an auto- "matic ice-cream sales machine has been affixed to and installed "on the forecourt of the premises known as 247, Terminus Road, "Eastbourne, and whereas the aforementioned operations consti- "tute development within the meaning of the above Act and "(a) the said operations have been carried out without the grant "of planning permission under Part III of the said Act; Now "therefore the [corporation] do hereby give you notice in pur- "suance of their powers as local planning authority under sections "23 and 24 of the aforementioned Act to:—remove the said auto- "matic ice-cream sales machine together with the electric cable "attached thereto and further to remove the bolts and other "fittings securing the said machine to the said forecourt within "21 days after the date on which this notice becomes effective."

The justices found the following facts: The premises at 247, Terminus Road comprised a shop on the ground floor and basement of a building at the corner of Terminus Road and Burlington Road. They were occupied by the company as an ice-cream parlour and restaurant under a lease held in trust for the company by one Forte, a director thereof. There was a paved forecourt adjoining the public footway of the above roads, and the shop-front

"may . . . require . . . the discon- "tinuance of any use of land . . .

"(4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may, at any time within "the period mentioned in the last "foregoing subsection, appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated; and on any such appeal "the court—(a) if satisfied that per- "mission was granted under this Part "of this Act for the development to "which the notice relates, or that no "such permission was required in "respect thereof, or, as the case may "be, that the conditions subject to "which such permission was granted "have been complied with, shall "quash the notice to which the appeal "relates; . . . (c) in any other case "shall dismiss the appeal: . . ."

facing these roads had a black base, large glass windows displaying food menus and advertisements, and a facia-board at a height of from 12 to 14 feet above the forecourt bearing the words "Fortes "Ice Cream Parlour."

In or about June, 1956, the company bought an automatic coin-operated ice-cream sales machine and had it placed on the forecourt in the corner of its premises nearest to the adjoining premises at 245, Terminus Road. The machine was blue and white in colour, was 6 feet 2 inches high, approximately 30 inches square, and weighed approximately 5½ hundredweight. The machine was not attached to the forecourt by bolts or otherwise. The refrigeration plant in the machine was operated by electricity supplied through a cable (housed in a ⅝th in. conduit) which was connected to the mains supply in the aforesaid premises. The conduit, black in colour, came from a grille in the base of the shop-front and was fitted by an electrician from a near-by shop. No planning permission under the Town and Country Planning Act, 1947, was sought or granted on any application relating to the machine. The company's machine was removed on only one occasion, June 24, 1957, when photographs were taken of the premises without the machine, which was thereafter immediately replaced. It took about five minutes to disconnect the electricity cable and remove the machine. By fitting a "niphan" switch the time taken to disconnect the cable could be considerably shortened.

The company contended that the justices were not bound to assume that the matters alleged in the enforcement notice had occurred or, insofar as they had occurred, that they constituted development, but could determine whether or not any operations amounting to development had occurred; that neither what was alleged in the notice, nor what in fact had occurred, amounted to the carrying out of development within section 12 of the Act of 1947, and accordingly the justices might be satisfied that no permission was required in respect thereof.

Alternatively, the company contended that any operations carried out did not involve development by reason of proviso (*a*) to section 12 (2) of the Act of 1947, and it was further contended that the requirements of the enforcement notice (except insofar as they were incapable of performance) had been satisfied (before the beginning of the period allowed for this purpose) on June 24, 1957; that in any event the form of notice used in this case was inappropriate. The company conceded that placing a machine on land might in some cases involve a material change of use, but not in this case.

The corporation contended that the installation of the machine constituted development within section 12 (2) of the Act of 1947, and as such required planning permission under section 12 (1) of the Act.

The justices were of the opinion that it was open to them to

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determine whether the matters alleged as constituting development had in fact occurred and whether, if so, they constituted development within section 12 (2) of the Act of 1947; in this case there had been no such development. They therefore quashed the notice.

The corporation appealed.

Peter Boydell for the corporation.

J. D. James and *H. H. Sebag-Montefiore* for the company.

The following case was cited in argument, in addition to the cases referred to in the judgments: *Mead* v. *Chelmsford Rural District Council.*[2]

Cur. adv. vult.

LORD GODDARD C.J. This is a special case stated by justices for the county borough of Eastbourne to whom a complaint was preferred under section 23 of the Town and Country Planning Act, 1947, asking for an order to quash or vary an enforcement notice relating to premises at 247, Terminus Road in the borough. The notice required the removal of an automatic ice-cream sales machine and its attachments from the forecourt of the premises within 21 days after the date on which the notice became effective, which was on the expiration of 28 days from service. The justices held that they had jurisdiction to determine whether or not the matters referred to in the notice constituted development within section 12 (2) of the Act, and determined that they did not.

The only question raised by the case and argued before this court was whether they had this jurisdiction or not. Sections 23 and 24 of this Act have been considered by the courts in a number of cases, all of which have raised questions of difficulty. Indeed in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[1] Lord Simonds referred to the question there in debate as one of exceptional difficulty and it is probable that the last word has not yet been spoken on these sections.

The court is indebted to both counsel for their careful arguments in which all the cases bearing on the point have been examined. Section 23 provides for the enforcement of planning control and enables the authority, if it appears that any development of land has been carried out without permission, to serve on the owner or occupier a notice called an enforcement notice. Subsection (2) provides that the notice shall specify the development which it is alleged to have been carried out without permission, or, as the case may be, the matters in respect of which it is alleged that any conditions subject to which permission had been granted had not been complied with. Subsection (4) gives an appeal to a magistrates' court to a person aggrieved by the notice

[2] [1953] 1 Q.B. 32; sub nom. *Mead* v. *Plumtree* [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

[1] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

and provides that on any such appeal " if satisfied that permission " was granted under this Part of this Act for the development " to which the notice relates, or that no such permission was " required in respect thereof, or, as the case may be, that the con- " ditions subject to which such permission was granted have been " complied with, shall quash the notice to which the appeal " relates."

The question we have to determine depends, in my opinion, on the construction of the words " if satisfied that permission " was granted under this Part of this Act for the development to " which the notice relates, or that no such permission was " required in respect thereof." Is the court to assume that there has been development and to confine themselves to considering whether it is development permitted by the Act without permission, or can they go further and decide that there has not in fact been any development? I propose in the first place to treat this as a matter of construction and then to consider what effect, if any, the cases which have been decided on the section have upon the conclusion to which I have come.

Reading subsections (2) and (4) together, paragraph 4 (*a*) provides that the court, if satisfied that no permission was required for the development which is alleged to have been carried out without the grant of permission, shall quash the notice to which the appeal relates. Now although the powers of the court are limited as has been pointed out in more than one judgment on this paragraph, in my opinion the court must be entitled to inquire into what the notice describes as development because if it was not development within the Act, it follows that no permission was required. Permission to carry out work is not required if it is one of the operations or uses dealt with in the proviso to section 12. Permission is not required if no material change is made in the use to which buildings or land is being put. If, then, the authority alleged that there had been a material change so that permission was required, the court would, as it seems to me, be bound to consider what the use had been and whether the change alleged by the authority constituted a material change.

In this respect it is important to have regard to section 17 of the Act. This section enables a person who proposes to carry out any operations or make any change in the use of the land to apply to the local planning authority to determine whether what he proposes would constitute or involve development of the land and, if so, whether an application for permission is required. The effect of section 17 (2) is to enable the landowner to appeal to the Minister against the determination of the planning authority and the proviso to that subsection enacts that where it is decided by the Minister that any operations or use would constitute or involve development, his decision shall not be final for the purposes of any appeal to the court under the provisions relating to the enforcement of planning control.

Section 23 (4) does give an appeal against an enforcement

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order and seems to me to envisage the case where, notwithstanding the decision of the Minister, the landowner carries out that which he proposed and then receives an enforcement order. Notwithstanding the Minister's decision, he is given an appeal to the court and in that case it appears to me that the first question the court would have to decide would be whether the proposed operations or use would constitute or involve development. It may be also they could decide that although it was development, no permission would be required because the work would come within the proviso to subsection (2) of section 12. It follows that, in my opinion, where the court is hearing an appeal under section 23 (4), it has jurisdiction to consider whether the operations or change of use is development or not.

The opinion I have formed does conflict with the decision of this court in *Keats* v. *London County Council*.[2] In that case it was held that the justices had no power to determine whether development had taken place, but only whether permission for the works or use to which the notice referred had been given or was not required, and for the reasons I have just given I think that, in considering whether permission was not required, the justices must be able to determine that it was not required because the works did not constitute development.

It will be observed that section 17 was not called to the attention of the court in *Keats'* case, and that section seems to me to have a most important bearing upon the question we now have to consider. Moreover, when *Keats'* case was cited to this court in *Norris* v. *Edmonton Corporation*[3] the opinion was expressed that the reasoning on which it was based appeared to conflict with that of the House of Lords in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[4] It appeared to the court that their Lordships had decided that justices have jurisdiction to inquire into the facts in order to see whether development had taken place, and in this respect I would call particular attention to the speech of Lord Evershed, Master of the Rolls.[5] Accordingly, I think I am justified in regarding *Keats'* case[6] as one that ought not to be followed and that I am at liberty to hold that the justices did have jurisdiction to consider whether the matter complained of constituted development.

Reluctant as I am to differ from my brethren, who take a contrary view, I feel constrained to maintain my opinion, first, because I think the construction I have placed on these difficult sections avoids the repugnancy to which Donovan J. has referred, and, secondly, because it enables the owner or occupier to challenge the planning authority's opinion otherwise than by inviting them to prosecute him or waiting for them to do so. The decision of the Court of Appeal in *Francis* v. *Yiewsley and West*

[2] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.
[3] [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801.
[4] [1957] A.C. 223.
[5] Ibid. 252.
[6] [1954] 1 W.L.R. 1357.

Drayton Urban District Council [7] shows that on a prosecution the challenge can be made and must be decided by the justices. The object of section 17 seems to me to enable the owner to obtain a decision without committing what may prove to be a criminal offence. The result therefore is that the appeal will be allowed.

HILBERY J. I have the misfortune to differ from my Lord, and need hardly say I do so with diffidence. But I have finally arrived at the same opinion as my brother Donovan and for the same reasons. As I have had the advantage of reading the judgment he is about to deliver, it is sufficient if I say I am in complete agreement with it. I would, therefore, allow the appeal.

DONOVAN J. I much regret to find myself differing from the Lord Chief Justice, and I need hardly say that in consequence I regard by own conclusions with misgiving. But though I have searched for the flaw, it still eludes me, and I had better, therefore, state my view at no more length than the subject and the circumstances require.

The Town and Country Planning Act, 1947, defines development as "the carrying out of building, engineering, mining or "other operations in, on, over or under land, or the making of "any material change in the use of any buildings or other land" (section 12 (2)). The Act then proceeds to deal with two kinds of such "development": (1) that for which permission is to be required; (2) that for which permission is not to be required. It also deals with certain operations on, or change of use of, land which are not to be regarded as involving development at all, and are therefore outside the Act altogether. These are set out in the proviso to section 12 (2) and include, for example, works which affect only the interior of a building, or do not materially affect the external appearance. It also follows from the words of the definition that any change in the user of buildings or land which is not a material change is not "development."

In relation to these matters which the Act says are not "development" no question of permission under the Act arises. They are simply not within it. When, therefore, section 23 (4) comes to pose the question: Was permission under this Act required or not? it cannot be referring to these operations, as regards which no question of permission or veto under the Act can arise. The inquiry has reference instead to those operations or change of use which, while still constituting "development" under section 12, may nevertheless be carried out without permission. These include all developments before the appointed day (section 12 (1)), all the changes of use specified in section 12 (5), and the operations described in the proviso to section 12 (3) (*b*).

In these circumstances I think it is inaccurate to speak of permission not being required under the Act on the ground that

[7] [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.

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the particular operation or change of use is not "development." For then, as I say, the question does not arise at all. The phrase is apt only to refer to that which is development but which the Act exempts from the necessity for permission.

Coming now to section 23 (4), it is clear that under its terms justices can do one of four things alone: (*a*) quash the notice if satisfied that permission was granted under Part III of the Act for the development in question; (*b*) quash the notice if satisfied that no such permission was required or that the conditions attached to any such permission have been complied with; (*c*) vary the conditions of the notice if satisfied they are to any extent unnecessary; (*d*) in any other case dismiss the appeal. There is quite clearly within the four corners of section 23 (4) itself no jurisdiction to inquire whether the alleged development has occurred.

The respondents' argument to the contrary, based on the words of section 23 (4), is this: The justices are to quash the notice inter alia "if satisfied . . . that no such permission was required in respect thereof." The words "in respect thereof" relate back to the expression "development" to which the "notice relates," and this in turn means "development which is alleged to have "been carried out without the grant of such permission" required under the Act (see subsections (1) and (2) of section 23). So, it is argued, one is dealing under section 23 (4) simply with "alleged "development," and it must be open to the subject to show that the allegation is unfounded and that therefore no permission is required. But the real allegation is not "development" but "development without the necessary permission," and since some development can be carried out without such permission, full effect can be given to the words in section 23 (4), "if satisfied that such "permission was required," without having to construe them as opening up the whole question whether there was any "develop-"ment" at all. And, as I have said, where there is no "development," no question of permission or embargo arises. I therefore reject the argument.

Stress, however, is laid upon the language of the proviso to subsection (2) of section 17, already referred to by the Lord Chief Justice, and I agree that this raises a real difficulty. The only appeal to the court referred to in that proviso is the appeal under section 23 (4), first to petty sessions and then to quarter sessions. If the proviso had been limited to a determination by the Minister that permission was required, there would be no conflict with the terms of section 23 (4) at all, because that question is expressly within the jurisdiction of the justices, and they are being told by the proviso not to treat the Minister's decision on that point as final. But they are told the same thing by the proviso in a case where the Minister decides that the prospective operations or use will constitute development of the land. Yet looked at alone, section 23 (4) confers on the justices no jurisdiction to determine this question at all. The problem, therefore, is how to resolve this repugnancy, and there are only two ways of doing it: (1) to

construe section 23 (4) as though it conferred the jurisdiction in question because of the language of the proviso; or (2) to treat the language of section 23 (4) as paramount; and the proviso as being, insofar as it contemplates an appeal on the question of development or no development, simply as careless language which is inoperative having regard to the clear terms of section 23 (4) itself. (See hereon Maxwell on Interpretation of Statutes, 10th ed., p. 229.)

I prefer the latter alternative. My reasons are that it is in section 23 (4) that jurisdiction is conferred and delimited; so that to find out the limits of that jurisdiction it is to section 23 (4) that one would naturally turn. It is not to be expected that Parliament would deliberately confer a very wide jurisdiction by a mere proviso in a section dealing with a different matter, and then go on in the section actually conferring jurisdiction carefully to confine it within narrower limits. Moreover, if section 23 (4) is regarded as paramount in this particular respect, the proviso to section 17 (2) does not thereby become empty of content, as I have shown. I think, therefore, that the position must be faced and accepted that in the one respect now under consideration the proviso and section 23 (4) are repugnant provisions; but I think it would do too much violence to the clear language of section 23 (4) to attempt a reconciliation by enlarging the jurisdiction to accord fully with the proviso. If two sections of an Act are repugnant, the general rule is that the last must prevail; and an enacting power cannot as a rule be implied from the language of a proviso. (See upon these matters *Wood* v. *Riley* [8] and *Arnold* v. *Gravesend Corporation.*[9])

A further consideration is this: The Act makes certain elected local authorities the persons who are to plan and control development. By section 5 of the Act these authorities must carry out surveys of their areas and submit to the Minister development plans which may allocate certain areas for agricultural, residential or other purposes. The development plans may be approved by the Minister with or without modifications. Provision is made for the hearing of objections, and local inquiries may be ordered. Unless it is contended by somebody that the plan is invalid under the terms of the Act, it is not open to question in any legal proceedings (section 11 (3)).

If local benches of magistrates, upon whom none of these duties is placed, can override the planning authority upon the question whether something is "development" or not, it is obvious that they can interfere with all development plans, and that a large measure of planning control (as distinct from enforcement) has been placed in their hands. Had this been Parliament's intention, I cannot believe that it would have been effected by a mere proviso in a section dealing with a different subject-matter. I should have expected provisions as clear and explicit

[8] (1867) L.R. 3 C.P. 26.

[9] (1856) 2 Kay & J. 574, 591.

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as those by which the magistrates' jurisdiction as to enforcement is expressed and limited in section 23 (4). In my respectful opinion, therefore, the decision in *Keats* v. *London County Council* [10] is correct, although no argument on the proviso to section 17 (2) was presented to the court.

In *Norris* v. *Edmonton Corporation*,[11] however, this court said that the decision in *Keats* must be regarded as overruled as being inconsistent with the reasoning of the subsequent decision of the House of Lords in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[12] Counsel for the present appellants, however, contended before us that there was no such inconsistency. It is common ground that in this latter case there was no express disapproval of the decision in *Keats*, which was cited to their Lordships in argument; but the contention of inconsistency is supported by the present respondents in this way: To arrive at its decision the House of Lords in the *East Riding* case had to regard justices as free to go behind the enforcement notice to ascertain whether there had been development within the meaning of the Act of 1947. The justices would then find that there was not because it had all taken place before the appointed day. But this cannot be reconciled with the decision in *Keats* that justices may not go behind the notice to inquire whether there has been "development." If, therefore, they may do this, then they were entitled to do so in the present case, and as a result they found that no development had occurred.

In the circumstances it is necessary to examine the matter in some detail. The short facts of the *East Riding* case were these: There had, admittedly, been development of the land in question, but it had all been carried out, again admittedly, before the appointed day, namely, July 1, 1948. That being so, while it did not cease to be "development," it was development for which permission was not required under Part III of the Act. (See section 12.) Nevertheless, the East Riding County Council served an enforcement notice upon the occupier stating that this development was "in contravention of planning control" and requiring that it should be discontinued. The occupier made two answers: (1) that the development having been carried out before the appointed day, the justices on appeal to them under section 23 (4) should have quashed the notice in exercise of their express jurisdiction to do so under the subsection in the case of development for which under Part III of the Act no permission was required; (2) that the notice was so defective in form that it was a nullity. The East Riding County Council contended that although the development had taken place before the appointed day, they were nevertheless entitled on the facts to invoke section 75 of the Act of 1947, and therefore treat the development as contravening that Act. As to this, it was held that, not having mentioned section 75 in the notice, they were not entitled to take the point. For the

[10] [1954] 1 W.L.R. 1357.
[11] [1957] 2 Q.B. 564.
[12] [1957] A.C. 223.

purposes of the present case that is all that needs to be said about section 75. The county council then disputed, for various reasons, that the notice was a nullity, and into these it is unnecessary for present purposes to go.

On the case made for the occupier, Lords Simonds, Cohen and Evershed agreed that the justices should have quashed the notice on the ground that the development, by reason of its date, required no permission under Part III of the Act. In this respect section 23 (4) confers express jurisdiction upon the magistrates. Lord Simonds also thought that the notice was in any event not a notice on which the county council could rely because of its defects. Lord Morton thought that the notice was a nullity. He doubted whether the justices had power to quash it, but, as the practical effect was the same, concurred in the motion to dismiss the council's appeal. Lord Radcliffe took the same view.

In considering whether the reasoning of their Lordships is inconsistent with the Divisional Court's decision in *Keats*, it may be observed first of all that the question for decision in each case was different. In *Keats* the question was: Can the justices under the terms of section 23 (4) inquire into the question: Has there been development at all? In the *East Riding* case the question was: Did the development, which had admittedly taken place, require any permission under Part III of the Act? Prima facie, therefore, one could answer this second question either way without disturbing the decision in *Keats*.

Next, as to the actual reasoning in the *East Riding* case, Lord Simonds said, adopting what the Lord Chief Justice had said in an earlier case, and applying it to the case under consideration [13]: "The justices, however, had power to quash here because permission under the Act of 1947 was not required in respect of a development which had been carried out before July 1, 1948." Lord Cohen said [14]: "the respondents proved that no such permission was required in respect thereof, i.e., in respect of 'the development to which the notice relates.' The magistrates, therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so."

Lord Evershed said [15]: "The words in section 23 (4), 'no such permission was required in respect thereof,' are clearly capable of application to any case in which permission was not in truth required under the 1947 Act, whether because the development was of a kind which by the terms of the Act called for no permission or because the development, by reason of the date when it was carried out, was outside the scope of the Act altogether. . . . I think the Court of Appeal and the Divisional Court were right in holding that in the circumstances and upon its true construction the enforcement notice of April 26, 1951, ought to have been quashed by the justices."

So far I have not been able myself to find in the reasoning of

[13] [1957] A.C. 223, 236.
[14] Ibid. 247.
[15] Ibid. 252.

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their Lordships anything inconsistent with the decision in *Keats*. It is true that in his speech Lord Evershed also said [16]: "But "other cases may well arise in which serious questions of fact "might be involved, questions whether in truth the development "had been carried out before the appointed day or whether the "land had in fact ever been used as alleged. If in such cases "it were beyond the jurisdiction of the justices upon an appeal "to determine such questions of fact, then the only course open "to the owner would be to await the taking of further steps by "the authority under section 24 of the Act and then to challenge "the validity of the notice; a course which might well involve "him in a long period of uncertainty and would certainly be "likely to expose him to serious expense. Equally might such "a course of proceedings be an embarrassment to the authority, "who might find, when the facts had turned out ultimately "against them, that it was then too late to exercise their statu-"tory powers and duties at all."

When Lord Evershed uses the words "or whether the land "had in fact ever been used as alleged," he does indeed pose the same kind of question that was answered in *Keats*. But he does not go on to answer it in a sense inconsistent with that decision, or indeed at all. And when reading this passage it is useful to recall his earlier remarks [17]: "It cannot, I think, be doubted that "the terms of section 23 (4) (*a*) and the formulation of the three "grounds upon which a notice under the section may be quashed "assume the premise on which the notice proceeds—namely, that "the matters complained of have been done or undertaken since "July 1, 1948. The relevant words, 'that no such permission was "'required in respect thereof,' according to their more natural "meaning refer to those cases in which, by virtue of section 12 "(5), the development is of the limited character for which "permission is excused. Upon the face of it, the subsection "makes no provision for the case where the development alleged "has not occurred in fact at all."

With diffidence, therefore, I think the reasoning of the speeches in the *East Riding* case is not inconsistent with the decision in *Keats*; indeed that it harmonizes with it. It is not the case, as counsel for the present respondents suggests, that the House of Lords regarded magistrates as free to go behind the enforcement notice in order to decide whether there had been development or not. But where the question is whether the development took place before the appointed day, magistrates must necessarily inquire into the facts in this respect, for the date of the development will determine whether permission was or was not required under the Act, and this matter is within the jurisdiction expressly conferred upon magistrates under section 23 (4) (*a*). The decision in the *East Riding* case in my view involves no more in this particular direction. At the same time it is noteworthy that all their Lordships emphasized the strictly

[16] [1957] A.C. 223, 252. [17] Ibid. 251.

confined nature of the jurisdiction conferred on magistrates by section 23 (4).

The question then arises whether the contrary view expressed by this court in *Norris* v. *Edmonton Corporation* [18] still binds us. The decision followed that of this court in *Perrins* v. *Perrins*,[19] and that decision was specifically overruled by the Court of Appeal in *Francis* v. *Yiewsley Urban District Council.*[20] *Norris* v. *Edmonton Corporation*, therefore, must also be regarded as no longer law. But the Court of Appeal reached its decision on a different ground, involving no necessary conflict with the reason which led the Divisional Court to its decision in the *Norris* case. Nevertheless, now that the decision itself has gone, no useful purpose would, it seems to me, be served by regarding its reasoning as still binding. I agree that it is a peculiar position if the occupier has to wait to be prosecuted before he can challenge the planning authority's view that development has occurred, and that, as the law stands at present, the magistrates will then do under section 24 (3) what they cannot do under section 23 (4), namely, inquire whether development has occurred. But at least that is better for the occupier than nothing at all. And in some cases he may also be able to proceed for a declaratory judgment. However that may be, I think the words of section 23 (4) strictly confine the magistrates' jurisdiction under that subsection to the issues there specified.

The ultimate result I reach is therefore this: (1) The decision in *Keats* still binds this court. (2) Accordingly, in the present case the magistrates had no jurisdiction under section 23 (4) to consider whether the alleged development had in fact occurred and to decide that it had not. (3) That the appeal must accordingly be allowed, there being no other question before us.

Appeal allowed.
Case remitted to justices with a direction to dismiss the company's appeal against the enforcement notice.
Leave to appeal to the Court of Appeal.

Solicitors: *Sharpe, Pritchard & Co. for F. H. Busby, Town Clerk, Eastbourne; Clifford Turner & Co.*

[18] [1957] 2 Q.B. 564.
[19] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.
[20] [1957] 3 W.L.R. 919.

[COURT OF APPEAL.]

C. A.

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April 23, 24.

Jenkins, Parker and Pearce L.JJ.

WILSON *v.* TYNESIDE WINDOW CLEANING CO.

[1956 W. No. 207.]

Negligence—Safe system of work—Dangerous premises—Employer's duty—Employee required to work in premises not in the occupation of the employer—Window cleaning—Defective Handle—Liability of employer—Whether duty to warn experienced workmen.

The plaintiff, a window cleaner of 56 with a life-long experience in the trade, was cleaning from the outside a window in a brewery, when a handle, by which he was supporting himself gave way, and he fell and received injury. He had often cleaned the window before, and knew that the woodwork was unsound. From his experience he knew that it was unsafe to trust to handles. He had worked for the defendants for some 14 years, and was already thoroughly experienced when he joined them. He had never received any instructions regarding safety precautions, except a standing order to the effect that if he found a window which presented unusual difficulty or risk, he was to report to the defendants for further instructions.

In an action for damages for negligence, it was claimed, first, that the defendants were under a duty to provide a place of work as safe as reasonable skill and care could make it, and that at least they should have inspected the premises from time to time; secondly, that they should have issued warnings in writing and orally from time to time, against the dangers of window cleaning in general, and those connected with unsafe handles in particular. Donovan J. held that the defendants had fulfilled their duty of care and dismissed the action. On appeal:—

Held, dismissing the appeal, that in the case of so experienced a workman as the plaintiff, the defendants had fulfilled their duty to take reasonable care for his safety. That duty, though conveniently divided for the purposes of argument in individual cases into such subdivisions as the provision of reasonably safe premises, or tools, or systems of work, was one and the same. As to premises, there was a great difference in degree between the performance of the duty when the premises were the master's own or those of a stranger. As to system, when the workman was so experienced, and the danger was so patent, the issue or repetition of warnings would be likely to do more harm than good.

Biddle v. *Hart* [1907] 1 K.B. 649; 23 T.L.R. 262 applied.

Hodgson v. *British Arc Welding Co. Ltd.* [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95 approved.

Taylor v. *Sims & Sims* [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375, and *Cilia* v. *H. M. James & Sons* [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9 explained.

Dicta of Denning L.J. in *Christmas* v. *General Cleaning Contractors Ltd.* [1952] 1 K.B. 141, 148; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39 considered.

Decision of Donovan J. affirmed.

APPEAL from Donovan J. at Newcastle Assizes.

The following statement of facts is taken from the judgment of Pearce L.J.

The plaintiff appealed from a judgment of Donovan J. given at York Assizes on June 14, 1957, dismissing his claim for damages for personal injury suffered in an accident sustained by him when he was working for the defendants as a window cleaner. The plaintiff alleged negligence against the defendants. The defendants denied negligence but made no allegation of contributory negligence. The judge assessed the damages, in case of appeal, at £4,320.

The plaintiff was a man of 56 at the time of the accident. He had been a window cleaner all his working life, and was a trained and very experienced man in that occupation. He had worked for the defendants for 13 or 14 years. He had been a chargehand with his previous employers, and acted in that capacity with the defendants when he was needed to do so. He had taught many hundreds of persons how to carry on their trade.

The defendant firm had been in existence for 60 years, employing at times up to fifty men, and so far as accidents were concerned had a good record. The defendants had a contract to clean the windows of the Newcastle Breweries once a quarter, a task which took two men three or four days. The plaintiff had done work on the breweries frequently in the last ten years before the accident. There was no inspection of the premises before the starting of the work. On September 3, 1954, the plaintiff and another man went to perform the quarterly cleaning. In due course the plaintiff cleaned the window with which this case is concerned. It was 12 ft. from the ground; it overlooked a street with a rather steep incline. He had cleaned that same window three months before and on other previous occasions. There had originally been handles on each side of the underneath of the upper sash, but for some two or three years there had been only one handle remaining, namely, that on the right. The room to which the window belonged was a kitchen. The steam condensed and ran down, causing the woodwork to rot. To the plaintiff it appeared "all rotten," to use his own words; and he said that the sash was always a bit stiff. The plaintiff first cleaned the window from the inside. Then he put up his 28 ft. extending ladder and wedged it firmly on the ground. Standing on the ladder, he cleaned the bottom half first. Then he took hold of the handle with his right hand and put the fingers of his left hand over the putty on the bottom bar of the top sash, in order to pull the sash down. He had so used that handle three months before and on previous occasions. He gave a pull on the handle. It came away in his hand, so that he lost balance and fell off the ladder, suffering severe injuries. The judge found that he gave a pull of sufficient strength to bring the top half of the window down had the handle remained firm. The plaintiff complains of that finding as putting the strength of the pull too high. But the judge took into account the fact that the pull was enough to throw him off balance.

When the plaintiff went to work for the defendants he knew

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that he should not trust handles on windows, but he had never himself experienced the coming off of a handle. The defendants had never given him general safety instructions, or said anything to him specifically about handles. But in answer to the judge's question "When you first went to this company if someone had "said to you 'Never trust handles on windows' would that have "been something you knew already?," the plaintiff said "Some-"thing I knew already." The judge described the extent of the plaintiff's knowledge and information in these words: "If in the "course of his work the plaintiff came across a window the clean-"ing of which presented some unusual difficulty, and the plaintiff "was in doubt whether he could clean it safely, then the system "was that he should leave the window uncleaned, report the "fact to the defendants, and ask for further instructions. He "was told to do this when he first joined the defendant firm in "1942. Mr. Waller [for the plaintiff] says that to call that a "system was putting the matter higher than the evidence justi-"fied. But I do not think that that criticism is made out. The "plaintiff had cleaned this particular window many times pre-"viously himself, the last occasion being the June before the "September when he met with his accident. In that June, he "had pulled the top half of this window down all right despite the "missing handle, though the window was always a bit stiff to "move. He knew that the window had had only one handle "for years, and, as already mentioned, he saw that the state of "the woodwork of the window was rotten. He knew from "experience that one should not trust to handles on windows, "that is, that he should not pull on them under any circum-"stances in which, if the handle gave way, he would run the "risk of injury. He knew that he should test the handle first. "No general instructions were given to him when he joined the "defendants as to how he should clean windows. He already "knew. No warning against using window handles as handholds "lest they should give way was given to him, but he was already "aware of this danger. He had cleaned very many windows "having handles similar to the one in the present case: such "handles were common in the Newcastle district, and, while "one had never come off before while he was holding it, he was "aware of the possibility that one might—'I knew all along' "he said 'that one should not trust to handles.'"

There was evidence that handles coming off were frequent causes of accidents. One Davis, a surveyor called for the plaintiff, made four criticisms of the defendants' behaviour. First, he said that there ought to be printed rules; and he produced a booklet which set out clearly what are the perils and what matters should be avoided. He said that that booklet ought to be given to the employees and that they should be made to sign a document to say that they had read it, because although they might be aware of the warnings contained in it it was necessary to drive those warnings home. Secondly, he said that the men should be told

that where there was only one handle remaining on an upper sash, the sash should be opened from the inside. Thirdly, he recommended regular visits, say once or twice a year, by someone in authority, to see that the employees were doing their work properly and that all was going well—that being chiefly designed to impress on them the importance of obeying safety rules. He admitted that there was a field where one had to leave it to the men to find defects and report. He had no knowledge of what the practice is in the window-cleaning trade; and he had no knowledge of preliminary inspections being made before the men worked on a particular job; but he had heard of people coming round as overseers to see that the work was being properly done.

Donovan J. gave judgment for the defendants. The plaintiff appealed.

G. S. Waller Q.C. and *R. P. Smith* for the plaintiff.

R. Marven Everett Q.C. and *R. C. H. Briggs* for the defendants.

The following cases cited in argument are not referred to in the judgments: *Paine* v. *Colne Valley Electric Supply Ltd.**; *Naismith* v. *London Film Productions Ltd.*†; *Drummond* v. *British Building Cleaners Ltd.*§; *Garrard* v. *A. E. Southey & Co. and Standard Telephones & Cables Ltd.*‖; *M'Quilter* v. *Goulandris Bros.*¶; *Roberts* v. *Dorman Long & Co.*‡‡

JENKINS L.J. I will ask Pearce L.J. to deliver the first judgment.

PEARCE L.J., after stating the facts. The judge's findings of fact are not seriously challenged. I do not think that any valid criticisms of the judge's findings of fact have been made out. In a long and careful judgment, he dealt with all the relevant facts and all the contentions put forward by the plaintiff. Mr. Waller, in his very fair and careful argument for the plaintiff, bases his contentions on two main grounds: first, that it is the duty of the defendants to provide a place of work as safe as reasonable care and skill can make it. The accident (he says) shows that this place of work was not safe. That duty is always on the defendants, whether delegated or not, as is shown by the case (in particular) of *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[1] He relies on *Biddle* v. *Hart*[2] and on a dictum of Denning L.J. in *Christmas* v. *General Cleaning Contractors Ltd.*[3] as showing that

* [1939] W.N. 19; 55 T.L.R. 181; [1938] 4 All E.R. 803.

† [1939] W.N. 86; [1939] 1 All E.R. 794.

§ [1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507.

‖ [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

¶ (1952) 102 L.J.News. 8.

‡‡ [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.

[1] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[2] [1907] 1 K.B. 649; 23 T.L.R. 262.

[3] [1952] 1 K.B. 141, 148; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39.

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the employer's duty of care as to the safety of the place of work extends even to premises over which he has no control; and he argues that the decisions in *Taylor* v. *Sims & Sims* [4] and *Cilia* v. *H. M. James & Sons* [5] are wrong in so far as a contrary view was taken. On the basis that the responsibility for providing a safe place of work remains on the master even though he has no control of the premises, Mr. Waller contends that at the least a preliminary inspection to ascertain the dangers is available to the master and that in this case the defendants were negligent in not so inspecting and in not providing a safe place of work for the plaintiff.

Further, in respect of premises out of the master's control Mr. Waller argues that the duty of providing safe premises is, as it were, delegated by the master to the occupier. The master is thus vicariously liable for the occupier's failure to provide safe premises. It is true that, if one can import such a notional delegation, that further argument would stand. But such a delegation necessitates a fiction which seems to me to have no justification in fact. The tradesman comes to the premises to do something to them. He does not thereby delegate to the owner something which he himself has no right to do and with which he has never been concerned.

Mr. Waller's second point, as additional or alternative, is that the defendants failed in their duty to take steps to provide a system which would protect the plaintiff from the danger which caused his accident. A proper system (in his contention) would necessitate first an instruction to the plaintiff that a window with only one handle must be opened from the inside; secondly, a regular inspection by an overseer to see how the work was going and to emphasize the necessity for safety precautions; thirdly, a specific warning of the danger of trusting to handles on windows, a warning which should be repeated say twice a year, even though the danger was known to the plaintiff—Mr. Waller instanced certain railway regulations that, though known to the men, have to be read to them twice a year as a reminder of things which, though well-known, are apt to escape their attention or to be treated lightly—and fourthly, that the master should have told the occupier to put the premises in order.

The judge dealt with the first contention (as to the duty to provide a safe place of work) as follows. First he reminded himself of the well-known dictum of Lord Herschell in *Smith* v. *Baker & Sons* [6]—that the duty of the employer is to take reasonable care to provide proper appliances and to maintain them in proper condition and so to carry out his operations as not to subject those employed by him to unnecessary risk. He dealt with the passage in the judgment of Denning L.J. in the window-cleaning

[4] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.
[5] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.
[6] [1891] A.C. 325, 362; 7 T.L.R. 679.

case of *Christmas* v. *General Cleaning Contractors Ltd.*[7] to which I have referred. That passage reads as follows: "The next question "is whether the contractors are liable to their workman, the "plaintiff. Mr. Nelson, for the contractors, argued that employers "who send their men out to work on the premises of other "people have no responsibility for the safety of those premises, "and he cited *Taylor* v. *Sims & Sims*[8] in support of that proposi- "tion. He said that it was for the occupier to see that the premises "were safe for the workman and not for the employer to do so. I "cannot agree with that proposition. Until recently many people "thought that an occupier was bound to use reasonable care to "see that his premises were safe for workmen he invited on to "them: but that is no longer true. The decision of the House of "Lords in *London Graving Dock Company Ltd.* v. *Horton*[9] shows "that an occupier can allow his premises to remain defective and "dangerous with impunity so long as he gives the men warning "of the risk, or the danger is so obvious that they must be aware "of it. If this is so, I think it must follow that it is for the "employer, who sends his men to the premises, to take reasonable "care to see that the premises are safe for the men or else take "proper steps to protect the men from the dangers to which he "sends them."

The Lord Justice was in effect saying that *Horton's* case[10] had left a gap which must be filled by imposing on the employer a liability for dangers for which the invitor might no longer be liable. The judge observed that the other members of the Court of Appeal had based their judgments on somewhat different grounds and that in the House of Lords the decision in the plaintiff's favour[11] was based on a shortcoming in the system employed to clean the windows rather than a failure to inspect the windows before each periodical cleaning. He then referred to *Cilia* v. *James & Sons*[12] and *Taylor* v. *Sims & Sims*,[13] in each of which cases the judges held that where an employer sent out his men to work on the premises of others there was no duty of care on him in respect of those premises and that, if there were, the duty had, on the particular facts of each case, been discharged. He also referred to *Hodgson* v. *British Arc Welding Co. Ltd.*[14] in which Hilbery J. dealt with a similar point in a somewhat different and, as it seems to me, a preferable way. The implications of his judgment are not that the employers had no duty at all in respect of things over which they had no control but that the discharge of that duty was of a wholly different kind from that where the master was in control.

The judge then continued as follows: "There is no evidence "before me of any practice of window cleaning employers to

[7] [1952] 1 K.B. 141, 148.
[8] (1942) 58 T.L.R. 339.
[9] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[10] [1951] A.C. 737.
[11] [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.
[12] [1954] 1 W.L.R. 721.
[13] 58 T.L.R. 339.
[14] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

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"inspect premises in detail before each periodical cleaning of "the windows. Nor would Davis—a surveyor called for the "plaintiff—go further than to say that employers should go around "while the work was on 'to keep an eye on the men and see how "'the job was shaping.' I think it would be placing too heavy a "burden upon employers to say that they must inspect in detail "all the premises where their men clean windows every time the "men do so and before they do so. Some premises contain "so many windows that before the last window was inspected "some new defect might have developed in the first; for example, "a broken sashcord, and the work of inspection might be endless. "And without in any way minimizing the risks of the job, I think "they can be met in other ways. If men are properly taught "their job; are provided with proper equipment; are adequately "warned of the dangers, and are instructed that they should "not clean any windows which appear to them to be too "dangerous to clean, but should report the matter back to the "employer, then it seems to me to be unnecessary to lay down "that the employer must in addition inspect every window "beforehand."

The judge then went on to deal with the case of *Thomson* v. *Cremin* [15] on which the plaintiff relied before him and relies before us. In that case a stevedore succeeded against a shipowner, as invitor, in respect of a faulty shoring that injured the plaintiff. The shoring had been installed by competent shipwrights in Australia who were independent contractors, and a Government certificate had been issued to the effect that the regulations had been duly complied with. The shipowner, on the same reasoning as that in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[16] was held vicariously liable to an invitee for the default of the independent contractors. The plaintiff in this case sought to say that since a master owes an even higher duty to a servant than an invitor to an invitee, then a master must a fortiori owe a duty to a servant to see that the premises are safe before sending his workman to work on someone else's premises. But, as the judge pointed out, this very argument had failed in that case, since the plaintiff had sued his master as well as the shipowner but had failed against his master. The judge referred to the words of Lord Simon and Lord Wright in that case. Lord Simon said [17]: "Here, again, I agree with the view of the Scottish courts that "it was not proved to be part of the regular practice or course of "duty of stevedoring firms to make such inspection."

The judge then dealt with the duty to make this particular handle safe, and concluded that since it was not within the power of the defendants to do so and they had not the necessary control over the premises it could hardly be unreasonable not to do so. He concluded, on this point, "The defendants in fact met the "situation in this case by telling the plaintiff, a very experienced

[15] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.
[16] [1938] A.C. 57.
[17] Ibid. 107.

" man, that he need clean no window which he considered unsafe. " I hold that there was no obligation upon the defendants to go " further and make good the defective handle. The duty of an " employer to take reasonable care to provide a safe place of work " relates, in my view, only to that place of work which is in the " employer's occupation or over which he is shown to have the " necessary degree of control. This is not true of the premises " in the present case."

The judge then dealt with the defendant's alleged failure to warn the plaintiff of that which he already knew, namely, the danger of pulling on handles, and with the failure to give periodically repeated warnings in order to keep his caution vigilant, and decided that there was no negligent failure in that respect. He commented on the fact that there was no evidence of any practice in the trade with regard to repeated warnings. He differentiated between this case and cases where risks are " insidious and " unseen," such as dermatitis cases, where, for instance, it might be that reminders as to the use of barrier cream and such like precautions were necessary; and he pointed out that in any event it was pure guesswork as to whether, if there had been periodic warnings, this accident would have been avoided. He found, therefore, that the defendants had not been negligent.

Now it is true that in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[18] Lord Wright divided up the duty of a master into three main headings, for convenience of definition or argument; but all three are ultimately only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk. Whether the servant is working on the premises of the master or those of a stranger, that duty is still, as it seems to me, the same; but as a matter of common sense its performance and discharge will probably be vastly different in the two cases. The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence. But if a master sends his plumber to mend a leak in a respectable private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap. Between these extremes are countless possible examples in which the court may have to decide the question of fact: Did the master take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk? Precautions dictated by reasonable care when the servant works on the master's premises may be wholly prevented or greatly circumscribed by the fact that the place of work is under the control of a stranger. Additional safeguards intended to reinforce the man's own knowledge and skill in surmounting difficulties or dangers may be reasonable in the former case but impracticable and unreasonable in the latter. So viewed, the question whether the master was in

[18] [1938] A.C. 57, 78.

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control of the premises ceases to be a matter of technicality and becomes merely one of the ingredients, albeit a very important one, in a consideration of the question of fact whether, in all the circumstances, the master took reasonable steps.

That, as it seems to me, is the reasoning of this court in *Biddle* v. *Hart*.[19] In that case a stevedore's workman, whilst engaged in unloading a ship, was injured owing to a defect in the tackle, and he was suing his master. The judge withdrew the case from the jury, on the ground that the stevedore was not responsible for a defect in the ship's tackle because the tackle did not belong to him. Lord Gorell said[20]: "In my opinion, if the "employer uses plant which is not his own for the purpose of "doing something which he has engaged to do, it cannot possibly "be said that he has no duty whatever in relation to that plant. "Otherwise he would be able to take anything that came from "anybody and to use anything in the work he was engaged upon "without making any inquiry at all, and then say, in the event "of an injury arising from a defect in the plant, that he had "nothing to do with it, and so escape liability. That, to my "mind, is unreasonable, and is not consistent with the second "section. What I take to be the meaning of that is that if the "employer uses plant which does not belong to him, he may have "a duty in regard to the persons employed to take reasonable "care to see that it is proper for the purpose for which it is used. "It may be that in a case of this character, although he had that "duty, yet, if he had dealt with these shipowners before and had "never had any cause for complaint, the jury might think that "he had reasonably discharged that duty. On the other hand, "when you have evidence that the plant was old and had been "in use for a long time, the jury might say they were not satisfied "that reasonable care had been taken to see that it was in a "proper condition. Once establish the duty the question is, "What would the jury consider a discharge of that duty?"

As Parker L.J. pointed out in *Davie* v. *New Merton Board Mills Ltd.*,[21] that reasoning seems inconsistent with the two decisions to which I have referred, which say that there is no duty of care in respect of premises over which the master has no control, but it is consistent with the alternative ratio in each case that the duty had been discharged. It is consistent, I think, with the implications of the judgment of Hilbery J. in *Hodgson* v. *British Arc Welding Co. Ltd.*[22] But applying that reasoning to this case, I think that the plaintiff has not shown that the defendants failed to take reasonable steps for the safety of the plaintiff.

The judge's reasoning seems to me to be sound. It was a question of fact whether the defendants were negligent; and I see

[19] [1907] 1 K.B. 649.
[20] Ibid. 653.
[21] [1958] 1 Q.B. 210, 242; [1958] 2 W.L.R. 21, 45; [1958] 1 All E.R. 67.
[22] [1946] K.B. 302.

no ground for differing from the conclusions of fact which the judge reached.

I would dismiss the appeal.

PARKER L.J. I agree. I have no doubt that this appeal fails. It is only out of respect for Mr. Waller's persuasive argument that I add anything. The first way in which he puts his case is this. It is, he says, the master's duty to provide a place of employment as safe as the exercise of reasonable skill and care will permit. Quite clearly, the premises in this case where the plaintiff was to work were not as safe as the exercise of reasonable skill and care would permit; therefore, as the duty is personal, the defendants are liable; and that is so, whether the premises are in the occupation of the defendants or (as here) of people who are neither servants nor agents, nor independent contractors employed by the defendants.

I think that this case is a very good example of the difficulties that one gets into in treating the duty owed at common law by a master to his servant as a number of separate duties. Thus, it is often said (as it is said in this case) that the master owes a duty to make the place of employment as safe as reasonable skill and care will permit. Again, it is said that it is the master's duty to make the plant and tools as safe as reasonable skill and care will permit; and again it is said that it is the master's duty to devise and lay down a safe system of working.

Approached in that way, questions at once arise as to whether, and if so to what extent, any of those duties extend (in the case of premises) to premises not occupied or controlled by the master, or (in the case of plant and tools) to plant and tools bought from responsible and reputable suppliers or manufacturers—bearing in mind, as has been laid down so often, that in each case the duty is a duty personal to the employer, in the sense used in *Wilsons'* case.[23] It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as Lord Herschell said in the well-known passage in *Smith* v. *Baker & Sons*,[24] to take reasonable care so to carry out his operation as not to subject those employed by him to unnecessary risk.

That general duty applies in the circumstances of every case; but the governing words "reasonable care" limit the extent of the duty in the circumstances of each case. Accordingly, the duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party, or whether the tool has been made to the order of the master or his manager, servant or agent, or is a standard tool supplied and manufactured by reputable third parties; but what reasonable care demands in each case will no doubt vary.

[23] [1938] A.C. 57.

[24] [1895] A.C. 325, 362.

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That, as it seems to me, is the true principle, and is consistent with the decision of this court in *Biddle* v. *Hart*.[25] As I said in *Davie* v. *New Merton Board Mills*,[26] I very much doubt whether the decisions in *Taylor* v. *Sims and Sims*[27] and *Cilia* v. *H. M. James & Sons*[28] are correct decisions in so far as they said that in circumstances such as these there is no duty in respect of the safety of the premises. It seems to me also that those statements are inconsistent with a passage in the speech of Lord Wright in *Thomson* v. *Cremin*.[29]

Mr. Waller relied strongly on the dicta of Denning L.J. in the case of *Christmas* v. *General Cleaning Contractors Ltd.*[30]; but in my judgment those were dicta, and in so far as Mr. Waller said that those remarks implied that there was a duty to make premises in the occupation of a third party safe, I do not think that they can stand with the decisions to which I have referred. Bearing that in mind, it seems to me that there is nothing in this case on which one can say that the general duty, so far as it relates to premises, has been broken.

One can conceive cases of a very old, dilapidated building, or a building which is known to have suffered war damage or is dilapidated in some other respect, where one could say that it was the duty of an employer to see that it was made safe or, if it could not be made safe, if necessary to forbid his workmen to go there and work. But there is no suggestion of that in the present case.

So much for Mr. Waller's first contention. His second contention is based on an allegation that in various respects there has been a breach of the sub-division of the duty which relates to an unsafe system of working. I think this must be right: that in so far as what one may call the first division, the making the premises safe, cannot be fully performed—as when they are in the possession of a third party, it behoves the master to exercise all the more care in regard to his system of working.

In regard to the system of working, various points are taken. It is said first that it was the duty of the master, albeit that he could not make the premises safe, to inspect them, either each time the workmen went on the job, or at any rate twice a year in the course of a contract such as this. That, of course, overlaps to some extent what I have already said in regard to the first contention; but in so far as it is based on an unsafe system of working, it seems to me that the answer here is that there is no suggestion that there is any practice in the trade in that regard. No doubt a master will inspect the premises generally with a view to estimating for the job in the first instance; but there is no practice in the trade whereby he must make a periodic inspection.

Secondly, it is said that reasonable care demanded in this case that there should be repeated warnings given to the plaintiff

[25] [1907] 1 K.B. 649.
[26] [1958] 1 Q.B. 210, 242; [1958] 2 W.L.R. 21, 45.
[27] 58 T.L.R. 339.
[28] [1954] 1 W.L.R. 721.
[29] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.
[30] [1952] 1 K.B. 141, 148.

of the danger of windows sticking and of handles coming off. In fact in the present case there not only has been no repeated warning, but no initial warning. But the circumstances here are these: this is a man who was 56 years of age, I think, at the time, and who has been all his life a window cleaner: he is a very experienced man, usually acting as a charge-hand, and he knew —and he frankly said that he knew—of the dangers involved, of handles coming off. It is said that he should have been told—one witness suggested that it should be impressed upon him twice a year—again and again. For my part, I would like to adopt entirely what Donovan J. said on that point. It seems to me that the disadvantages of doing that in the case of skilled men of this sort may well outweigh the advantages; and for my part I cannot think that "reasonable care" demands a repeated warning to skilled men in a case at any rate such as this, where the dangers involved are patent. It is not a case that one sometimes comes across of the danger of silicosis from particles of dust which are quite invisible and cannot be seen. I do not know, but it may well be that in such cases "reasonable care" would demand that the employer should warn and exhort the men constantly to wear masks. But there, as I have said, the danger is not patent.

Lastly, it is said (and for my part I think that this is the strongest way that Mr. Waller can put his case) that there ought to have been general instructions that in the case of all sash windows men should clean them from the inside first and, while inside, should see that the top sash will come down—in other words, that it is not stuck; and that in the case of a window the handles of which are suspect it is actually opened while the men are inside. That, however, was a suggestion made by only one witness, who I do not think had any experience of window cleaning whatsoever. There is no suggestion that there is any settled practice in the trade for the giving of such instructions. Accordingly, one would have to say (adopting the words so often used) that it would have been folly on the part of a prudent employer not to give such instructions. For my part, I am quite unable to say that in that regard the plaintiff has made out his case.

For these reasons, as well as the reasons given by my Lord, I would dismiss this appeal.

JENKINS L.J. I entirely agree, and find nothing I can usefully add.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co. for Hadaway & Hadaway, Newcastle-upon-Tyne; Barlow, Lyde & Gilbert.*

F. R. D.

[PRIVY COUNCIL.]

J. C.*

1958
May 7.

In re PARLIAMENTARY PRIVILEGE ACT, 1770.

Parliament—Privilege—Issue of writ—Writ against member in respect of proceeding in Parliament—Whether treatment by Commons of writ as breach of privilege contrary to Parliamentary Privilege Act, 1770 (10 *Geo.* 3, *c.* 50)—*Bill of Rights*, 1688 (1 *Will. & Mary, sess.* 2, *c.* 2), *art.* 9.

Article 9 of the Bill of Rights, 1688, declares that "The freedom "of speech and debates or proceedings in Parliament ought not to "be impeached or questioned in any Court or place out of "Parliament."

The Parliamentary Privilege Act, 1770, provides in section 1 that ". . . any person . . . may at any time commence and prosecute "any action or suit in any court . . . against . . . any . . . Lord of "Parliament of Great Britain, or against any of the knights, "citizens, and burgesses, and the commissioners for shires and "burghs of the House of Commons of Great Britain . . . or any "other person intitled to the privilege of Parliament . . . and no "such action . . . shall at any time be impeached, stayed or delayed "by or under colour or pretence of any privilege of Parliament."

The London Electricity Board having threatened to institute proceedings for libel against a Member of Parliament in respect of statements made by him in a letter to the Paymaster-General criticizing the board's method of disposing of scrap cable, the matter was referred to the Committee of Privileges of the House of Commons. That committee came to the conclusion that in writing the impugned letter the member was engaged in a "proceeding in Par- "liament" within the meaning of the Bill of Rights, and that the board in threatening to commence proceedings for libel had acted in breach of the privilege of Parliament. The committee, however, having had their attention called to the possible impact of the Parliamentary Privilege Act, 1770, on the question, recommended that the opinion of the Judicial Committee of the Privy Council should be sought on the question "whether the House would be "acting contrary to the Parliamentary Privilege Act, 1770, if it "treated the issue of a writ against a Member of Parliament in "respect of a speech or proceeding by him in Parliament as a "breach of its privileges":—

Held, that the question referred should be answered in the negative.

While the Act of 1770 (which did not extend the ambit of its predecessor of 1700 (12 & 13 Will. 3, c. 3)) was, as was the Act of 1700, apt to cover any suits, including suits for defamation, whether in or out of Parliament, and in every case to bar the plea of any privilege of Parliament, there were considerations inherent in the Act itself pointing to a necessary limitation of its meaning, and it applied only to proceedings against Members of Parliament in respect of their debts and actions as individuals, and not in respect of their conduct in Parliament as Members of Parliament, and did not abridge or affect the ancient and essential privilege of freedom

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**Present*: Viscount Simonds, Lord Goddard, Lord Morton of Henryton, Lord Reid, Lord Radcliffe, Lord Somervell of Harrow and Lord Denning.

of speech in Parliament—if it was read so as to have any application to such speeches, the effect was substantially to repeal article 9 of the Bill of Rights, and such a conclusion could not lightly be reached.

The Board's decision was confined to the single narrow question referred, and they did not intend either expressly or by implication to pronounce upon any other question of law. In particular they expressed no opinion whether the proceedings out of which the reference arose were "a proceeding in Parliament"—a question not discussed before them—nor on the question whether the mere issue of a writ would in any circumstances be a breach of privilege.

Burdett v. *Abbott* (1811) 14 East 1; *Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1, and the *Sheriff of Middlesex Case* (1840) 11 Ad. & E. 273 referred to.

SPECIAL REFERENCE (under section 4 of the Judicial Committee Act, 1833) made pursuant to a recommendation of the Committee of Privileges of the House of Commons and an Order in Council dated December 13, 1957, of the question of law "whether the "House of Commons would be acting contrary to the Parliamen-"tary Privilege Act, 1770, if it treated the issue of a writ against "a Member of Parliament in respect of a speech or proceeding by "him in Parliament as a breach of its privileges."

The following facts are taken from the Reasons for the Report of Judicial Committee on the reference: On February 8, 1957, the Right Honourable G. R. Strauss, a member of the House of Commons, wrote a letter to the Paymaster-General in which he called his attention to certain conduct of the London Electricity Board. The Paymaster-General, being of opinion that the question related to a matter of day-to-day administration, replied to Mr. Strauss that the responsibility lay with the board not with the Minister, and he had arranged for his officials to bring the views of Mr. Strauss to the attention of the board's chairman as a matter of urgency. An interview was accordingly held between the chairman and Mr. Strauss and some of his associates, after which the chairman wrote to Mr. Strauss demanding the unqualified withdrawal of the latter's statements in his letter of February 8, which he regarded as casting grave reflections on the integrity of the board's personnel and on the board's attitude towards its public duty. Receiving no satisfactory reply to this or a subsequent letter he then put the matter into the hands of the board's solicitors, who wrote to Mr. Strauss demanding a withdrawal and an apology and stating that, if these were not forthcoming, they were instructed to issue a writ for libel against him. To this letter the solicitors for Mr. Strauss replied that it appeared to them that the letter in question was written on an occasion of qualified privilege and that they were prepared to accept service of any proceedings on his behalf.

No writ had in fact been issued when on April 6, 1957, Mr. Strauss called the attention of the House of Commons to the letters that had passed between himself and the board and its solicitors and claimed that the threats of an action for libel in those letters were a breach of the privilege of Parliament. The

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Speaker of the House of Commons ruled that the threats constituted a prima facie case of breach of privilege and the House resolved to refer the matter to its Committee of Privileges. On October 30, 1957, that committee reported. They pointed out that the answer to the question whether these threats constituted in themselves a breach of privilege depended in the main on the meaning of article 9 of the Bill of Rights, but, having had their attention called to the possible impact of the Parliamentary Privilege Act, 1770, upon the question, came to the following conclusions:

"(*a*) In writing the letter of February 8, 1957, to the "Paymaster-General of which the London Electricity Board "complain, Mr. Strauss was engaged in a 'proceeding in Par-"liament' within the meaning of the Bill of Rights of 1688.

"(*b*) The London Electricity Board in threatening by the "letters from themselves and their solicitors to commence pro-"ceedings for libel against Mr. Strauss for statements made by "him in the course of a proceeding in Parliament are threatening "to impeach or question the freedom of Mr. Strauss in a Court or "place outside Parliament, and accordingly the London Elec-"tricity Board and their solicitors have acted in breach of the "privilege of Parliament.

"(*c*) The opinion of the Judicial Committee of the Privy "Council should be sought on the question whether the House "would be acting contrary to the Parliamentary Privilege Act, "1770, if it treated the issue of a writ against a Member of "Parliament in respect of a speech or proceeding by him in "Parliament as a breach of its privileges."

On December 4, 1957, the House of Commons presented a humble address to Her Majesty in accordance with conclusion (*c*) of the committee, and on December 13 an Order in Council was made accordingly.

1958. March 10, 11, 12 and 13. *Sir Reginald Manningham-Buller Q.C.*, *A.-G.*, *Rodger Winn* and *C. H. de Waal* for the Attorney-General in support of an affirmative answer to the question referred.

Gerald Gardiner Q.C. and *Conolly H. Gage* for the London Electricity Board also in support of an affirmative answer.

Sir Frank Soskice Q.C. and *Bryan Clauson* for the Treasury Solicitor in support of a negative answer to the question referred.

In addition to the cases referred to in the report of the Judicial Committee the following cases were cited in argument: *Ashby* v. *White* [1]; *Sir John Elliot's Case* [2]; *Rex* v. *Sir William Williams* [3]; *Ex parte Wason* [4]; *Bradlaugh* v. *Gossett* [5]; *Clarke* v. *Bradlaugh* [6]; *Goudy* v. *Duncombe* [7]; *Benyon* v. *Evelyn* [8]; *Reg.* v.

[1] (1703) 2 Ld.Raym. 938.
[2] (1629) 3 St.Tr. 293.
[3] (1686) 13 St.Tr. 1370.
[4] (1869) L.R. 4 Q.B. 573.
[5] (1884) 12 Q.B.D. 271.
[6] (1881) 8 Q.B.D. 63.
[7] (1847) 1 Ex. 430.
[8] (1664) Bridgman 324.

Paty [9]; *Cassidy* v. *Steuart* [10]; *Mitten's Case* [11]; *Dillon* v. *Balfour* [12]; *Chaffers* v. *Goldsmid* [13]; *Gruban* v. *Booth* [14]; *Meggott's Case* [15]; *Gee's Case* [16]; *Phillips' Case* [17]; *Harbin's Case* [18]; *Goffin* v. *Donnelly* [19]; *Wilkinson* v. *Barking Corporation* [20]; *Robinson & Co.* v. *The King* [21]; *Donne* v. *Walsh* [22]; *Ryver* v. *Cosins* [23]; *Hodges* v. *Moor* [24]; *Lake* v. *King* [25]; *Rex* v. *Dangerfield* [26]; *Jay* v. *Topham* [27]; *Rex* v. *Lord Abingdon* [28]; *Rex* v. *Creevey* [29]; *Coffin* v. *Coffin* [30]; *Reg.* v. *Bunting* [31]; *Rivlin* v. *Bilainkin* [32]; *Royal Aquarium, etc., Society* v. *Parkinson* [33]; *Rex* v. *Wright* [34]; *Rex* v. *Graham-Campbell* [35]; *Sturmy's Case* [36]; *Attorney-General* v. *Prince Ernest Augustus of Hanover.* [37]

May 7. Their Lordships' reasons for their report were delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: Their Lordships now turn to the question referred to them. They point out at the outset that this question is a very narrow one. It is independent of the conclusions (*a*) and (*b*) in the conclusions of the Committee of Privileges above set out. Upon them their Lordships are required to express, and express, no opinion. Before considering the text of the Act of 1770 and certain other Acts with which it is inseparably connected, it is only necessary to observe that the words "in respect of a "speech or proceeding by him in Parliament" refer (though not quite accurately) to that part of the Bill of Rights by which, after reciting that "the late King James the Second by the assistance "of divers evil Counsellors Judges and Ministers employed by "him did endeavour to subvert and extirpate the Protestant "religion and the laws and liberties of this Kingdom" by the divers means therein set out, "the Lords Spiritual and Temporal "and Commons pursuant to their respective letters and elections "being now assembled in a full and free representative of this "nation . . . do in the first place (as their ancestors in like case "have usually done) for the vindicating and asserting their "ancient rights and liberties declare . . .

[9] (1704) 2 Ld.Raym. 1105.
[10] (1841) 2 M. & G. 437.
[11] (1757) 27 Commons Jo. 686.
[12] (1887) 20 Ir.R. 600.
[13] [1894] 1 Q.B. 186; 10 T.L.R. 14.
[14] (1915) Cases in Court, Sir P. Hastings.
[15] (1696) 11 Commons Jo. 591.
[16] Ibid. 599.
[17] (1845) 81 Parliamentary Debates 1436.
[18] (1845) 82 Parliamentary Debates 431.
[19] (1881) 6 Q.B.D. 307.
[20] [1948] 1 K.B. 721; 64 T.L.R. 230; [1948] 1 All E.R. 564.
[21] [1921] 3 K.B. 183; 37 T.L.R. 698.
[22] (1473) Hatsell's Precedents, Vol. 1, 41.
[23] (1472) Hatsell's Precedents, Vol. 1, 42.
[24] (1620) Latch 15.
[25] (1668) 1 Saunders 120.
[26] (1688) 11 St.Tr. 503.
[27] (1689) 12 St.Tr. 822.
[28] (1794) 1 Esp.N.P. 225.
[29] (1813) 1 M. & S. 273.
[30] (1802) 4 Massachusetts Rep. 1.
[31] (1885) 7 O.R. 524.
[32] [1953] 1 Q.B. 485; [1953] 2 W.L.R. 281; [1953] 1 All E.R. 534.
[33] [1892] 1 Q.B. 431.
[34] (1799) 8 T.R. (D. & E.) 293.
[35] [1935] 1 K.B. 594; 51 T.L.R. 198.
[36] (1676) 9 Commons Jo. 399.
[37] [1957] A.C. 436; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49.

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" 9. That the freedom of speech and debates or proceedings in " Parliament ought not to be impeached or questioned in any " court or place out of Parliament."

The Bill of Rights was enacted in 1688. In 1700 the first of the group of Acts was passed which fall for their Lordships' consideration. They are clearly of opinion, and it appeared to be common ground between the parties, that the ambit of the later Acts was no greater than that of the earlier. This Act must therefore be closely examined. It is the Act 12 & 13 Will. 3, c. 3, and is entitled " An Act for preventing any inconveniences that may " happen by privilege of Parliament." Its opening words, which can hardly be called a preamble, are significant. " For the " preventing of all delays the King or His subjects may receive in " any of His Courts of Law or Equity and for their ease in the " recovery of their rights and titles to any lands tenements or " hereditaments and their debts or other dues for which they have " cause of suit or action "—here is the declared purpose of the Act, which goes on to enact that from and after June 24, 1701, any persons may commence and prosecute any action or suit in any of His Majesty's courts of record or other courts therein enumerated against any peer of this Realm or Lord of Parliament or against any of the knights, citizens and burgesses of the House of Commons for the time being, or against any of their menial or other servants or any other person entitled to the privilege of Parliament at any time from and immediately after the dissolution or prorogation of any Parliament until a new Parliament shall meet or the same be reassembled, and from and immediately after any adjournment of both Houses of Parliament for above the space of 14 days until both Houses shall meet or reassemble, and that the said respective courts shall and may after such dissolution, prorogation or adjournment proceed to give judgment and to make final orders, decrees and sentences and award execution thereupon, any privilege of Parliament to the contrary notwithstanding.

It is convenient to pause at these words which conclude the first section of the Act and to ask what is its scope. It is not in doubt that its language is comprehensive. It is apt to cover any suits, including suits for defamation whether in or out of Parliament, and in every case to bar the plea of any privilege of Parliament. It should therefore prima facie be read in this sense. But there are considerations, which will be strengthened by later sections, pointing to a necessary limitation of its meaning. In the first place, as has already been noted, the declared purpose of the Act is to prevent delay in the bringing of those actions to which the Act relates. The Members of both Houses had long notoriously abused their privileges in respect of immunity from civil actions and arrest, which by ancient usage extended during the sitting of Parliament and for 40 days after every prorogation and 40 days before the next appointed meeting. It was to curtail this delay in the commencement and prosecution of suits that the

Act was avowedly passed, and by clear implication it referred only to those suits which, subject to delay, were ultimately enforceable. But there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament. No question of delay or ultimate enforceability could arise in regard to that privilege which demanded that a Member should be able to speak without fear or favour in Parliament in the sure knowledge that neither during its sitting nor thereafter would he be liable to any man for what he said and that Parliament itself would protect him from any action in respect of it either by the Crown or by a fellow subject. Here, then, is a strong reason for limiting the meaning of the general words which have been quoted.

In the second place, the section empowers not only the subject to "commence and prosecute any action or suit" but the court "to proceed to give judgment and to make final orders decrees "and sentences and award execution thereon." The last words of the section "any privilege of Parliament to the contrary "notwithstanding" must apply equally to all the preceding words. If, then, the Act is read so to have any application to speeches made in Parliament, the effect is substantially to repeal the ninth article of the Bill of Rights. It is not a question of a writ being issued in a court of law and the defendant then making a plea in bar or a plea to the jurisdiction on the ground of privilege of Parliament. Final orders, decrees, sentences, and execution may follow the commencement and prosecution and no plea of privilege is to be available. It appears to their Lordships that a consideration of this consequence supports the view that the Act applies only to proceedings against Members of Parliament in respect of their debts and actions as individuals and not in respect of their conduct in Parliament as Members of Parliament, and does not abridge or affect the ancient and essential privilege of freedom of speech in Parliament. The conclusion that this privilege, solemnly reasserted in the Bill of Rights, was within a few years abrogated or at least vitally impaired cannot lightly be reached.

The following sections of the Act of 1700 support, or at least do not militate against, the same view. The second section provides that the Act shall not extend to subject the person of any of the knights, citizens and burgesses of the House of Commons or any other person entitled to the privilege of Parliament to be arrested "during the time of privilege"—a significant phrase. Section 3 again emphasizes the temporal aspect of the impediment to a plaintiff pursuing his proper remedy by providing that, if he shall by reason of privilege of Parliament be stayed or prevented from prosecuting any suit by him commenced, he shall not for that reason be barred by any Statute of Limitation or nonsuited, dismissed, or his suit discontinued, but shall from time to time upon the rising of the Parliament be at liberty to proceed to judgment and execution. Section 4 makes special provision

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in regard to actions against the King's original and immediate debtors and other persons therein mentioned which do not appear to call for comment. Section 5 provides that neither that Act nor anything therein contained shall extend to give any jurisdiction, power or authority to any court to hold plea in any real or mixt action in any other manner than such court might have done before the making of that Act. Of this section it may be safely said that it does not touch the question of the privilege of freedom of speech in Parliament.

The Act of 1700 having been closely examined, the succeeding Acts can be briefly dealt with. An Act of 1703 (2 & 3 Anne, c. 18) entitled "An Act for the further explanation and regulation "of privilege of Parliament in relation to persons in public offices" throws no additional light on the scope of the earlier Act, nor does an Act of 1738 (11 Geo. 2, c. 24), which purported to do no more than amend the Act of 1700 by further curtailing the so-called time of privilege. An Act of 1763 (4 Geo. 3, c. 33) sufficiently indicates its purpose and effect by its title "An Act for pre-"venting inconveniences arising in cases of merchants and such "other persons as are within the description of the Statutes "relating to bankrupts being entitled to privilege of Parliament, "and becoming insolvent." It is in no way relevant to the question that has to be determined. Finally comes the Act of 1770, the immediate subject of reference, and little remains to be said about it, for it is clear, as has already been stated, that it did not extend the ambit of section 1 of the Act of 1700, and that its only relevance is that it altogether abolished the time of privilege during which suits might not be commenced or prosecuted against Members of Parliament.

Their Lordships have already expressed their views upon the Act of 1700, and it follows that they must answer the question referred to them by saying that the House would not be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges. It is proper, however, that they should mention certain arguments that were addressed to them.

It is a commonplace in the interpretation of statutes that the court may be assisted by a consideration of the existing law at the time of the passing of the statute under review, and of the evil which it was designed to remedy. Accordingly, the Attorney-General, as he was well entitled to do, invited their Lordships to consider what was the law in regard to the issue of a writ against a Member of Parliament at the relevant date, which by common consent was the year 1700. Sir Frank Soskice, who assisted their Lordships by contending that the Act did not affect the privilege of freedom of speech, in effect made the same plea, for he opened his speech by asking that it should be decided, first, whether, if the 1770 Act and the earlier Acts had not been passed, the issue of a writ would in the circumstances mentioned in the

reference be a breach of privilege, and, secondly, if the answer was in the affirmative, whether it was the effect of those Acts to prevent the issue of such a writ being any longer a breach. As a result of this approach to the construction of the Act of 1700 and, accordingly, of the Act of 1770, the argument on both sides ranged widely over the field of parliamentary privilege. In particular their Lordships were reminded of the manner in which from the earliest times the right of freedom of speech had been asserted. Strode's Act, passed in the fourth year of Henry VIII, was recalled, by which it was declared that all suits and proceedings against Richard Strode and against every other Member of the present Parliament or of any Parliament thereafter " for any " bill, speaking, or declaring of any matter concerning the Parlia- " ment to be communed and treated of, be utterly void and of " none effect." Nor was there any doubt that, though the form was new, this was but the assertion of an ancient privilege.

Then their Lordships were invited to examine, and examined, a large number of cases through the seventeenth and following centuries in which many aspects of privilege were discussed, but it did not appear to them that there was any authority relevant to the only question referred to them—viz., the meaning of the Act of 1770. For even if it is assumed, as the Attorney-General contended (and their Lordships do not pronounce upon it), that the mere issue of a writ for defamation in respect of a speech in Parliament is not a breach of privilege, the assumption does not assist his argument that the Act of 1770 is to be construed so as to cover suits against Members of Parliament in respect not only of their actions as individuals but also of their speeches in Parliament. Nor can it be relevant first to determine, as Sir Frank Soskice invited their Lordships to do, what would have been the state of the law if the Act of 1770 and the related Acts had not been passed. The single question is whether " the House " would be acting contrary to the Parliamentary Privilege Act, " 1770, if it treated the issue of a writ against a Member of " Parliament in respect of a speech or proceeding by him in Par- " liament as a breach of its privileges." This question can, for the reasons already given, be answered by saying " No," without embarking upon a general consideration of parliamentary privilege.

Their Lordships repeat that they answer this and no other question. It was referred to them and it became their duty to answer it. But they do not intend expressly or by implication to pronounce upon any other question of law. In particular they express no opinion whether the proceedings referred to in the introductory paragraph were " a proceeding in Parliament," a question not discussed before them, nor on the question whether the mere issue of a writ would in any circumstances be a breach of privilege. In taking this course they have been mindful of the inalienable right of Her Majesty's subjects to have recourse to her courts of law for the remedy of their wrongs and would not

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prejudice the hearing of any cause in which a plaintiff sought relief. As was justly observed by the Select Committee of the House of Commons appointed in 1810 to consider the famous case of *Burdett* v. *Abbott* (see Hatsell's Parliamentary Precedents, Vol. 1, at p. 293): "And it appears, that in the several instances of "actions commenced in breach of the privileges of this House, "the House has proceeded by commitment, not only against the "party, but against the solicitor and other persons concerned in "bringing such actions; but your committee think it right to "observe, that the commitment of such party, solicitor, or other "persons, would not necessarily stop the proceedings in such "action." This is an aspect of the matter which cannot be ignored, for in the words of Erskine May, Parliamentary Practice, 16th ed., p. 172: "The House of Commons . . . claims to be "the absolute and exclusive judge of its own privileges, and that "its judgments are not examinable by any other court or subject "to appeal. On the other hand, the courts regard the privileges "of Parliament as part of the law of the land, of which they are "bound to take judicial notice. They consider it their duty to "decide any question of privilege arising directly or indirectly "in a case which falls within their jurisdiction and to decide it "according to their own interpretation of the law. The decisions "of the courts are not accepted as binding by the House in "matters of privilege, nor the decisions of the House by the "courts. Thus the old dualism remains unresolved." An example of this dualism may be seen in the case of *Stockdale* v. *Hansard* [1] and the subsequent case of the *Sheriff of Middlesex*,[2] which are part of history.

In accordance with the views expressed above their Lordships humbly report to Her Majesty that the question referred to them should be answered in the negative.

Solicitors: *Treasury Solicitor; Sydney Morse & Co.*

C. C.

[1] (1839) 9 Ad. & E. 1. [2] (1840) 11 Ad. & E. 273.

[QUEEN'S BENCH DIVISION.]

BEER *v.* DAVIES.

1958
April 28.

Lord Goddard C.J., Hilbery and Donovan JJ.

Road Traffic—Notice of intended prosecution—Service of notice—Notice sent by registered post to defendant's usual residence—Defendant away on holiday—Postman unable to deliver—Returned to police by post office—Not received by defendant within 14 *days of alleged commission of offence—Whether "served on or sent" to defendant—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

Statute—Construction—Service of document by post—Meaning of "sent" and "served"—Road Traffic Act, 1930, *s.* 21 (*c*).

An omnibus driver who was involved in a minor road accident while driving his omnibus gave his usual home address to the police

officer who took particulars of the accident. He was given no warning of any proposed prosecution under Part I of the Road Traffic Act, 1930, but 10 days after the accident the police, under section 21 (*c*) of the Act,[1] sent to him by registered post at his usual address a notice of intended prosecution for careless driving. The defendant did not in fact receive the notice as he had gone away for a week's holiday, and as there was no one at his home to take delivery of registered post the notice was returned by the post office to the police marked accordingly. The police served no notice of intended prosecution on the defendant's employers, the registered owners of the omnibus, but served a duplicate notice on the defendant on his return to his home some days after the statutory period had expired. In a prosecution for careless driving the magistrate took the view that the terms of section 21 (*c*) as to the service of the notice had not been complied with, and that the proviso had no application. He, accordingly, dismissed the information. On appeal by the police:—

Held, (1) that the requirements of section 21 (*c*) were not sufficiently complied with by the mere sending of the notice by registered post to the defendant's usual address. As the notice had not been delivered to him within the statutory period there had not been good service within the meaning of the section.

Reg. v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi* [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; [1956] 1 All E.R. 670 applied.

(2) That the police were not entitled to rely on the proviso to section 21 to excuse their failure to serve the service as (a) they took no steps to serve it on the registered owners of the vehicle, and (b) the defendant had not by his own conduct "contributed to the "failure" to serve the notice within the meaning of the proviso as he had done nothing, such as giving a false address, to prevent the police from serving the notice upon him.

Observations of Denning L.J. in *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi* [1956] 1 Q.B. 682, 693 considered.

CASE STATED by a stipendiary magistrate.

On July 19, 1957, an information was preferred by the police against George Robert Davies, an omnibus driver employed by

[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an "offence under any of the provisions "of this Part of this Act relating . . . "to reckless or dangerous driving, "and to careless driving he shall not "be convicted unless either—(*a*) he "was warned at the time the offence "was committed that the question of "prosecuting him for an offence under "some one or other of the provisions "aforesaid would be taken into consideration; or (*b*) within fourteen "days of the commission of the offence "a summons for the offence was "served on him; or (*c*) within . . . "fourteen days a notice of the intended prosecution specifying the "nature of the alleged offence and "the time and place where it is "alleged to have been committed was "served on or sent by registered post "to him or the person registered as "the owner of the vehicle at the time "of the commission of the offence: "Provided that—(i) Failure to comply with this requirement shall not "be a bar to the conviction of the "accused in any case where the court "is satisfied that—(1) neither the "name and address of the accused "nor the name and address of the "registered owner of the vehicle, "could with reasonable diligence have "been ascertained in time for a summons to be served or for a notice "to be served or sent as aforesaid; "or (2) the accused by his own conduct contributed to the failure; and "(ii) the requirement of this section "shall in every case be deemed to "have been complied with unless and "until the contrary is proved."

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the London Passenger Transport Executive, alleging that on June 10, 1957, on a road in London, S.W.1, he unlawfully drove a motor vehicle without due care and attention contrary to section 12 (1) of the Road Traffic Act, 1930.

At the hearing of the information, after the whole of the evidence for the prosecution had been given. the defendant gave evidence on the question whether section 21 of the Act had been complied with by the prosecutor. On that issue the magistrate found the following facts. The defendant, when driving a London Passenger Transport omnibus at the time, date and place alleged in the information, was involved in a collision with a private motor-car. No personal injury was caused to the driver of either vehicle. A police officer took all appropriate particulars from both drivers and the defendant gave his correct address in London without adding any qualifications thereto. He was not warned at the time that the question of prosecuting him under one or other of the provisions of Part I of the Act relating to reckless, dangerous or careless driving, would be taken into consideration. A summons for the alleged offence was not served on him within fourteen days of the alleged commission of it. On June 20, 1957, a proper notice of intended prosecution within the terms of section 21 of the Act was sent by registered post to the defendant at the address which he had given the police officer at the time of the accident. On June 27 the notice and its envelope were returned to the police by the General Post Office marked " Undelivered for " reason stated " and " No response to 739 " [the postman's number]. The defendant did not in fact receive the notice because he was away from his home on holiday from June 15 to 22. Between those days there was no one in his home so no registered post could be taken in. The prosecutor made no inquiries as to the defendant's whereabouts nor did he consult the London Passenger Transport Executive who, to his knowledge, employed the defendant, and no notice of intended prosecution was served on the Executive as the defendant's employers, who knew that he was away on holiday and would not be returning to work until June 30 but did not know where he was or how to get in touch with him. On July 2, 1957, after the prosecutor had discovered on June 27 that the defendant was away, a police officer saw him at his home and personally served on him a second or duplicate notice and explained to him what had happened to the original notice.

It was contended on behalf of the defendant that the provisions of section 21 of the Act of 1930 had not been complied with in that (a) the second or duplicate notice was out of time and (b) the defendant did not in fact receive the original notice and must accordingly be acquitted. It was contended by the prosecutor that the original notice had been properly sent by registered post in time to the address given by the defendant and that since the police were unaware that the defendant was going on holiday section 21 had been complied with.

The magistrate, being of the opinion on this issue that the contentions of the defendant were correct and that the failure to comply with the requirements of section 21 were not due to any of the matters mentioned in the proviso thereto, dismissed the information.

The prosecutor appealed.

Paul Wrightson for the prosecutor.
Henry Newman for the defendant.

The following cases were cited in argument: *Stewart* v. *Chapman* [2]; *Sandland* v. *Neale* [3]; *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi.* [4]

LORD GODDARD C.J. This is a case stated by Mr. Blundell, one of the metropolitan magistrates, which raises once again this question under section 21 of the Road Traffic Act, 1930, which has frequently given this court trouble. [His Lordship stated the facts, read section 21 of the Act, and continued:] The result of the magistrate's findings was that a notice of intended prosecution was sent to the defendant within 14 days, but it was not delivered.

The question is whether the notice has been "served" on him. Under section 21 it can be "served" by serving it upon him—that is, by personal service—or by serving it by registered post. Since other cases which have been decided in this court, and which I need not consider, the question of service has been considered by the Court of Appeal, it is true with regard to the service of a notice under a section of another Act. The question of service by post is dealt with by section 26 of the Interpretation Act, 1889, which provides: "Where an Act passed after the "commencement of this Act authorizes or requires any document "to be served by post, whether the expression 'serve,' or the "expression 'give,' or 'send' or any other expression is used, "then, unless the contrary intention appears, the service shall "be deemed to be effected by properly addressing, prepaying, and "posting a letter containing the document, and unless the con-"trary is proved to have been effected at the time at which the "letter would be delivered in the ordinary course of post." In *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi,* [1] the Court of Appeal seem to me to have decided that where a notice is served by registered post or is purported to be served by registered post, it is not enough to prove that it was correctly directed, stamped and posted. That is prima facie enough, but it can be shown that the letter was never

[2] [1951] 2 K.B. 792; [1951] 2 T.L.R. 640; [1951] 2 All E.R. 613.
[3] [1956] 1 Q.B. 241; [1955] 3 W.L.R. 689; [1955] 3 All E.R. 571.
[4] [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All E.R. 670.

[1] [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All E.R. 670.

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delivered, and if it was never delivered then the Court of Appeal has said that there has not been service and that section 26 of the Interpretation Act does not assist. It is true that *Reg.* v. *County of London Quarter Sesssions Appeals Committee, Ex parte Rossi,*[1] with which the Court of Appeal was dealing, did not concern the Road Traffic Act, 1930. There it was a question of an appeal to quarter sessions in a bastardy matter, but the substance of the decision applies equally here, because the section which the Court of Appeal was considering was section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, which provides for the giving of various notices, and states: "A notice required by "this subsection to be given to any person may be sent by "post in a registered letter addressed to him at his last or "usual place of abode." In that case the alleged putative father, the man who had been adjudged by the magistrate not to be the putative father, who was the respondent to the mother's appeal, had left the house where he had been living, and a notice was sent to him by registered post at the house which was his last known place of abode. He had gone away, and the letter was not taken in. The Court of Appeal held that there was no notice and reversed the decision of this court which held that there had been a notice. I am bound to say that one of the matters which caused this court to decide that there had been notice was that we thought the man was deliberately evading it, and had taken himself off so that the unfortunate woman could not know where he was. She knew where he ordinarily lived, and she sent the notice there, but it was proved that he had gone away. We thought that section 3 (1) had been complied with, but the Court of Appeal said that that was wrong. It is true that Denning L.J. did say in the course of his judgment[2]: "Evading service would "be a ground for ordering personal service or substituted service, "but not for dispensing with service altogether." With great respect to the Lord Justice, I know there are many rules of the Supreme Court which deal with substituted service of writs or other proceedings. I do not know of any rule in the Magistrates' Courts Act, 1952, or anywhere else which allows for substituted service of notices which have to be given under the Acts which apply in those courts. It may be, in view of the expression of opinion of Denning L.J., that one may go to a court and ask for leave to serve a notice by substituted service. How that can be done in the case of an appeal to quarter sessions I have no knowledge. Is one to apply to the magistrates for leave to serve by substituted service, or to quarter sessions, which is the court which has to try the case, because quarter sessions probably will not be able to sit in time for the application to be made as they only sit so many times a year? I confess that I do not understand how substituted service can be effected, but at any rate there is the decision of the Court of Appeal that a notice sent by registered post but not delivered is not good service, and

[1] [1956] 1 Q.B. 682.

[2] [1956] 1 Q.B. 682, 693.

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I do not see, therefore, that we can possibly hold otherwise in this case without disregarding the Court of Appeal's decision, though technically it may not be binding because it is a criminal cause or matter.

After full argument, it seems to me that we are bound to decide that there has not been service in this case. The question then arises whether the proviso to section 21 is brought into play. [His Lordship read the proviso and continued:] Before the failure to serve can be excused the court has to be satisfied that neither the name nor the address of the defendant nor his employer could be ascertained, because section 21 provides that the notice can be sent by registered post to the person registered as the owner of the vehicle as well as to the actual driver at the time of the commission of the offence; so it seems to me impossible to bring that part of the proviso into play because here the police certainly knew the registered owner of the vehicle, namely, the London Passenger Transport Executive. Of course I quite understand their position. They naturally served the notice on the driver whose name and address they had. It was because the Post Office took some time to return it to them that they had not time then to serve the registered owner, but that is a matter of which the defendant can take advantage. We cannot rewrite the section. It is also said that the defendant by his own conduct contributed to the failure to serve the notice because he had given an address to the police and had not said he was going to be away on a certain day. Whether or not he knew he was going to be away, he at any rate would not know that he was going to be prosecuted. The object of this notice is to tell him that he is to be prosecuted. Still less would he know when the notice was going to be served upon him. I think the words "the accused "by his own conduct contributed to the failure" which appear in the proviso mean whether the accused had done something, such as giving a false address, which prevented the police from serving him.

For these reasons I think that the magistrate came to a correct decision and the appeal fails.

HILBERY J. I am of the same opinion. Section 21 of the Road Traffic Act, 1930, is a section which provides certain restrictions on prosecutions under the preceding section, under which it is the duty of a driver to give his name and address. [His Lordship read section 21, referred to the facts and continued:]

For the reasons given by my Lord, I am of opinion that we cannot hold that there was in this case a sufficient giving of the notice of intended prosecution merely by sending the notice by registered post to the defendant at the address which was his usual address. We are clearly precluded from so doing it seems to me, by the decision of the Court of Appeal in *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi.*[3]

[3] [1956] 1 Q.B. 682.

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I refer particularly to the judgment of Morris L.J. where I think the matter as to which we are precluded is made perfectly clear. After quoting the whole of section 26 of the Interpretation Act, 1889, to which I need not refer again, he refers to the Summary Jurisdiction (Appeals) Act, 1933, and says [4]: "The Act of 1933 "clearly permits or authorizes the giving of a notice as to a "hearing by sending a document by registered post. But if the "primary obligation of giving notice means in this context the "giving of some form of notice which reaches the party interested "so that he may be present or represented at a hearing, then "the permissive user of the post denotes a user so that notice "may reach the party interested so that he may be present or "represented at the hearing. It was therefore entirely proper "to send a notice to Mr. Rossi by registered post. Applying the "provisions of section 26 of the Interpretation Act, since no "contrary intention appears from the Act of 1933, the sending "of the notice to Mr. Rossi was deemed to be effected by "properly addressing, prepaying and posting the letter which "contained the document. Then by the concluding words of "section 26, the sending of the notice was deemed, unless the "contrary was proved, to have been effected at the time at "which the letter would have been delivered in the ordinary "course of post. But here the contrary was proved. It was "proved, not merely that the letter was not delivered in the "ordinary course of post but that the letter was not delivered "at all." For that reason the Lord Justice is saying that there was no compliance with the requirements of the Summary Jurisdiction (Appeals) Act, 1933, that a notice required by section 3 (1) to be given might be sent by post in a registered letter addressed to him at his last or usual place of abode. In those circumstances, it seems to me quite plain that we, too, are bound now to give that interpretation to these words in section 21 of the Road Traffic Act, 1930.

Mr. Wrightson then falls back upon the proviso, but that in my view on its plain language is a proviso which can only be used where there has been a failure to comply with the requirements of section 21 because "neither the name and address of "the accused nor the name and address of the registered owner "of the vehicle, could with reasonable diligence have been ascer-"tained in time for a summons to be served or for a notice to be "served or sent as aforesaid, . . ." Those words relate of course to the provision in section 21 that such a notice may be given to the person who has been driving the car or to the owner of the car and, those alternatives being open, in order to obtain the benefit of the proviso the police must show that neither of those alternatives was open to them by the exercise of reasonable diligence. Here that cannot be shown because by the exercise of less than diligence, since it was a public omnibus owned by the

[4] [1956] 1 Q.B. 682, 697.

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London Passenger Transport Executive, there was no difficulty about serving the notice on the owner.

Finally, Mr. Wrightson relies upon the second part of the proviso, namely, that "the accused by his own conduct contri- "buted to the failure," but here all that is shown is that the driver of the omnibus, the defendant, having given his correct address in the ordinary course of his employment, apparently went away on his annual holiday. He was not to know, because no warning had been given to him, that there might be a prosecution, that the police would be serving on him any such notice as is required by section 21. He was not in any sense taking any action to avoid service, and I think, without stating anything which would be regarded hereafter as binding on the construction of the words in the second part of the proviso, that it is enough to say that in my view at any rate what he did here did not amount to conduct which contributed to the failure of the police to serve on him the notice under section 21 which they wished to serve.

For these reasons I agree with the judgment of my Lord.

DONOVAN J. I agree with both judgments which have been delivered, and have nothing to add.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police; Geoffrey B. Gush & Co.*

E. M. W.

[CHANCERY DIVISION.]

In re TRIFFITT'S SETTLEMENT. HALL *v.* HYDE.

1958
April 14, 15.

Upjohn J.

[1957 H. No. 15.]

Power of Appointment — Hybrid power — Delegation — Power neither special nor general—Power to appointment with consent of trustees and to any person or persons with two named exceptions—Whether capable of delegation.

A marriage settlement made by the plaintiff on July 8, 1953, contained in clause 3 (1) thereof a power of appointment in these terms: "Upon trust for such person or persons other than and "except T. and any wife of his and in such manner generally as "the wife [the plaintiff] shall from time to time or any time by "deed revocable or irrevocable with the consent in writing of the "trustees for the time being hereof . . . which consent such trustees "may withhold or give at their absolute discretion without being "in any way liable for the exercise of such discretion appoint."

The plaintiff, who was now 42, had had no issue and desired to exercise the power by execution of a deed settling certain shares in the marriage settlement of 1953: "Upon trust for . . . [certain

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"defined classes of] beneficiaries or any one or more of them "exclusive of the other or others in such shares and proportions "and subject to such terms limitations and provisions as the "trustees shall from time to time by deed or deeds revocable or "irrevocable execute before the vesting day." The vesting day was defined in the deed as a day to expire at the end of 21 years from the date of the marriage settlement; the trustees were not the same body as the trustees of the marriage settlement.

The plaintiff asked for a declaration that on the true construction of clause 3 (1) she was (subject to the consent of the trustees) entitled to execute the deed. It was not in dispute that the power in clause 3 (1) was a hybrid power, i.e., having some attributes of a general power and some attributes of a special power:—

Held, (1) that although the trust was expressly only "for such "person or persons," it was to be implied that it was to include any trust for such purposes as the plaintiff might appoint.

In re Dilke [1921] 1 Ch. 34; 37 T.L.R. 13, and *In re Phillips* [1931] 1 Ch. 347 applied.

(2) That the trustees could, if they so desired, consent to an appointment in the widest possible terms, and were not under any duty regarding the selection of the objects of the power.

In re Dilke (supra) and *In re Phillips* (supra) applied.

(3) That although the words "in such manner generally as the "wife . . . shall . . . appoint" did not confer any power to delegate her discretion, in a widely drawn power such as this it was to be implied that the plaintiff could delegate the discretionary powers entirely.

(4) That this was not a fiduciary power, but a beneficial power conferred by the plaintiff on herself for her own benefit, and she could (with the consent of the trustees) appoint to any person or persons whom she liked outside the two excluded persons. She was accordingly, entitled to execute the proposed deed.

ADJOURNED SUMMONS.

The plaintiff, Mrs. Nancy Eileen Hall (then Triffitt) on July 8, 1953, executed a marriage settlement; the parties to the deed were the plaintiff (therein referrd to as "the wife") of the first part; her husband, James Edward Hall (therein referred to as "the husband") of the second part, her father, William Triffitt (therein referred to as "Mr. Triffitt") of the third part and the three trustees of the fourth part.

The plaintiff settled certain shares which included 12,000 ordinary shares of £1 each in Cooper, Triffitt & Co. Ltd.; those were now represented by some 60,000 shares in that company. Her father settled 6,000 ordinary shares in Cooper, Triffitt & Co. Ltd., which were now represented by some 30,000 shares in the company, making a total now of 90,000 shares in Cooper, Triffitt & Co. Ltd. It was in respect of those shares that the plaintiff desired to exercise the power of appointment contained in the settlement.

Clause 3 of the settlement was in these terms: "The trustees "shall stand possessed of the said investments mentioned in the "First and Second Schedules hereto respectively and the invest- "ments for the time being representing the same (hereinafter "called 'the trust fund') and of the annual income thereof upon

" the trusts and subject to the powers and provisions following " (that is to say) (1) As to the whole of the trust fund and the " annual income thereof or any part or parts thereof respectively " upon trust for such person or persons other than and except " Mr. Triffitt [the plaintiff's father] and any wife of his and in " such manner generally as the wife [the plaintiff] shall from " time to time or at any time by deed revocable or irrevocable with " the consent in writing of the trustees for the time being hereof " not being less than two in number which consent such trustees " may withhold or give at their absolute discretion without being " in any way liable for the exercise of such discretion appoint. " (2) And in default of and until and subject to any such appoint- " ment upon trust to pay the annual income of the trust fund to " the wife during her life." There followed in sub-clause (2) a power to appoint amongst the children or remoter issue of the marriage in a wide manner which included express authority to delegate the exercise of the discretion to other persons, with the usual trusts for the children in default of appointment. Clause 7 empowered the plaintiff " with the consent in writing of the " trustees " in the same terms as in clause 3 (1) to appoint " to " or in favour of the husband but only in case he survives her " during the residue of his life or any less period all or any part " of the annual income of the trust fund . . ."

The marriage of the plaintiff and her husband took place on July 23, 1953. She was now some 42 years old and so far there had been no issue of the marriage. She was now anxious to exercise the power by a deed, a draft of which was in evidence before the court. The plaintiff was the party of the first part: the trustees of the marriage settlement referred to as " the settle- " ment trustees," were parties of the second part and the parties of the third part were four trustees called the resettlement trustees. Of those four trustees three were different from the marriage settlement trustees, but there was one trustee common to both settlements.

The deed after reciting the settlements defined the trust fund as 90,000 shares in Cooper, Triffitt & Co. Ltd. The deed then defined certain classes of beneficiaries: the primary beneficiaries, who were the children or adopted children, of the plaintiff who might be born or adopted before the vesting day; the secondary beneficiaries were certain nephews of the plaintiff and their issue born or adopted and the respective spouses and widows of such persons existing before the vesting day. The vesting day was defined as a day to expire at the end of 21 years from the date of the marriage settlement. Then the proposed settlement proceeded to settle these shares and investments for the time being representing the same " Upon trust for the primary and secondary " beneficiaries or any one or more of them exclusive of the other " or others in such shares and proportions and subject to such " terms limitations and provisions as the trustees shall from time " to time by deed or deeds revocable or irrevocable execute before

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"the vesting day." There were a number of other trusts, and an ultimate trust in favour of the Royal College of Surgeons.

The plaintiff by this summons asked: (1) Whether upon the true construction of clause 3 (1) of the marriage settlement the plaintiff was entitled (subject to the consent in writing of the trustees of such settlement) to delegate the power of appointment therein contained so as when exercising the same to appoint and direct that the funds thereby dealt with should be held upon discretionary trusts or subject to discretionary powers exercisable by the trustees thereof. (2) In particular whether upon the true construction of the said clause the plaintiff was entitled (subject to such consent as aforesaid) validly to execute a deed of appointment in the terms of the draft which was intended to be exhibited to an affidavit.

R. W. Goff Q.C. and *A. C. Sparrow* for the plaintiff.

M. J. H. Fairbairn for the defendants, the trustees of the settlement and the plaintiff's husband, James Edward Hall.

The following cases not referred to in the judgment were cited in argument: *In re Joicey* [1]; *In re Penrose* [2]; *Eland* v. *Baker* [3]; *In re Mackenzie* [4]; *Ingram* v. *Ingram* [5]; *White* v. *Wilson.* [6]

UPJOHN J. This summons raises an interesting question which may be shortly stated thus. Under a settlement the plaintiff was given a wide power of appointment fettered, however, in this way, that there are two named persons to whom she cannot make an appointment, and any appointment can only be made with the consent of the trustees of the settlement. The plaintiff is anxious to exercise that power of appointment in a way which involves a transfer of property to a new body of trustees and confers upon those trustees wide discretionary powers. The question is whether such an exercise of the power of appointment is within the terms conferred upon her or not.

[His Lordship stated the facts and continued:] The whole question is whether it is proper to confer upon the new trustees the discretion to which I have referred. The trustees of the marriage settlement, who are the first three defendants, have intimated that they will consent to the proposed appointment provided, of course, that it is a proper and valid appointment within the terms of clause 3 (1) of the marriage settlement.

Mr. Goff for the plaintiff concedes at once that the power of appointment contained in clause 3 (1) is not a general power of appointment, using that phrase in its widest sense: that is to say, a power to appoint amongst the whole world unfettered by any consent. Equally, of course, it is not the usual limited power of

[1] [1915] 2 Ch. 115.
[2] [1933] 1 Ch. 793; 49 T.L.R. 285.
[3] (1861) 29 Beav. 137.
[4] [1916] 1 Ch. 125.
[5] (1740) 2 Atk. 88.
[6] (1852) 1 Dr. 298.

appointment where there is a limited class to whom the donee of the power can make the appointment.

Counsel on both sides agree that it is really a hybrid power: it has some of the attributes of a general power and some of the attributes of a special power. The validity of such a power is not in dispute, and has been established in such cases as *In re Park*,[1] *In re Jones*[2] and *In re Harvey, decd.*[3]

I have been referred, quite properly, to a considerable number of authorities. It is not in dispute, although I do not have to decide the question, that, for the purposes of the rule against perpetuities, a power such as I have read must be treated as a special or limited power. That seems to be the effect of *In re Watts*,[4] and *In re Churston Settled Estates*.[5] Equally, for the purposes of section 27 of the Wills Act, 1837, the power would also seem to have the character of a limited power: see *Phillips* v. *Cayley*,[6] and *In re Byron's Settlement*.[7] On the other hand, under the now obsolete Legacy Duty Act, 1796, it would seem that a power in these terms has the character of a general power: see *Platt* v. *Routh*.[8] But, as I have said, I am not concerned with those questions, and I do not decide them.

I have to consider whether there is a power in the plaintiff to delegate the exercise of discretionary powers to others. In my judgment, that is essentially a question of construction of the marriage settlement. The donee of the power can delegate the exercise of discretionary powers to others in two cases: First, where there is a completely general power in its widest sense, that is tantamount to ownership, and, therefore, the donee of the power can exercise it in whatever way he pleases. That is not this case for the reasons which I have already mentioned. In the first place, there are two persons in this world who are excluded from being the objects of the appointment, and, secondly, the appointment can only be made with the consent of the trustees. Mr. Goff very properly concedes that this power cannot be treated as tantamount to ownership. Secondly, the donee may delegate discretionary powers where, as a matter of construction, some power can be spelt out enabling the donee of the power to delegate his discretion. That, of course, is frequently done in the case of special powers, and, as I have already said, it was in fact done by clause 3 (3) of this very marriage settlement. In all other cases the principle "delegatus non potest delegare" applies.

Mr. Fairbairn, for the trustees, submits that properly regarded the power conferred by clause 3 (1) is a power of selection among a limited class, limited perhaps somewhat indefinitely, but, nevertheless, effectively, because there are two people in this world who cannot be included under the power of appointment as objects

[1] [1932] 1 Ch. 580.
[2] [1945] Ch. 105; 61 T.L.R. 120.
[3] [1950] W.N. 112; 66 T.L.R. (Pt. 1) 609; [1950] 1 All E.R. 491.
[4] [1931] 2 Ch. 302.
[5] [1954] Ch. 334; [1954] 2 W.L.R. 386; [1954] 1 All E.R. 725.
[6] (1889) 43 Ch.D. 222; 6 T.L.R. 128.
[7] [1891] 3 Ch. 474.
[8] (1841) 3 Beav. 257.

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of an appointment. He referred me to *In re Byron's Settlement*,[9] where Kekewich J. considered the matter. It was in fact a decision on the Wills Act, 1837, but the following observations seem to me of general application[10]: "Thus regarded, one understands without any difficulty the intention and meaning of the words, 'which he may have power to appoint in any manner 'he may think proper.' Anything less than a power to appoint as he thinks fit is not equivalent to ownership. A power so to appoint, but with an exception, is something less than proprietorship. A man is not any more the proprietor of land or money if he has power to appoint to all the world except to the children of A. than he is if he has power to appoint to the children of B. It is, in either case, a power of selection, not ownership; the appointor cannot deal with the property as he pleases." Mr. Fairbairn submitted that that general principle applies and there is here a power of selection with no express power to delegate the discretion.

There are one or two general observations to be made before I consider the actual terms of the power. The first is that the trust is for such person or persons as may be appointed, and it does not include expressly any trust *for such purposes* as the plaintiff may appoint. It is clear from *In re Dilke*[11] and from *In re Harvey*[12] that those words are readily to be implied in a power such as this. Secondly, that in an ordinary limited power, such as a power to appoint to a class of issue, it is settled that the words "in such manner," namely, as the wife shall appoint, do not confer any power to delegate a discretion. That appears from the recent case of *In re Morris's Settlement Trusts*[13]: but that was a case of an ordinary limited power of appointment.

The next question is this: what is the duty of the trustees in giving consent? Mr. Goff submits the matter is covered by the authority of *In re Dilke*[14] and the later authority of *In re Phillips*,[15] a decision of Maugham J. Those authorities seem to establish that the trustees may, quite properly, if they so desire, consent to an appointment in wide terms and are not under any duty as regards the selection of the objects of the power. Maugham J., in *In re Phillips*,[16] after referring to the *Dilke* case,[17] put the matter in this way[18]: "Stated in other language, their consent was required to the appointment to give validity and effect to the appointment, but there was no reason for holding that they had any duty as regards the selection of the objects of the power." Mr. Fairbairn has submitted that that does not apply here because of the wording at the end of the clause, they are in fact under a duty to consider the selection of

[9] [1891] 3 Ch. 474, 479.
[10] Ibid. 479.
[11] [1921] 1 Ch. 34; 37 T.L.R. 13.
[12] [1950] 1 All E.R. 491.
[13] [1951] W.N. 412; sub nom. *Morris's Settlement Trusts, Re, Adams v. Napier* [1951] 2 All E.R. 528.
[14] [1921] 1 Ch. 34.
[15] [1931] 1 Ch. 347.
[16] Ibid.
[17] [1921] 1 Ch. 34.
[18] [1931] 1 Ch. 347, 355.

the objects of any appointment. The words he relied upon are "which consent such trustees may withhold or give at their absolute discretion without being in any way liable for the exercise of such discretion." I am not able to accept that argument. In my judgment, the matter is covered by the two authorities I have mentioned and, therefore, the trustees properly could (only, of course, if they are so minded) give their consent to an appointment in the widest possible terms. For instance, they could—and this would be closely analogous to the actual facts in *In re Dilke* [19] —give their consent to an appointment by the plaintiff if they thought fit which gave her a general power of appointment in the widest sense. It is quite clear they could, if they were so minded, quite properly consent to an appointment by the plaintiff in favour of herself. They could quite properly, if they were so minded, consent to an appointment to a charitable organization such as the Royal College of Surgeons.

One other matter has been argued before me which I must consider. It was submitted by Mr. Fairbairn that the power conferred upon the plaintiff is in fact a fiduciary power. The ambit of a fiduciary power has recently been considered in the Court of Appeal in *In re Greaves*.[20] That case in fact related to a release of powers, but the Master of the Rolls made some useful observations on this question of fiduciary power and what constitutes a fraud upon it. He quoted with approval the language of Chitty J. in *In re Somes* [21]: "'There is no duty "'imposed on the donee of a limited power to make an appoint-"'ment; there is no fiduciary relationship between him and the "'objects of the power beyond this, that if he does exercise the "'power of appointment, he must exercise it honestly for the "'benefit of an object or the objects of the power, and not "'corruptly for his own personal benefit.'" Then he considers the release of the powers.

That language cannot be made to fit this power. The plaintiff can appoint to anyone in the world (including herself) except the two persons named, for any purpose, providing that she could obtain the consent of the trustees. This is not a fiduciary power at all but a power conferred by the plaintiff on herself for her own benefit.

I must consider next the words of this power. It is couched in the ordinary terms of a general power. I have already pointed out that the plaintiff can appoint for any purpose including a charitable purpose or to any charitable organization. If she appointed to a charitable purpose rather than an existing charitable entity, it would seem extraordinary if she had no power to delegate the exercise of the discretionary power to the persons she appoints as charitable trustees. It seems to me quite plain that she can appoint a new body of trustees as she was anxious

[19] [1921] 1 Ch. 34.

[20] [1954] Ch. 434, 441; [1954] 2 W.L.R. 557; [1954] 1 All E.R. 771.

[21] [1896] 1 Ch. 250, 255; 12 T.L.R. 152.

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to do providing, of course, that those trustees do not include Mr. Triffitt or any wife of his. Otherwise she has a complete and unfettered power, subject, of course, to consent, to appoint anyone, and that includes power to appoint persons as trustees for whatever objects or purposes she desires. In my judgment, in a widely drawn power such as this, it is to be implied in the power that the plaintiff can delegate the exercise of discretionary powers entirely. As I have said already, it is a beneficial power conferred upon her for her own benefit. She can with consent appoint to any person or persons she likes outside the two prohibited persons, and it would be quite wrong to put any fetter upon her powers. Such a power is inherent in the words contained in sub-clause (1) of clause 3. Accordingly, in my view, the deed she is anxious to execute is a proper exercise by her of the power conferred by clause 3 (1).

I have considered whether I ought to make any declaration, but, having heard argument upon it, I am satisfied that this is not a future or hypothetical question; the plaintiff is anxious to execute this document which is in draft, and I have no doubt will now at once do so. I think, therefore, that it is proper for me to make a declaration that she may validly do so.

I do not propose to answer question 1 of the summons because that goes outside what she is proposing to do, but I shall answer question 2 by stating that she is entitled, subject to consent, validly to execute the deed of appointment in the terms of the draft.

Declaration accordingly.

Solicitors: *Bell, Brodrick & Gray for Weatherhead G. Butcher, Bingley.*

I. G. R. M.

[PROBATE, ETC., DIVISION.]

1958
April 23.

HUGHES *v.* HUGHES.

Wrangham J.

Solicitor—Costs—Lien—Divorce—Whether absolute lien in divorce suit. Husband and Wife—Divorce—Public interest in—Solicitor's lien for costs.

A petitioner in divorce proceedings discharged his solicitors and instructed a second solicitor who obtained the papers in the suit from the first solicitor subject to his undertaking to respect their lien for costs. The petitioner subsequently discharged the second solicitor and intructed his present solicitors. On the application of the petitioner the registrar made an order that the second solicitor should deliver up the papers to the petitioner or his present solicitors within 14 days on the undertaking of the present solicitors to respect the lien of the first and the second solicitor. From this order the second solicitor appealed:—

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Held, that, since a divorce suit involved questions of status, it was, of its very nature, a proceeding in which persons other than the petitioner were interested and, moreover, one in the full and complete investigation of which the public had an overriding interest; and that the assertion by the second solicitor of an absolute right to refuse to deliver up material papers in the divorce suit pending the payment of his costs was liable to cause embarrassment to persons other than the petitioner and could not be maintained; the application must be dismissed.

In re Boughton (1883) 23 Ch.D. 169, *Boden* v. *Hensby* [1892] 1 Ch. 101 and *Dessau* v. *Peters, Rushton & Co. Ltd.* [1922] 1 Ch. 1 applied.

APPEAL from decision of Registrar.

On October 10, 1956, the petitioner presented a petition alleging desertion by his wife. He became dissatisfied with the solicitors who then acted for him and discharged them on December 11, 1957. They handed over the papers to a second solicitor subject to his respecting their lien for costs: it was not clear whether this arrangement was made by word of mouth or in writing. On March 26, 1958, the petitioner discharged the second solicitor. On March 31, 1958, Mr. Registrar Compton Miller made an order directing the second solicitor to deliver the papers in his possession to the petitioner or his present solicitors within 14 days on the undertaking of those solicitors to respect the lien of the first firm of solicitors and of the second solicitor. Against that order the second solicitor appealed, contending that he had a lien upon the papers for his costs which he was entitled to assert without qualification. The matter was argued in chambers and adjourned into open court for judgment.

S. E. Brodie for the second solicitor.

A. M. Ryan for the petitioner.

WRANGHAM J. referred to the facts and continued: The general rule is that a solicitor, who is discharged by his client during an action (otherwise than for misconduct), can retain any papers in the cause in his possession until his costs have been paid: *In re Rapid Road Transit Co.*[1] That rule, however, is subject to this qualification, that this absolute lien can not be asserted where the cause is one in which other parties are interested, and where those other parties would be embarrassed by the assertion of such a lien. In such a case the solicitor must deliver up the papers subject to his lien, that is to say, subject to his right to have the papers returned to him at the conclusion of the proceedings for which they are needed, and to such undertakings as may be required to make his lien effective against his former client: *In re Boughton.*[2] This qualification has been applied in the case of a partition action: *Boden* v. *Hensby*,[3] and an action for the dissolution of a

[1] [1909] 1 Ch. 96.
[2] (1883) 23 Ch.D. 169.
[3] [1892] 1 Ch. 101.

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partnership: *Dessau* v. *Peters, Rushton & Co. Ltd.*[4] The question now arises whether a petition for divorce should be regarded as a matter in which parties other than the petitioner are interested, and one in which the withholding of relevant documents might embarrass those parties, or as being analogous to a civil action in which the plaintiff alone has a beneficial interest; in the latter case, as Sargant J. pointed out in *Dessau* v. *Peters, Rushton & Co. Ltd.*[5] the plaintiff's previous solicitor would be entitled to enforce an absolute lien, however much it might embarrass the plaintiff, whereas in the former case only the qualified lien could be asserted.

In my judgment a petition for divorce can never properly be described as a matter in which the petitioner alone is interested. Divorce affects status, the status not merely of the petitioner, but of one or more other parties. In many petitions (though not in this one) the interests of children of the marriage are concerned; and it would be odd if the right of a solicitor in a divorce case to assert an unqualified lien depended upon the question whether or not there were children of the marriage in issue. A respondent may have an interest in a divorce petition of quite a different character to that of a defendant in a civil action; for there are many respondents whose welfare depends very much upon the success of uncontested petitions. That does not, indeed, apply to this particular case, where the respondent denies the petitioner's charge of desertion and has presented a cross-prayer based on desertion by him; but it is none the less, I think, a potent argument to show that a divorce petition is, by its very nature, a proceeding in which others than the petitioner are interested. Finally, there is an overriding public interest in a full and complete investigation of the facts of any divorce case. Divorce cases can not be disposed of by agreement, like civil litigation: the Matrimonial Causes Act, 1950,[6] imposes upon the court a duty to inquire into matters and to refuse to grant decrees unless satisfied of certain facts, irrespective of the wishes of the parties; and there is provision for the intervention in divorce proceedings, in certain circumstances, of the Queen's Proctor, representing the public, and indeed of any individual member of the public. It seems to me that the assertion of an absolute right to refuse to deliver up material papers must be calculated to embarrass that full investigation of the matter which the public interest requires in divorce proceedings. I, therefore, hold that the second solicitor does not possess the absolute lien which he claims and that the order of Mr. Registrar Compton Miller, which gave effect to his qualified lien, was correct.

There remains a subsidiary question upon that part of the registrar's order which directed that the second solicitor be relieved from his undertaking to the first firm of solicitors.

[4] [1922] 1 Ch. 1.
[5] Ibid. p. 4.
[6] Section 4.

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It is contended that the second solicitor personally undertook to pay the costs of that firm, and that the registrar had no jurisdiction to deal with that undertaking. In my opinion the second solicitor did no more, in his transaction with the first firm of solicitors, than to undertake to do everything to make their lien for costs effective against the petitioner; and if he complies with the registrar's order he will be fulfilling that undertaking. I am disposed to think that that part of the registrar's order which in terms relieves the second solicitor from his undertaking is mere surplusage, the true view being that the undertaking has been fully complied with; but the point appears to be of no practical importance. The application will therefore be dismissed.

Order accordingly.

Solicitors: *Edward S. Isaacs; Adams & Co.*

E. J.

[COURT OF APPEAL.]

HILLIER *v.* HILLIER AND LATHAM.

C. A.

1958 *April* 24.

Hodson, Romer and Sellers L.JJ.

Husband and Wife—Divorce—Expedition—Exceptional hardship—Subjective approach in exercise of court's discretion—Pregnancy of wife by adultery—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2 (1), (2) *and* (3).

The parties were married in March, 1956. Eight months afterwards the wife left the husband and never returned to him. Three months later she went for treatment into a rehabilitation centre where she met a man with whom she committed adultery and was now living. As a result, as it was agreed between the parties, she became pregnant and the birth of the child was expected on about May 5, 1958. The husband, a man of nervous temperament, suffered a nervous breakdown which seriously affected his work and prospect of promotion. Having been advised by his doctor that a continuance of the worry and distress caused by his domestic troubles would inevitably result in further serious deterioration of health, he applied under section 2 of Matrimonial Causes Act, 1950,[1] for leave

[1] Matrimonial Causes Act, 1950, s. 2 (1): "No petition for divorce "shall be presented to the court "unless at the date of the presentation of the petition three years have "passed since the date of the marriage: Provided that a judge of the "court may, upon application being "made to him in accordance with "rules of court, allow a petition to be "presented before three years have "passed on the ground that the case "is one of exceptional hardship "suffered by the petitioner or of exceptional depravity on the part of "the respondent . . ."

Subs. (2): "In determining any "application under this section for "leave to present a petition before the "expiration of three years from the "date of the marriage, the judge "shall have regard to the interests of "any children of the marriage and to "the question whether there is reasonable probability of a reconciliation "between the parties before the "expiration of the said three years."

Subs. (3): "Nothing in this section shall be deemed to prohibit the "presentation of a petition based upon matters which have occurred "before the expiration of three years "from the date of the marriage."

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the marriage does not seem to me to assist, because looking at the realities of this matter this child is agreed to be not a child of the marriage, and it is on both sides agreed that the child is in reality the child of the wife by this man Latham, with whom she has committed adultery. It is pointed out that if the child is born before Latham marries the respondent, as he says he intends to do, the child cannot be legitimated by subsequent marriage. But, of course, if the child is born when Latham and the woman are free to marry and do marry, the child will be regarded prima facie as the child of that marriage.

But there is an element in this case which I think the court is entitled to look at as showing that the husband has suffered exceptional hardship. The judge did pay some regard to the breakdown in health which the husband has suffered after November, 1956, when his wife left him, before she had actually met this other man: but he disregarded it, or paid little attention to it, because he thought it was scarcely relevant having regard to the fact that the man who has caused the trouble in this case did not come on the scene until afterwards. But in this court we have allowed further evidence to be given as to the suffering which the husband has had following upon, not only his wife leaving him, but her throwing in her lot with this other man; and from that further evidence it appears that he has suffered to a perhaps unusual extent from the nervous anxiety which this domestic situation has caused him. He has been unable to concentrate on his work—which is that of a supervising clerk—and he failed in his attempt to be accepted as a candidate for a departmental training scheme at a time when he was quite unable to concentrate on or do justice to his work. He has suffered, and is still suffering, from sleeplessness and anxiety caused by the domestic situation in which he finds himself, and he has consulted a medical man who has prescribed sedatives and advised him that, if he continues to worry, his health must inevitably suffer.

I think that the court is entitled to look at the effect on this particular husband of the situation which has developed in considering the question of exceptional hardship, and not merely to confine itself to an objective view as to how the ordinary man might be expected to react in given circumstances. I have said that I do not base my judgment on any question of the interests of the child, although reference was made to a passage in the judgment of Denning L.J. in *Bowman* v. *Bowman* [1] where, in giving instances in which he had himself exercised his discretion at first instance, the Lord Justice refers to the case of a wife as the result of adultery having a child by another man so that the husband, if he took her back, would have to maintain another man's child. That situation, of course, is not the situation which is contemplated in this case. Here, so far as the evidence goes, there is no likelihood of the husband, if this application is rejected, being expected to take his wife back and legitimize the

[1] [1949] P. 353; 65 T.L.R. 461; [1949] 2 All E.R. 127.

child. The facts of the case are that the other man and the wife are living together, and that it is not contemplated that the woman should return to her husband bringing the child with her. Therefore, the only real ground upon which I can see my way to saying that this is a case of exceptional hardship is the case which has been put forward in this court, and indeed supported by quite different evidence from that given in the court below, namely, a case in which exceptional hardship has been caused to the husband by reason of the suffering in his health which he has endured, and it is for those reasons that I would allow this appeal.

ROMER L.J. I agree, and for the same reasons which my Lord has mentioned. The reasons for the view that this appeal should be allowed to my mind are founded principally on evidence which was not before the judge, consisting of a further affidavit of the husband. He relies on the exceptional hardship provision in section 2 of the Act of 1950—that the case is one of exceptional hardship suffered by the petitioner. Those words presumably include hardship suffered in the past by the would-be petitioner, but I think myself that they are directed to a considerable extent, if not primarily, to the possibility or probability of exceptional hardship being suffered in the future by the petitioner if he has to wait the full period of three years before he can present his petition, which in this case would be nearly one more year, the marriage having taken place in March, 1956.

The husband, as the evidence quite obviously shows, experienced in the past worry and strain to a degree which may fairly be described as exceptional, resulting as it did at the end of 1956, I think, in a nervous breakdown. That trouble was quite plainly brought about by his wife's treatment of him, her desertion and vacillation as to whether to return to him or not, her confession that she had a lover, and her later confession as to her pregnancy. All those elements, lasting as they did over quite a period of time, built up a position which resulted in the husband being subjected to and experiencing a very considerable degree of nervous tension.

That being the position in the past, we have now before us an affidavit which has been sworn since the matter was before the judge, in which the husband says that he has consulted his doctor, who advised him that if he continues to worry in the way he has been worrying in the past his health must inevitably suffer further; and that, of course, is highly relevant to what is, in my opinion, perhaps the primary purpose, or the position which was primarily envisaged by the section, namely, the effect that having to wait for the full three years would have upon the would-be petitioner; and in this case the position is that it would inevitably result in a further deterioration in his nervous condition.

I agree with my Lord that one should approach each case subjectively, and whatever the position might be in relation to what might in other connexions be described as the ordinary reasonable man, if one finds a man who is of a particularly

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nervous or highly-strung disposition, and further delay may have a serious effect upon him, then it may fairly be said of him that it would be exceptional hardship in his case to compel him to delay and hold up his petition for the full three years, especially if one couples it, as one does in this case, with his experiences in the past. In addition to all that, it is perfectly plain here that there is no prospect of reconciliation between these two parties, a matter to which Denning L.J. adverted in his judgment in *Bowman* v. *Bowman* [1] to which my Lord has referred.

For those reasons, based as they are on the husband's health and on nothing else, as far as I am concerned, I think he has made out a case.

But in conclusion I would associate myself with what my Lord has said; and I agree with the judge in this: I cannot think that the mere fact that conception follows upon an act of adultery in the first three years of the marriage constitutes in itself exceptional hardship for the purpose of section 2 of the Act. I would allow the appeal.

SELLERS L.J. I so entirely agree with the reasons given by both my Lords that I desire to add none of my own.

Appeal allowed.

Solicitors: *H. E. Thomas & Co.; Webster, Butcher & Johnson.*

A. W. G.

[1] [1949] P. 353.

[PROBATE, ETC., DIVISION.]

1958
April 30.
Wrangham J.

ANDREWS *v.* ANDREWS AND SULLIVAN AND SULLIVAN.

Infant—Ward of court—Jurisdiction—Divorce Division.

In October, 1957, a father obtained an order in the Divorce Division for the custody of the two children of himself and his divorced wife. On April 15, 1958, the mother made an application to the Chancery Division, the effect of which was that the children automatically became wards of court. Nine days later the father issued a summons in the Divorce Division asking for leave to take the children permanently out of the jurisdiction. At the hearing of the father's summons on April 29, 1958, the mother opposed the application, first, on the ground that, in the circumstances, the Divorce Division had no jurisdiction to entertain the matter and, secondly, on the merits:—

Held, that since the powers of the Divorce Division were less extensive than those possessed by the Chancery Division over wards of court, the former were superseded by the latter; the Chancery Division had, moreover, on the mother making her application,

become, in effect, the guardian of the wards of court, and it was, therefore, that division only which could give leave for them to go out of the jurisdiction or otherwise control their persons or property. It followed that the Divorce Division ought not to entertain the father's application which must, therefore, be dismissed.

Hyde v. *Hyde* (1888) 13 P.D. 166; 4 T.L.R. 586, and *In re E.* (*An Infant*) [1956] Ch. 23; [1955] 3 W.L.R. 493; [1955] 3 All E.R. 174 applied.

Manders v. *Manders* (1890) 7 T.L.R. 149 distinguished.

SUMMONS for leave to take children out of the jurisdiction.

On October 25, 1957, a decree nisi for dissolution of the marriage of the parties was pronounced, the custody of the two children being granted to the father, who was the petitioner, and the decree was made absolute on February 12, 1958. On April 15, 1958, the mother applied to the Chancery Division for an order that the infants be made wards of court. On April 24, 1958, the father made an application to the Probate, Divorce & Admiralty Division that he should be at liberty to take the two infant children of the marriage to reside permanently in Auckland, New Zealand. The mother opposed the application; first, upon the ground that, in the circumstances, the Divorce Division had no jurisdiction which it could or should exercise, and, secondly, upon the merits. The matter was argued in chambers and adjourned into open court for judgment.

John B. Latey Q.C., *Victor Williams* and *J. C. J. Tatham* for the father.

Sir Frank Soskice Q.C. and *C. D. Ellison Rich* for the mother.

WRANGHAM J. referred to the facts and the provisions of section 9 (2) of the Law Reform (Miscellaneous Provisions) Act, 1949,[1] and R.S.C., Ord. 54P, r. 3,[2] and continued: When the father issued his summons in this Division nine days after the mother's originating summons in the Chancery Division and also when it was heard by me five days later, the children were both wards of court. The question, therefore, arises whether this Division can or ought to make such an order as is here applied for in the case of infants who are wards of court.

The jurisdiction of this Division to make such an order is

[1] Law Reform (Miscellaneous Provisions) Act, 1949, s. 9: "(1) Subject to the provisions of this section, no infant shall be made a ward of court except by virtue of an order to that effect made by the court. (2) Where application is made for such an order in respect of an infant, the infant shall become a ward of court on the making of the application, but shall cease to be a ward of court at the expiration of such period as may be prescribed by rules of court unless within that period an order has been made in accordance with the application."

[2] R.S.C., Ord. 54P, r. 3: "Unless within 21 days after its issue an appointment is obtained for the hearing of the summons the infant shall cease to be a ward of court at the expiration of the said period of 21 days. Upon an appointment being obtained as aforesaid the infant shall continue to be a ward of court until the determination of the application."

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Wrangham J.

derived from section 26 (1) of the Matrimonial Causes Act, 1950,[3] which re-enacted section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. That section empowers the court to make such provision as appears just with regard to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court. This last phrase clearly means proceedings to make the children wards of court, in which event the Chancery Division, to which the wardship of the infants is specifically assigned by section 56 (1) (*b*) of the Supreme Court of Judicature (Consolidation) Act, 1925, would have power to control their persons and property including, for instance, the power to give or refuse leave to them to quit the jurisdiction. It seems obvious that the section contemplates that an infant who has been made a ward of court of the Chancery Division, as a result of proceedings directed by this Division, shall no longer be subject to the control of this Division. It would be absurd if, in such a case, a person wishing to take an infant abroad had to apply for leave to both Divisions, who might, indeed, take contrary views upon the merits of the application. But of course it does not follow from this that this Division cannot or should not exercise its jurisdiction over infants who have become wards of court without its direction because it could be argued that, by making such a direction, this Division impliedly abdicated in favour of the Chancery Division or delegated its powers thereto. I was told by Mr. Latey that, in practice, where an infant was subject to the control of one Division, as a ward of court, and the other Division, under section 26 (1) of the Matrimonial Causes Act, 1950, either Division exercised jurisdiction upon any matter on which it was seized before the other. Logically this seems to me to be indefensible. If an infant subject to the control of this Division under section 26 (1) becomes a ward of court one of three positions, as I think, is created; either the infant is subject to both courts so that upon a proposal to take him abroad leave must be asked of both Divisions, or the jurisdiction of the Chancery Division supersedes that of this Division, or the converse occurs. In my opinion the true view is that the jurisdiction of the Chancery Division supersedes that of this Division.

The jurisdiction of this Division was originally conferred upon the Divorce Court by section 35 of the Matrimonial Causes Act, 1857, which was in somewhat similar terms to section 26 (1) of the 1950 Act, save that there was a specific reference to the

[3] Matrimonial Causes Act, 1950, s. 26 (1): "In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court."

Court of Chancery as the court of protection of children. Thirty-one years later the Court of Appeal had to consider, in *Hyde* v. *Hyde*,[4] whether the Divorce Division had, under section 35, powers in relation to infants as full as those possessed by the old Court of Chancery. They held that it had not. Cotton L.J. said[5]: "... the 35th section of the Divorce Act does not enable "the court by its order to make the infants wards of the Divorce "Division ..." Bowen L.J. said[6]: "... the Divorce Division "has no wards of court ..." and Fry L.J. said[7]: "I think that "the section itself shews it was not intended by the legislature to "clothe the Court of Probate with as wide a jurisdiction as the "Court of Chancery had in respect of infants, because it enables "the Court of Divorce and Matrimonial Causes, if it see fit, to "direct proceedings to be taken for placing the children under the "protection of the Court of Chancery." If, then, the powers of this division over infants are less extensive than those possessed by the Chancery Division over wards of court, it seems likely that when the latter come into existence, they supersede the former. There is, however, another aspect of the matter. The Chancery Division is, in effect, the guardian of a ward of court either by itself or by any guardian appointed by it (see *In re E.* (*An Infant*)[8]). It cannot, therefore, be right for any other court to issue orders or directions about the control of the person of an infant who is in the custody, or what amounts to the custody, of the Chancery Division. No statute or rule draws any distinction between the position of an infant who has a guardian appointed by the Chancery Division and an infant, such as the children in this case, for whom no such guardian has been appointed; indeed, it is clear from *In re E.* (*An Infant*),[8] cited above, that no such distinction can exist.

Mr. Latey relied on *Manders* v. *Manders*.[9] In that case the decree nisi had been pronounced giving custody of a child to her father. The mother applied, by originating summons under the Guardianship of Infants Act, 1886, to the Chancery Division for access, but Stirling J. refused the application on the ground that it ought to have been made to the Divorce Court. In my view, that case is distinguishable on the ground that the jurisdiction of the court under the Guardianship of Infants Acts is less extensive than that possessed by the Chancery Division over wards of court: see *In re E.* (*An Infant*).[10] There was in *Manders* v. *Manders*[11] no question of the Chancery Division being, in any sense, the guardian of the child; the jurisdiction under the Guardianship of Infants Acts being in no way superior to or more extensive than the jurisdiction of the Divorce Court, there was no reason for the latter to give way to the former.

[4] (1888) 13 P.D. 166; 4 T.L.R. 586.
[5] 13 P.D. 166, 174.
[6] Ibid. 176.
[7] Ibid. 178.
[8] [1956] Ch. 23; [1955] 3 W.L.R. 493; [1955] 3 All E.R. 174.
[9] (1890) 7 T.L.R. 149.
[10] [1956] Ch. 23.
[11] (1890) 7 T.L.R. 149.

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In my judgment the children in this case became, on April 15, 1958, and still are, wards of court and as such are in the custody of the Chancery Division. The Chancery Division is their guardian and it is only their guardian who can give leave for them to go out of the jurisdiction or otherwise control their persons and property. It follows that I decline to exercise jurisdiction and dismiss this application accordingly.

Order accordingly.

Solicitors: *Boxall & Boxall; Wegg-Prosser & Co.*

E. J.

[CHANCERY DIVISION.]

1958
May 1, 6, 7, 8.

Upjohn J.

In re ANDREWS (INFANTS).
SULLIVAN *v.* ANDREWS.

[1958 A. No. 751.]

Infant—Ward of court—Jurisdiction—Custody order by Divorce Division—Children subsequently made wards of court—Whether conflict of jurisdiction—Principles applicable—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 100), *s.* 9.

The custody of two infant children on the dissolution of the marriage of their parents was awarded to the father with access to the mother. When she realized that the father was planning to take the children to New Zealand she had them made wards of court. The father then applied in the Divorce Division for leave to take the children to New Zealand, which was refused on the ground that the children having become wards of court, the jurisdiction of the Chancery Division superseded that of the Divorce Division (ante, p. 942). When the matter came before the judge in the Chancery Division he refused to grant the father permission to take the children to New Zealand.

Per curiam. The exercise by the judges of the Divorce Division of their statutory powers could not in any way fetter the powers of the Chancery Division exercising the jurisdiction of the Crown as parens patriae over wards of court.

Where an infant was subject to an order of the Divorce Division, and was also a ward of court:—

(1) Where it was made a ward of court before any order of a judge of the Divorce Division, it was universally accepted, probably as a matter of law, but certainly as a matter of comity between judges, that no order would be made by a judge of the Divorce Division with regard to its custody, care or control, but it would be left with the judge dealing with the wardship proceedings.

(2) Where a judge of the Divorce Division made such an order before an infant had become a ward of the court, and the infant was thereafter made a ward of court by the issue of a summons in the Chancery Division, the judge of the Chancery Division before whom the matter was brought, exercising that comity mentioned, would normally refuse to consider an application on its merits, but would leave it to the judge of the Divorce Division, and, to avoid

any difficulty of jurisdiction, would de-ward the infant under the powers conferred by the Law Reform (Miscellaneous Provisions) Act, 1949.[1] That, however, did not apply where the order of the judge of the Divorce Division was made without any determination on the merits; for example, where an order for custody followed almost as a matter of course in an undefended divorce petition, or where, as in this case, the order was made by consent.

(3) Even where there had been an earlier investigation into the merits by a Divorce judge it might become necessary for the Chancery judge, in the exercise of his undoubted discretion, to entertain applications relating to infants who had been the subject-matter of orders as to custody, care and control in the Divorce Division.

ORIGINATING SUMMONS under the Law Reform (Miscellaneous Provisions) Act, 1949.

This summons, which was heard in camera, was adjourned into open court for judgment on the question of the respective jurisdictions of the Divorce and Chancery Divisions in respect of the custody of infants.

Two infant children, whose custody was awarded to their father on the dissolution of his marriage with their mother, were subsequently made wards of court by the mother, who feared that their father was intending to take them to New Zealand. The father's application for permission to take them to New Zealand was refused by Wrangham J. on April 30, 1958,[2] on the ground that the infants having been made wards of court some nine days previously the jurisdiction of the Chancery Division superseded that of the Divorce Division. An appeal from the decision of Wrangham J. was adjourned by the Court of Appeal on May 5, 1958,[3] pending the hearing of this summons before Upjohn J.

Sir Frank Soskice Q.C. and *C. D. Ellison Rich* for the mother.
R. W. Goff Q.C. and *John Mills* for the father.

No cases were cited on and no argument was directed to the question of jurisdiction.

UPJOHN J. I have just delivered in camera judgment in this case, but having regard to the course which the case has taken in another division of this court and in the Court of Appeal, I think it proper to make a few observations upon it in open court.

I must mention a few essential facts. The parties were

[1] Law Reform (Miscellaneous Provisions) Act, 1949, s. 9. "(1) Subject "to the provisions of this section no "infant shall be made a ward of "court except by virtue of an order "to that effect made by the court. "(2) Where application is made for "such an order in respect of an "infant, the infant shall become a "ward of court on the making of the "application, but shall cease to be a "ward of court at the expiration of "such period as may be prescribed by "rules of court unless within that "period an order has been made in "accordance with the application. "(3) The court may, either upon an "application in that behalf or with-"out such an application, order that "any infant who is for the time "being a ward of court shall cease to "be a ward of court."

[2] Ante, p. 942.

[3] *The Times*, May 6, 1958.

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married in 1944. There were two daughters of the marriage, Deirdre, now nearly eleven, and Caroline, just over six. The mother left the father for another man, one Sullivan, in 1956, and the father began divorce proceedings against his wife, the mother, in December, 1956, on the ground of his wife's adultery. That came on for hearing before Mr. Commissioner Bush James on October 25, 1957, being undefended except as to custody and damages to be paid by the co-respondent, Sullivan. The commissioner made a decree nisi, and, by consent, ordered that the custody of the infant daughters should be the father's until further order. The order provided for access by the mother on every alternate Sunday and contained the usual prohibition against removing the infants out of the jurisdiction of the court.

The mother married the co-respondent in April of this year. On April 15 the mother, for the reasons with which I have dealt fully in the judgment I have delivered, and being a shrewd woman, became suspicious that the father was about to remove the children from the jurisdiction without the leave of the court. On that day she issued an originating summons in the Chancery Division which made the infants wards of court. Her suspicions were fully justified. The husband had long planned a voyage with his children to New Zealand, and I have but little doubt that if it had not been for his wife's astuteness he would have disappeared with the children without a trace. However, the issue of the originating summons put an end to that. His solicitors had not previously been consulted, and of course when they became aware of their client's intentions they drew his attention, very properly, to the fact that it would be necessary for him to obtain the leave of the Divorce Division to take them out of the jurisdiction, and on April 22 they began proceedings for that purpose.

I may say (and I propose to say no more about the facts) that having been into the merits, the husband's application to take the children out of the jurisdiction permanently and take them to New Zealand was not, in my opinion, a proper application at all. For example, he swore that he had a salaried position to go to. In fact he had no such thing. That circumstance, however, formed by no means the only ground for reaching my decision. However, the divorce summons came before Wrangham J. on April 30, who decided that as the children had become wards of court he had no jurisdiction to entertain an application. That same day an appeal from that decision was brought before the Court of Appeal,[1] who gave leave to advance the hearing having regard to the obvious urgency of the matter. The next day the husband's advisers applied to the Chancery master dealing with the Chancery summons which had been issued by the mother, and applied to de-ward the infants in pursuance of the powers conferred by section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949 in order that the Divorce Division might consider

[1] *The Times*, May 1, 1958.

the husband's application unfettered. That application was adjourned and came before me on May 6. I have since heard the matter for nearly three days. I have read a large number of affidavits and heard a great deal of cross-examination, with the result that the order which I have made is that the father's application is refused and the children remain wards of court.

I think that it is desirable to state why I have taken this course, for at first sight there might appear to be some conflict of jurisdiction, or at any rate some competition of jurisdiction, in the question of the custody, care and control of infants between the two divisions of this court. In my opinion, however, there is no such conflict or competition. The decision by Wrangham J. is under appeal, and it would be impertinent of me to express any views upon it. In any event, I am not exercising any jurisdiction conferred upon the judges of the Divorce Division with which alone his judgment was concerned.

One thing is clear: that an exercise by the judges of the Divorce Division of their statutory powers cannot in any way fetter the powers of the Chancery Division exercising the jurisdiction of the Crown as parens patriae over wards of court. That, however, does not conclude the matter, for the judges of both divisions are judges of the High Court, and by a natural comity of judges of that court no judge desires to trespass or even appear to trespass upon a matter of which another judge is rightly and proper seized in the exercise of his jurisdiction. This seems to me an appropriate time to state, as I understand it, the principles upon which the judges of the High Court habitually act in this delicate and often overlapping jurisdiction with regard to the custody, care and control of infants who are subject to an order of the Divorce Division and who are also wards of court.

First, where an infant is made a ward of court before any order of a judge of the Divorce Division, it is, I think, universally accepted, probably as a matter of law, but certainly as a matter of comity between judges, that no order will be made by a judge of the Divorce Division, but it will be left with the judge dealing with the wardship proceedings, for the reason that, unlike judges of the Divorce Division, a judge of this division nearly always retains each infancy matter that comes before him under his own particular and personal control.

Secondly, where a judge of the Divorce Division makes an order as to custody, care or control before an infant has become a ward of court and the infant is thereafter made a ward of court by the issue of a summons for that purpose in the Chancery Division, the judge of the Chancery Division before whom the matter is brought, exercising that comity I have mentioned, will normally refuse to consider an application on its merits, but will leave it to the judge of the Divorce Division, and, to avoid any difficulty of jurisdiction in that Division, will de-ward the infant under the powers conferred by the Act of 1949. That, however,

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does not apply where the order of the judge of the Divorce Division is made without any determination on the merits; for example, where an order for custody follows almost as a matter of course in an undefended divorce petition, or where, as in this case, the order is made by consent. In such cases comity between the judges does not seem to demand such respect as will preclude investigation of the merits by a judge of the Chancery Division where there has been none by the Divorce judge.

Thirdly, even where there has been an earlier investigation into the merits by a Divorce judge, it may become necessary for the Chancery judge, in exercise of his undoubted discretion, to entertain applications relating to infants who have been the subject-matter of orders as to custody, care and control in the Divorce Division, at any rate where there has been a change of circumstances since the order of the Divorce Division, or some wholly new question arises.

It is impossible to attempt any classification of such cases, but I may usefully give one or two examples. As Wrangham J. fully recognized in his judgment last week, the jurisdiction of the Chancery Division over wards is, in certain circumstances, fuller and more complete, and it may be essential in the interests of the infants that, notwithstanding the order of the Divorce Division, even after a hearing on the merits, that wardship jurisdiction should be exercised. This very case provides a striking example. I have already stated that the wife was fully justified in thinking that her husband was going secretly to remove the children from the jurisdiction. By making them wards in Chancery and informing the Home Office, as her advisers did, automatically no air or sea port will permit them to depart.

At my request counsel have made inquiry as to the procedure available on the making of a decree and order for custody in the Divorce Division. I understand that no such automatic prohibition against departure is available, although possibly, after application, orders can be obtained, or protection can be obtained, in certain cases. But in the meantime valuable hours, or even days, may have been lost. That is one example where it seems to me that this Division must step in. The wife in this case was abundantly justified in issuing her summons, and, being so justified, it must necessarily become the duty of the judge of the Chancery Division to inquire into the merits, even had there been some earlier investigation into questions of custody, care and control by a judge of the Divorce Division.

Another example is where questions of education arise. That is sometimes more conveniently dealt with in this division than in the Divorce Division, and where a judge of this division is once seised of the matter, it is sometimes better, although it is a matter of discretion in each case, for him to retain control over the matter, notwithstanding some earlier order of the Divorce Division.

A further example is where some direction is required regarding the property of an infant.

This seems an appropriate occasion on which to make these remarks as to the exercise of this delicate jurisdiction for the guidance of the profession.

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Order accordingly.

Solicitors: *Wegg-Prosser & Co.; Boxall & Boxall.*

I. G. R. M.

[CHANCERY DIVISION.]

In re HAMILTON-SNOWBALL'S CONVEYANCE.

1958 *April* 18.

[1957 P. 760.]

Upjohn J.

Vendor and Purchaser—Purchaser's interest before completion—Requisitioned premises—Compensation on derequisitioning payable to "owner" at date of derequisitioning—Contract of sale at that date—Completion—Claim by purchaser—Whether vendor a constructive trustee for purchaser of compensation money — Compensation (Defence) Act, 1939 (2 & 3 *Geo.* 6, *c.* 75), *ss.* 1 (1), 2 (1) (*b*), 2 (3), 17 (1).

Emergency Legislation—Requisitioning.

On January 26, 1956, R. contracted to purchase certain premises already occupied by him, which had been requisitioned under the Compensation (Defence) Act, 1939, and on the same day R. contracted to sell the same premises to A. The contract between R. and A. contained no condition that the premises were sold subject to the requisitioning. On February 3, 1956, the premises were conveyed to R. and on February 6, 1956, they were derequisitioned, compensation thereby becoming payable on that date to the "owner" of the premises under the Compensation (Defence) Act, 1939.[1]

[Reported by JENNIFER WEST, Barrister-at-Law.]

[1] Compensation (Defence) Act, 1939, s. 1 (1): "Where, in the exercise of emergency powers during the period beginning with the 24th day of August, 1939, and ending with such day as His Majesty may by Order in Council declare to be the day on which the emergency came to an end,—(*a*) possession of any land has been taken on behalf of His Majesty . . . then, subject to the following provisions of this Act, compensation assessed in accordance with those provisions shall be paid, out of moneys provided by Parliament, in respect of the taking possession of the land, the requisition or acquisition of the property, or the doing of the work, as the case may be."

S. 2: "(1) The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say . . . (*b*) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained (except in so far as the damage has been made good during that period by a person acting on behalf of His Majesty), no account being taken of fair wear and tear or of damage caused by war operations. . . . (3) Any compensation under paragraph (*b*) of subsection (1) of this section shall accrue due at the end of the period for which possession of the land is retained in the exercise of emergency powers, and shall be

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The question raised by the summons taken out under section 49 of the Law of Property Act, 1925, by A., was whether or not R., as the legal owner of the premises on February 6, 1956, should hold the compensation payable under the Act on a constructive trust for A., to whom he had contracted to sell the premises:—

Held, that a vendor under a contract of sale is only a qualified trustee for the purchaser of the premises with vacant possession, together with any physical accretions thereto, and not of any right to compensation moneys payable to him under Act of Parliament which did not, in the absence of express provision in the contract, form part of the subject-matter of the sale. Accordingly, R. was entitled to receive for his own benefit compensation payable to him as owner of the premises on February 6, 1956, under the Compensation (Defence) Act, 1939.

Rayner v. *Preston* (1881) 18 Ch.D. 1 and *In re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch. 472; 36 T.L.R. 307 applied.

ADJOURNED SUMMONS.

Under the provisions of the Compensation (Defence) Act, 1939, certain premises known as 77, Glendale Avenue, Edgware, had been requisitioned by the Hendon Borough Council and had for 11 years before February 6, 1956, been in the occupation of George Hamilton-Snowball, the respondent to the summons (hereinafter called "the respondent"). On January 26, 1956, he contracted with the then owners of the premises to purchase the same for the sum of £2,100, completion to be on or before February 26, 1956. The premises were sold, inter alia, expressly subject to the requisitioning of the property and to the occupation of the property by the respondent.

Subsequent to that contract and also on January 26, 1956, the respondent contracted to sell the premises to Mrs. Anne Peters, the applicant to the summons (hereinafter called "the "applicant") for the sum of £3,350. The contract contained no conditions that the premises were sold subject to the requisitioning nor to the respondent's occupation, the condition as to requisitioning being excluded because on the purchase of requisitioned premises by the occupier of such property derequisitioning would shortly follow. The contract was subject to the National Conditions of Sale, 16th ed., except conditions 13 and 16 (3) so far as such conditions were not inconsistent with the conditions following and were applicable to a sale by private treaty.

On February 3, 1956, the premises were conveyed by the original owners to the respondent and on February 6, 1956, they were derequisitioned. On February 23, 1956, the respondent conveyed the premises to the applicant who then entered into possession and occupation.

The Hendon Borough Council, as the local authority responsible, were willing to pay a sum of £236 together with £12 7s. 9d.

"paid to the person who is then the "owner of the land."

S. 17 (1): "... 'owner' means "—(*a*) in relation to land, the person "who is receiving the rackrent of "the land, whether on his own "account or as agent or trustee for "any other person, or who would so "receive the rackrent of the land if "it were let at a rackrent."

compensation under section 2 (1) (*b*) of the Compensation (Defence) Act, 1939, and had agreed to abide by the decision of the court as to who was the proper person to receive such compensation under the Act. They were accordingly not made parties to the summons which was taken out under section 49 of the Law of Property Act, 1925, by the applicant to determine whether or not the respondent as the legal owner on February 6, 1956, should hold any compensation payable to him as owner under the aforesaid Act of Parliament on constructive trust for the applicant.

Lionel A. Blundell for the applicant.
W. G. H. Cook for the respondent.

No cases were cited in argument other than those referred to in the judgment.

UPJOHN J. This is a vendor and purchaser summons under section 49 of the Law of Property Act, 1925, for the determination of the interesting question which has accrued as between the applicant, the purchaser of certain premises, and the respondent, as vendor of those premises, as to who is entitled to certain compensation moneys payable after the date of the contract but before completion under the provisions of the Compensation (Defence) Act, 1939.

[After stating the facts and reading the relevant sections of the Act of 1939 his Lordship continued:] Mr. Blundell, for the applicant, concedes that, having regard to condition 5 of the National Conditions of Sale, the respondent is, within the definition in section 17 (1) of the Act of 1939, the "owner" who is entitled to give a good discharge to the local authority, for he is the person who on February 6, 1956, was the person who would be entitled to receive the rack-rent of the land if it were let at a rack-rent, because that was before the date of completion.

Mr. Blundell has submitted that although the respondent was entitled to give a good receipt so far as the local authority is concerned, he in fact holds that compensation money as trustee for the applicant. He submits that, having regard to the general law applicable as between vendor and purchaser, the respondent is a trustee of the property contracted to be sold and trustee of all the accretions thereto that may happen to arise between the date of the contract and the date of completion; for example, timber that may fall: minerals that may be dug otherwise than under some pre-existing contract, and there may be various other accretions. He submits this is an accretion of that nature. He points out, quite rightly, that this is not a sum which accrued due to the respondent before the date of the contract. The first time it accrued due was after the date of the contract when the derequisitioning was completed. He submits that it comes to the respondent solely as owner and not under any collateral contract and must therefore be accounted for by him as such.

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Mr. Blundell agrees that the rights arising under some collateral agreement such as a policy of insurance do not enure for the benefit of the purchaser, but he submits what does enure for the benefit of the purchaser is all rights which accrue to him solely as owner of the property.

He referred me for the general proposition to *Shaw* v. *Foster*,[1] for the statement by Lord Cairns. That is a very well-known passage and I do not think I need refer to it.

He also referred me to *Aberdeen Town Council* v. *Aberdeen University*,[2] where the Aberdeen Town Council under a transaction which was in Scottish form acquired certain fishing rights for themselves although they held the property as trustee for the Aberdeen University. It was held that they were accountable for those fishing rights to the Aberdeen University and could not use them themselves. That was a case of an express trustee and a cestui que trust, and it is only an illustration of a very much wider proposition that in such a case a trustee may not make any profit out of his trust. It does not seem to me to be helpful on a question as between vendor and purchaser.

He also referred me to *In re Armitage's Contract*.[3] In that case a somewhat similar problem arose, but Vaisey J. determined the matter solely upon the question of the true construction of certain express words appearing in the contract of sale, and it is no decision upon the matter I have to consider where there are no express words. Mr. Blundell, however, rightly pointed out that, if the respondents are right, it would have been quite unnecessary to consider in *In re Armitage's Contract* [3] the construction of the agreement, and he naturally relies upon the fact that it seems to have been assumed as far as one can make out that, if the compensation had not belonged to the vendor personally under the express words of the contract, it would have belonged to the purchaser. But the arguments and judgment are entirely silent upon the point.

On the other side, Dr. Cook for the respondent says that the case of the fiduciary relation between vendor and purchaser is a very special one, and the vendor is only trustee of the property contracted to be sold, and, he submits, of any physical accretions thereto. He referred me to the observations of Sir George Jessel M.R. in *Lysaght* v. *Edwards*,[4] where he says [5]: "It appears to "me that the effect of a contract for sale has been settled for "more than two centuries; certainly it was completely settled "before the time of Lord Hardwicke, who speaks of the settled "doctrine of the court as to it. What is that doctrine? It is "that the moment you have a valid contract for sale the vendor "becomes in equity a trustee for the purchaser of the estate "sold, and the beneficial ownership passes to the purchaser, the "vendor having a right to the purchase-money, a charge or lien

[1] (1872) L.R. 5 H.L. 321, 333.
[2] (1877) 2 App.Cas. 544.
[3] [1949] Ch. 666; 65 T.L.R. 532.
[4] (1876) 2 Ch.D. 499.
[5] Ibid. 506.

" on the estate for the security of that purchase-money, and a " right to retain possession of the estate until the purchase money " is paid, in the absence of express contract as to the time of " delivering possession."

He referred me also to some observations in the later case of *Rayner* v. *Preston*,[6] a decision of the Court of Appeal, which dealt with the question of insurance money arising between the date of the contract and the date of completion. He referred me in particular to the words of Cotton L.J.[7]: " It was said that the " vendor is, between the time of the contract being made and " being completed by conveyance, a trustee of the property for " the purchaser, and that as, but for the fact of the legal owner- " ship of the building insured being vested in him, he could not " have recovered on the policy, he must be considered a trustee " of the money recovered. In my opinion, this cannot be main- " tained. An unpaid vendor is a trustee in a qualified sense only, " and is so only because he has made a contract which a Court " of Equity will give effect to by transferring the property sold " to the purchaser, and so far as he is a trustee he is so only in " respect of the property contracted to be sold. Of this the policy " is not a part."

Finally he referred me to *In re Lyne-Stephens and Scott-Miller's Contract*.[8] In that case the property had been contracted to be sold with vacant possession, and there was in existence a lease which came to an end between the date of the contract and the date fixed for completion. The lease having expired, the dilapidations under the provisions thereof were agreed at £2,060, which was paid by the purchaser. Sargant J., whose decision was affirmed in the Court of Appeal, held that the dilapidations were payable to the vendor. He dealt with the position of vendor and purchaser in a passage which I will now read, which was expressly approved by Lord Sterndale in the Court of Appeal in that case. Sargant J. said[9]: " The purchaser says that a vendor, speaking generally, is a " trustee for him of the property sold, subject to the completion " of the contract, and that when the completion takes place the " trust becomes an absolute one. A number of decisions were " cited for that proposition, one instance being the right of the " purchaser to any windfall of timber. The vendor does not " dispute that general proposition, but says: ' What was it that " ' was sold? It was not the house subject to and with the " ' benefit of the lease which was existing at the date of the con- " ' tract, but it was the house with possession, altogether apart " ' from and independent of the lease, the obligations and rights " ' under which were simply and solely a matter between the " ' vendor and the lessee.' In my judgment, that contention of " the vendor is correct." That seems to me to be the principle which must govern this case and I must look and see what was the

[6] (1881) 18 Ch.D. 1.
[7] Ibid. 6.
[8] [1920] 1 Ch. 472; 36 T.L.R. 307.
[9] [1920] 1 Ch. 472, 477.

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property sold. It is quite clear that it was only the property 77, Glendale Avenue, Edgware, with a right, though not expressed in the contract, to vacant possession on completion. There is nothing in that contract, therefore, which expressly includes the right to the compensation money.

The compensation money, as is now conceded, was properly payable to the vendor, the respondent, because at the date when it became payable on February 6, 1956, he was the person who satisfied the definition of "owner" in the Act in that he was entitled to receive the rack-rent if there were any.

It seems to me that the respondent was entitled to receive this sum under this Act of Parliament because the Act says that he is the person to receive it, and I cannot see that he has sold or assigned that right away under any contract of sale. The contract of sale did not, in my judgment, include or comprehend this compensation money. Had that been intended, then, in my view, it should have been expressly put in as part of the subject-matter of the sale. I cannot see how it is possible to say, in the circumstances of this case, that the respondent, who is entitled to receive it under the terms of the Act, becomes in some way a constructive trustee of that sum which he has not contracted to sell to the purchaser.

Accordingly, I must dismiss this summons with costs.

Declaration accordingly.

Solicitors: *Frank J. French & Co.; Worrell, Fordyce & Lys.*

[PROBATE, ETC., DIVISION.]

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1958
March 25, 26, 27.

Sachs J.

Solicitor—Costs—Proceedings improperly continued—Personal liability of solicitor to pay costs—Position under legal aid unaltered—Proceedings under section 23 *of the Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25)*—Desirability of initial inquiries—Effect of discovery on continuation of proceedings—R.S.C., Ord.* 65, *r.* 11.

Legal Aid—Costs—Solicitor's liability—Proceedings improperly continued.

Unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the jurisdiction of the court to call upon solicitors personally to pay costs which have been incurred in a suit. The mere fact that litigation fails is no reason for invoking that jurisdiction, nor is an error of judgment, nor even the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts to a dereliction of duty. It is not, however, necessary to establish mala fides. Although the jurisdiction is one to be exercised sparingly, that cannot affect the duty of the court to protect litigants from being improperly damnified.

Generally speaking, there is no reason in principle why the fact that the solicitor is acting under a civil aid certificate should make any difference, although there might be exceptional cases where a certificate had, for example, been improperly obtained or litigation unreasonably continued.

In view of the special factors involved in proceedings under section 23 of the Matrimonial Causes Act, 1950, especially as regards the initiation of such proceedings, those who put in motion such proceedings, and not least any solicitor concerned, should be properly cautious before so doing, and should ascertain if possible beforehand from the husband the appropriate information as to his income and inescapable liabilities. To few proceedings is the axiom that it may become obvious on discovery that litigation not improperly initiated is bound to fail more applicable than those taken under this section.

A husband left the matrimonial home at the end of November, 1956. On December 11, 1956, the wife was granted a civil aid certificate to take proceedings under section 23 of the Matrimonial Causes Act, 1950, and an originating summons was issued on January 4, 1957. Although the wife was still living in the matrimonial home with the child of the parties, and was receiving certain financial benefits, no preliminary inquiries had been made of the husband's solicitors for information as to his true income and inescapable liabilities with a view to diminishing the risk of litigation proving necessary. The wife was, however, advised favourably by counsel on February 7, 1957, as regards the financial aspects, after considering an affidavit of the husband's disclosing an income of some £1,567 a year less a mortgage interest of £150, an endowment policy of £240 and upkeep of the home at £160. Orders for discovery were made and inspection took place in April, 1957. The wife's solicitors requested three copies of each of a large number of documents which were delivered on May 10, 1957, at a cost of over £64.

In May, 1957, the husband's solicitors wrote to the appropriate area committee submitting that there was on the facts no justification for the proceedings to continue. After the wife's solicitors had appeared ex parte before the area committee the certificate was allowed to remain in force.

The matter was heard upon oral evidence in October, 1957, following a last-minute conference with counsel, and after a two-day hearing the summons was dismissed:—

Held, (1) that it would be inappropriate in the present case to order the solicitors (upon whose personal honesty no imputation was made) to pay costs ab initio in view of the absence of any previously reported observations as to the propriety of making preliminary inquiries before issuing an originating summons in a case of this nature, and in view of the solicitors' ignorance at that stage of the husband's true financial position.

(2) That once there had been discovery, however, it should have become obvious that the wife would be unable to establish her case of wilful neglect to maintain as at the date of her summons (whatever effect any later change in financial arrangements might have had in any subsequent proceedings), and the solicitors should, accordingly, pay to the husband his party and party costs as from the beginning of August, 1957, when the summons for directions was issued.

Myers v. *Elman* [1940] A.C. 282; 56 T.L.R. 177; [1939] 4 All E.R. 484 applied.

(3) That the fact that the area committee had allowed the civil aid certificate to continue after the solicitor had personally and ex parte addressed it offered him no protection against the

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husband's claim (whatever effect it might have had upon a legal aid taxation). Such proceedings neither were nor were they intended to constitute any sort of trial or other process affecting the rights of an opposing party.

Hollington v. *Hewthorn & Co. Ltd.* [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35 applied.

Ingram v. *Ingram* [1956] P. 390; [1956] 2 W.L.R. 782; [1956] 1 All E.R. 785 distinguished.

(4) That, in the circumstances of this case, the action of the wife's solicitors in requesting such voluminous copying of documents amounted to a flagrant case of wasteful procedure, and the solicitors must pay the costs of the expenses thereby caused the husband over and above the amount found reasonable in the registrar's report.

(5) That the wife's solicitors must also pay the husband's costs relating to the application as to costs, and that it would be appropriate to reduce the costs to be allowed upon their legal aid taxation in the application.

APPLICATION as to costs against a wife's solicitors arising out of proceedings under section 23 of the Matrimonial Causes Act, 1950, in which the wife was an assisted person.

The husband and wife were married in 1946 in Belgrade, the wife being a Yugoslav by birth. There was one child of the marriage, a girl, born in September, 1954. In 1955 the husband acquired a matrimonial home, purchasing the freehold by aid of mortgage and upon the footing that he took out an endowment insurance policy. There he lived with his wife and the child of the marriage. Whilst there the wife, who had no means of her own, received £5 10s. per week from the husband and was entitled and did charge the accounts of the husband at Messrs. Barkers and Messrs. Whiteleys for purchases averaging some £2 a week.

In September, 1956, after a quarrel during which the husband had for the first and only time spoken of closing those accounts (although he did not do so, and there was never any fear he would if they were used reasonably), the wife consulted solicitors about her marriage and, among other matters, raised that of money, telling the solicitor the kind of sums which she was charging against the accounts with the stores. The solicitor advised her to increase her purchases on those accounts: he did not suggest that she should tell her husband. In fact, she did not tell her husband but increased her charges on the accounts to sums which amounted in October, 1956, to £57, in November, 1956, to £45, and in December, 1956, to £32, an average of some £10 per week. In effect, the wife and child during the quarter ending December 31, 1956, had benefits in cash and kind to a total of some £277 out of the husband's available £400.

On October 8, 1956, the wife's solicitor had an interview with the husband. The entry on the cost sheet reads: "attending Mr. Edwards at our office from 11 a.m. to 12.15 and discussing with him thoroughly the question of his domicile at the time of his marriage to Mrs. Edwards, when we formed

"the opinion that it is almost certain that domicile is in Yugo-"slavia. Generally discussing the difficulties with him between "him and his wife, with particular regard to maintenance, when "at the end of the interview he said he would think about what "we had said and would probably ask his solicitor, Mr. Kershaw, "to contact us within a fortnight or so." The note did not refer to any suggestion having been made, or discussion having arisen, as to whether the husband might wish to confess to adultery.

The solicitor on that occasion did not tell the husband of the increased sums being charged against the accounts. The inference was drawn by the court that the wife and her solicitor were both being careful not to inform the husband about the increased charges, a policy in which they were assisted by the fact that the accounts only came in a very long time after the charges were incurred.

There was a conflict of evidence between the husband and the wife's solicitor as to what was said on October 8, 1956, and the court accepted the husband's evidence on this point. The husband, in fact, did not cause his own solicitor to get into touch with his wife's solicitor; but on October 30, 1956, he informed him by telephone that he was not prepared to admit adultery and that it was left to the wife to take what action she thought fit. The court found that it appeared that up to that time the financial issues were obviously subsidiary. Questions of the validity of the marriage and the possibilities of a divorce were matters which had loomed large. Without any further communication with the husband or the solicitor whom the husband had mentioned, there was forwarded to the legal aid committee on November 6, 1956, an application by the wife for legal aid in section 23 proceedings. At the end of November, 1956, the husband left the matrimonial home. On December 11, 1956, a civil aid certificate was granted to the wife. On December 13, 1956, without further inquiry, the wife's solicitors wrote to Messrs. Kershaw a letter which contained this paragraph: "We "believe that you have been told that our client proposes to "apply to the court under section 23 of the Matrimonial Causes "Act, 1950, and perhaps you will kindly confirm that you have "instructions to accept service of these proceedings on your "client's behalf. In the meanwhile we enclose herewith for your "information Form 6" [which relates to legal aid]. Messrs. Kershaw replied on December 17, 1956, by a letter which included the phrase: "You will appreciate that we must obtain his "instructions to accept service of the contemplated proceedings."

The following day the wife's solicitors wrote an intemperate and unfortunate letter which was considered likely by the court to give the impression that the solicitors who wrote it not only did not desire to discuss the matter in the usual way but were really anxious to embark on litigation.

The originating summons under section 23 was issued on January 4, 1957. On that day the wife, who continued to reside

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at the matrimonial home, swore an affidavit which stated that the husband's income from his B.B.C. appointment was believed to be at least £1,250 per annum, and that the wife estimated his journalistic income at not less than £250. She stated that the husband owned the freehold of the matrimonial home. She did not refer to the mortgage on it, or to the endowment policy, though her solicitor was aware of the existence but not the amount of those expenditures. In referring to her own position the wife mentioned the fact that she had during the past few months increased the sums which she had charged against the two stores accounts. "On the advice of my solicitor I spent a "little more, amounting to possibly £3 10s. per week on the two "accounts together,"—an inaccurate statement, as she had been spending on average £10 per week.

On January 23, 1957, the husband swore an affidavit stating that as from October, 1956, his B.B.C. salary had been £1,430 per annum, and giving an average of £100 per annum for his income from journalistic activities. He set out the position as regards the matrimonial home and the expenditure in connexion therewith. He stated that the freehold was subject to a mortgage of £2,860 secured on the house and an endowment policy. The mortgage interest was set out as being £150 per annum and the policy premium £240 per annum. He further stated that he paid the outgoings of the matrimonial home amounting to approximately £160 a year. Those figures were never challenged.

On February 1, 1957, the wife swore a further affidavit in which she put the respondent to proof as to his income over the past three years, and as to his capital assets of all kinds, including the values of his life policies, bank accounts, stocks and shares and bonds, and further put him to proof as to the rent paid by him at [his then address].

On February 7, 1957, counsel for the wife, having been asked to advise on evidence and generally, gave a written opinion mostly concerned with issues other than the question of the sufficiency of the financial provisions being made by the husband, but also dealing briefly with that point and with questions of discovery. He advised favourably as regards the question of what were the wife's prospects in relation to the financial point.

On February 15, 1957, orders for mutual discovery were made, the wife being represented by counsel.

On March 29, 1957, the husband filed an affidavit of documents which, at the request of the wife's solicitors, he supplemented on April 5, 1957. On April 15, 1957, the wife's solicitor inspected the documents disclosed. This inspection took two to two and a half hours. He then made a demand for three copies of each of a mass of documents. These were delivered to him on May 10, 1957, at a charge of £64 11s. 6d.

On May 17, 1957, the husband's solicitors, who considered that there was no justification for these present proceedings which were bound to involve their client in considerable costs, wrote, as

they were fully entitled to do, a letter to the area committee. On May 23, 1957, the wife's solicitor, who was most incensed by the fact that the above letter had been written, attended before the committee. The legal aid certificate thereafter remained in force.

On July 12, 1957, he had a three-hour conference with the wife, who was then in hospital, mainly relating to documents such as the two accounts. On August 14, 1957, the wife came out of hospital and at about that time a summons for directions was issued by the wife which was heard eventually on September 20, 1957, when the parties were given leave to supplement their affidavits by oral evidence. On October 8, 1957, the wife's solicitor had the case entered for trial because her mother was due later in the month to leave for Yugoslavia, and October 18, 1957, was fixed for the hearing. On October 15 and 16, 1957, the solicitors delivered to counsel the papers which constituted his brief.

On October 20, 1957, the originating summons came into the list and was called on for hearing first on that day. In due course it transpired that in substance the only figures over which there was really a conflict were, first, as to the husband's earnings from journalism in the one year, namely, 1956–57; secondly, as to what really were the amounts he was being called upon to pay off from his bank overdraft; and thirdly, what were the monthly totals of the sums the wife had charged the above two accounts after receiving advice from her solicitor.

The court found that if the wife's legal advisers had acted reasonably in checking and not disputing figures which could not properly be disputed, and if they had troubled to ascertain what exactly the wife had charged monthly against these two accounts, a single court day would have sufficed to dispose of the matter; but that a course was taken which included, no doubt on instructions, cross-examination on materials which had not been properly analysed. The matter took two full days, and on October 21, 1957, the application was dismissed, it being held that on the facts it was quite hopeless to argue that in the period preceding the issue of the summons there was any wilful neglect to maintain the wife.

On October 22, 1957, Mr. Ormrod, for the husband, made applications for costs to be paid personally by the wife's solicitors. The matter was referred to the registrar for a report relating to unnecessary expenses caused to the husband, which was made by Mr. Registrar Wilkinson after bills of costs had been lodged, and which was amplified by a supplementary report setting out in monetary terms the respective effects of accepting or rejecting the main substance of the report, with its findings of unnecessary expenses brought upon the husband, in order to obviate the necessity of incurring further costs after the present hearing if any order came to be made on one of the lines asked for by Mr. Ormrod. The difference in the two amounts was £43.

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Even without the costs of and occasioned by the copying of documents which it was contended was unnecessary, the proper costs of the husband on a party and party basis up to the conclusion of the hearing on October 21, 1957, were found by the registrar to amount to some £108 up to August 1, 1957 (immediately before the summons for directions), and to some £105 thereafter until and including October 21, 1957 (the date the originating summons was dismissed). Those of the wife on a solicitor and client basis amounted to some £320, but those costs included items relating to certain issues not dealt with at the hearing of the summons.

R. F. G. Ormrod and *Roger Gray* for the husband.

R. H. W. Dunn (who did not represent her in the proceedings upon the summons) for the wife.

John Latey Q.C. and *J. T. Stephenson* for the wife's solicitors in the proceedings upon the summons.

In addition to the cases cited in the judgment reference was made to *Tulip* v. *Tulip*.*

SACHS J. stated the facts substantially as set out above and continued: The claims made in the course of Mr. Ormrod's applications were that the wife's solicitors should be held personally liable to the husband for all the costs of the present proceedings, having regard to their lack of any reasonable chance of success and the way in which they were initiated and conducted; alternatively, that they ought thus to be liable for the costs after completion of discovery, when the lack of such chances became even more apparent; and in the further alternative that they should in any event pay the costs of and arising out of the copying of unnecessary documents, regard being had to the provisions of R.S.C., Ord. 65, r. 20.

The number of pages in the various bundles numbered over 300 and in some of them there were photostats of quite a number of documents. They included one bundle of 110 pages never used at trial, and this and another one which was also not used at trial were submitted to constitute fantastic bundles.

In addition, it became relevant to consider whether any guidance should be given to the registrar as regards the costs which the wife's solicitor claims under the legal aid taxation, both in so far as these arose out of copying which attracted the provisions of R.S.C., Ord. 65, r. 20, or out of any other of the matters of complaint particularized on October 22, 1957, under the informal procedure referred to in *Myers* v. *Elman*.[1]

It is convenient first to deal with the question of the documents, their copying, and the costs that arose out of this aspect of the case.

* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[1] [1940] A.C. 282, 318; 36 T.L.R. 177; [1940] 4 All E.R. 484.

I do not propose to deal in detail with the various factors affecting this portion of Mr. Ormrod's application, but one of them does need mention as it shows something of the general attitude adopted in the conduct of this case. The solicitor for the wife has stated that by June or July, 1957, he was, after examining the documents, aware that there would be no dispute as to what sums the husband had in fact paid annually in regard to the outgoings of £160 for rates, fuel, light, etc., referred to in the husband's affidavit of January 23, 1957; and in fact none of these items were disputed at trial. Yet though he had the conduct of the proceedings the solicitor for the wife did not inform the husband's solicitor of the fact that these figures were agreed as such. On the contrary, on October 15, 1957, he caused all the documents relating to this type of expenditure to be included in the court bundles and numbered. It was with the aid of documents relating to that type of expenditure and to other irrelevant matters that one bundle came to have 110 unused and unusable pages numbered and placed with counsel's briefs. A more flagrant case of wasteful procedure is not easy to think of and it serves to show how costs were run up without regard to propriety.

Similar comments are applicable to documents relating to expenditure on mortgage interest and other undisputed items.

On this part of the case I have the very valuable assistance of the report of a particularly experienced registrar. It was a report made after a full hearing. The wife's solicitor, however, has in the course of the present hearing before me re-stated in evidence at some length the same facts as were put before the registrar and then caused to be submitted that almost every line—certainly every other line—in the effective part of the report as to be treated as being erroneous. [His Lordship considered that evidence and continued:] I adopt broadly and without hesitation the registrar's report with its careful and detailed findings. Equally I accept his supplementary report on detailed items.

I was invited by Mr. Latey to deal with this portion of the matter in a final way on a broad basis. I would myself have made some further reduction on the footing that if conducted in the way that I have indicated the case would have been concluded in a single court day: but again it seems proper to adopt the report of one who has such wide experience. The result is that whatever may be the conclusions reached on the other issues raised on behalf of the husband, the wife's solicitors must pay to him the £43 referred to in the supplementary report.

My prima facie view is that this of itself would lead to an order that the solicitors should pay one-third of the costs of October 22, 1957, all the costs of the hearing before and the report of the registrar, and having regard to the reopening of the issues by evidence on March 25, 1958, two-fifths of the costs relating to the present hearing. In addition I record my

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view that as regards the taxation of the wife's bill the registrar's findings in relation to reductions he would make in her bill as given in the supplementary report in my opinion proceed on the proper basis to be applied.

There now falls to be dealt with the main application made on behalf of the husband—that the solicitors for the wife should be personally called upon to pay all the costs of the husband or alternatively those costs which he incurred after discovery. This application raises matters of serious import, particularly as there appears to be no previous authority in relation to an application of this kind made against a solicitor acting for an assisted person.

The jurisdiction invoked is that discussed in *Myers* v. *Elman*,[2] where its origin and nature are explained in the speeches of Viscount Maugham,[3] Lord Atkin[4] and Lord Wright.[5] It is there made clear that the jurisdiction is one that the court by virtue of its inherent powers exercises over solicitors in their capacity of officers of the court. The relevant duty of the solicitor covers "all those against whom they are concerned," *per* Lord Maugham.[6] It is a "duty owed to the court to conduct litigation "before it with due propriety," *per* Lord Atkin.[7] The conduct complained of must, before it attracts the above jurisdiction, be such as to "involve a failure on the part of a solicitor to fulfil "his duty to the court to aid in promoting in his own sphere the "cause of justice," *per* Lord Wright.[8] The jurisdiction is exercised not to punish the solicitor but to protect and compensate the opposite party.

It is, of course, axiomatic, but none the less something which in the present case should be mentioned, that the mere fact that the litigation fails is no reason for invoking the jurisdiction: nor is an error of judgment: nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham,[9] to "a serious dereliction of duty," something which justifies, according to other speeches in that case, the use of the word "gross." It is not, however, normally necessary to establish mala fides or other obliquity on the part of the solicitors; though it may be that if mala fides is established that might turn the scale in a particular case: and it is right at this stage to make it clear that no imputation whatever is made against the solicitor's honesty.

No definition or list of the classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the court and oppressive conduct generally. It is also from the authorities clear, and no submission to the contrary

[2] [1940] A.C. 282.
[3] Ibid. 289.
[4] Ibid. 302.
[5] Ibid. 317.
[6] Ibid. 290.
[7] Ibid. 302.
[8] Ibid. 319.
[9] Ibid. 292.

has been here made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction.

Once a sufficient degree of dereliction of duty is established, Mr. Latey submitted in the course of his most helpful address that the exercise of the above jurisdiction was a matter of discretion and I accept that view. I also agree with his submission that the jurisdiction is one to be exercised sparingly and that the court can to some extent bear in mind the repercussions of making an order. On the other hand, that cannot affect the duty of the court to protect litigants from being improperly damnified. Suffice it to say that any application made to the court in relation to this jurisdiction is naturally one which causes anxious scrutiny of all the circumstances.

I now turn to the question as to whether the fact that the solicitor is acting under a legal aid certificate affects the position. Generally speaking I can see no reason in principle why that should make any difference. Further, it is to be noted that section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, provides that save as set out in the Act or regulations made thereunder "the rights conferred by this Part of this Act on a person "receiving legal aid shall not affect the rights or liabilities of "other parties to the proceedings or the principles on which the "discretion of any court or tribunal is normally exercised." To my mind that provision applies to issues of the type now before me.

Of course, where the lay client has been granted a certificate under which he is either making no or no substantial contribution, that demonstrates that that client may well have little if anything to lose if the proceedings fail, that in all probability the opposing party, assuming him to be unassisted, will even if successful have to bear his own costs without any real prospect of recouping them, and that the more the prospects of success diminish the greater become the chances that no one will benefit from the litigation except those retained to conduct it. But that means no more than that factors which may occur in any litigation are thrown into more prominence when the lay client is receiving legal aid, and that accordingly the solicitor to the assisted person is to that extent put on automatic notice that there is or may come into being, a situation that needs careful watching to see that the litigation is conducted with the due propriety to which Lord Atkin referred. That this notice is widely acted on by the legal profession is well known.

I have used the words "generally speaking" in relation to the lack of difference as regards legal aid cases, partly because there may be exceptional cases, in which the fact that the solicitor had been intentionally instrumental in improperly obtaining a legal aid certificate might of itself give rise to special considerations: these might also arise if, for instance (as happened in one case), the solicitor even unintentionally omitted to inform the certifying committee of an obviously vital fact such as a previous adverse

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decision of an appellate tribunal between the same parties on substantially the same facts. It was, however, no part of the case made on behalf of the husband or in his applications that the wife's solicitor acted improperly in furthering the application for or continuing of the legal aid certificate, and the present case falls to be decided without reference to what might be the effect of such exceptional considerations.

A second reason for using the words "generally speaking" relates to the special provisions of the regulations which refer to cases where it becomes unreasonable to continue the litigation, a matter to which further reference will be made later.

Before examining further the facts of this particular case it is, having regard to the very infrequency of applications such as the present, proper to say that their very rarity is of itself an implicit tribute to the high standard adopted by those concerned to implement and act under the legal aid system.

The issue next to be decided is whether the wife's solicitors were in such grave fault in initiating the proceedings at the time and in the manner which this was done as to make it right that they should bear the costs of so doing.

First, however, it is to be observed that this is not an ordinary action which is being considered: it is a form of proceedings involving certain special factors, especially as regards its initiation. A plaintiff seeking judgment in debt or damages has to get the case on its feet by admissible evidence. A wife applying under section 23 of the Matrimonial Causes Act, 1950, can, however, by an affidavit stating what in truth may be no more than an optimistic belief "put the husband to proof" of his income and assets, and thus without having further to rely on affirmative admissible evidence can cause him great inconvenience and the expenses of discovery, and can also have him cross-examined in court. This standard practice as regards "putting to proof" is exemplified in textbook precedents—compare Rayden on Divorce, 7th ed., at pp. 1244/5—and in the wife's affidavits in this case. It stems from, and is necessary by reason of, the difficulties a wife often has in testifying accurately to her husband's income. It results, however, in the court's process having something of an inquisitorial element.

Further, a plaintiff who fails in an ordinary action is normally ordered to pay costs, but a husband not only has to pay the costs of a successful applicant, he may also on occasion be ordered to pay those of an unsuccessful wife. In any event, unless the wife has appropriate assets, he is not normally awarded costs where the applicant fails. So by the type of affidavit I have mentioned he is put to the peril of considerable expense.

This procedure can of its nature be liable to abuse: and danger of abuse has not diminished since the Legal Aid Act, 1949 has enabled wives to press forward with their applications with greater ability to pursue the litigation to its end. It is accordingly right that those who put in motion the above procedure, and not least

any solicitor concerned, should be under a duty to be properly cautious before so doing.

It is thus not unexpected to find that, in accordance with the reputation of their profession for honourable conduct, solicitors of standing when acting for wives have made it their normal practice in cases such as the present, where the wife has possession of the matrimonial home and is in receipt of regular sums from the husband, to seek from the husband's solicitors before starting proceedings appropriate information as to that husband's income and inescapable liabilities, so as to diminish the chances of starting litigation which may prove to be unnecessary or oppressive. Indeed, the wife's solicitor said that this was the invariable practice of his firm and so far as I could understand him, gave no reason for failing to take that course on this occasion. Thus, to my mind, it seems that a solicitor who in such circumstances fails, without some overriding reason, to conform to the above practice can hardly be surprised if complaint is made against him.

What happened in the present case was that the solicitor for the wife had a long interview on October 8, 1956, with the husband, and later had the telephone communication from him on October 30, 1956, which was first referred to when the solicitor gave evidence for the second time. I am not at all happy as to having been given a full account of what happened on the earlier date. Suffice it to say that my preference for the husband's evidence as to it as expressed at the original hearing has now been reinforced by the appearance of the costs entry of October 30, 1956.

It is clear that the money aspect on October 8, 1956, was then, as he said, a subsidiary one: and that though the solicitor indicated his client's lack of satisfaction with her financial position, it was never made sufficiently plain to the husband that this was going to be the subject of litigation, far less that he was expected to provide information as to his means. I must also refer again to the fact that although the wife's solicitors knew that Messrs. Kershaw might well be acting for the husband, and so assumed, no letter was written to that firm before the one which, on December 13, 1956, asked them whether they would accept service of the proposed proceedings. It is thus apparent that no inquiries were made with a view to eliciting information as to the husband's financial position—and that despite the wife's solicitors being aware that there was a mortgage on the matrimonial home, and that the husband was under a necessity to pay policy premiums in connexion with an insurance relating thereto. Further, no attempt was made to secure documents to check what were the actual increased amounts which the wife had, after receiving advice, been surreptitiously charging to the two accounts.

In view of the statement by the wife's solicitor as to the inquiries that were, according to the normal practice of his firm, invariably made in this sort of case, it is hard to understand why

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none were embarked upon during the six weeks that followed October 30, 1956. Further, the letter of December 18, 1956, was written in a strain which was to bedevil much of this litigation and which was hardly likely to assist the interests of reason. Moreover, it is the fact that if proper inquiries had been made and appropriate answers given, it would have become extremely difficult to say that there was any reasonable chance of success for a summons issued in December, 1956, or January, 1957.

In the above circumstances it is hard to come to any conclusion but that the commencement of the litigation at that time and in that manner was unreasonable.

On the other hand, there had not been previously any reported case in which the distinction between section 23 proceedings and an ordinary action had been referred to; so the propriety of making certain inquiries in cases such as the present may not perhaps have been appreciated in its true light. Until the solicitor actually knew the figures of the husband's inescapable expenditure, the paucity of chances of success would not be easy to apprehend, and it may be that without guidance of the type above referred to a solicitor might have thought he was entitled to strike before making inquiries of the husband. Taking this factor into account I am not prepared to hold that the solicitor's action at this stage was such as to make it right to order him to pay the costs ab initio.

Accordingly, it becomes unnecessary to consider the effect in relation to the period up to the end of January of counsel's advice given on February 7, 1957. Nor is it necessary to consider submissions on behalf of the husband as to how the absence of certain material, which could with reasonable diligence have been placed before counsel, might have affected the cover it gave to the instructing solicitors.

The next question is whether at some stage in the proceedings it became plain, on the material available, that it had no prospects of success which would justify its continuance.

It is axiomatic that on discovery it may become obvious that litigation, originally not improperly initiated, is yet bound to fail. It is one of the best known duties of a solicitor to examine closely whatever is disclosed upon the husband's affidavit of documents to see whether the relative prospects of success or failure have been altered thereby. To few proceedings is the above axiom more applicable than those taken under section 23 of the Matrimonial Causes Act.

As regards legal aid proceedings it is to be noted that section 1 (6) provides as follows: "A person shall not be "given legal aid in connection with any proceedings unless "he shows that he has reasonable grounds for taking, "defending or being a party thereto, and may also be refused "legal aid if it appears unreasonable that he should receive it in "the particular circumstances of the case." Further, it is well known to both branches of the profession that there are special

provisions in the Legal Aid (General) Regulations, 1950, to ensure that solicitors are in a position to cease acting in litigation when once it becomes apparent that the chances referred to in the above section 1 (6) no longer exist. So in such proceedings there is nothing to necessitate their continuing to conduct them when once such continuation becomes unreasonable. A fortiori if the chances of success become non-existent or virtually non-existent, it becomes difficult to see how it can remain justifiable to continue to put the opposing party to increasing costs.

Now the present case is a classic one of a change in position on discovery. Not only did hope of challenging the essential outgoing expenditure (£637 per annum) vanish, but it became visible that the wife had been charging on the accounts not an average of £3 10s. per week but of £10 per week for the three months before the summons was issued. In addition there had been disclosed documents relating to the receipts from and income tax returns as to the husband's journalistic earnings. Further, on May 17, 1957, the solicitors for the husband by their letter to the area committee as transmitted to the wife's solicitor had put the latter on guard. The position cried aloud for careful appraisement in the light of proper and sufficient analysis of the documents disclosed on discovery. For it is elementary that the " wilful neglect " to maintain " must be established as at the date the proceedings start, it is elementary that the courts look at benefits received by the wife in kind as well as in cash, and it is elementary that the court has regard to the inescapable financial commitments of the husband.

The wife's solicitor says that he was seriously concerned; and it is quite clear that by May 23, 1957, he not only ought to have known, but in fact did know, enough to realize that there had been an important and adverse change in the prospects of success. But what was done was not to make the appropriate analyses of what appeared from all the documents—that never seems to have been done—nor to consult counsel. In fact he chose to go whilst in an angry mood to the area committee without any written submission, without, on his own evidence, having made the analyses, and without any advice from counsel. I am aware that on February 7, 1957, counsel in the brief way I have mentioned did deal favourably with the question of the wife's prospect of obtaining an order. But to rely on that in the circumstances as they arose in mid-May is not good enough; nor did I gather that the solicitor did rely on it at that stage; nor did Mr. Latey submit that he properly could.

He chose to form in an incensed frame of mind a strong opinion that there remained a good case and that he would proceed. No careful and considered appraisement with properly examined figures was ever made. Unfortunately the opinion thus formed by the solicitor was wrong. But it was worse than that. It was an opinion that a solicitor examining the matter with the aid of proper use of the material I have mentioned could not

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reasonably have reached once he had been into the situation with appropriate care.

The opinion indeed turned out, when the facts were analysed sufficiently, to be grossly wrong; chances of success did not really then exist at all. To come to that conclusion one has only to bear in mind the points I have referred to as being elementary, and then to examine the figures as stated in my judgment (where I found the wife was receiving for herself and the 3½-year-old child the benefit of £277 out of an available £400 or less in the last quarter of 1957), or those set out in the registrar's report, for anyone with knowledge of this Division's practice to appreciate that point. In parenthesis I should perhaps add that the above figure of £400 was arrived at before taking into account expenses, tax liability or the bank's demands for overdraft repayments, and that there was no sign of any sufficient windfall from journalistic earnings which could possibly so affect their average as to outweigh all the factors I have mentioned. Indeed, I feel sure that if counsel for the wife had ever been given a real opportunity for giving a reasoned opinion after having had the documents carefully considered and the figures appearing from them analysed, he could have come to no other opinion than that these proceedings were, to use a phrase of the husband's solicitors in their letter of May 17, 1957, "doomed to failure."

Further, there was another point which in itself called for a reconsideration of the situation at about this period. The accounts at Barkers and Whiteleys had been closed, albeit under the circumstances set out in the letter of May 17, 1957, where the wife's charging of the account with £33 16s. between March 27, 1957, and April 8, 1957, is stated to have brought the matter to a head. The wife thus, by the end of May, appears to have been receiving £5 10s. per week and no more, and was in a worse physical condition than previously. This was quite a different situation to that obtaining immediately before the issue of the summons on January 4, 1957. Clearly there fell for consideration in those circumstances whether there should not be taken out a further summons alleging wilful neglect to maintain as at this later date; and in conjunction with that there would have naturally to be considered the question of discontinuance of the earlier proceedings. Any experienced counsel would immediately have taken this question into account, and it would have been even more obvious that the continuance of the current proceedings should be abandoned. Although this point was alluded to in my judgment, the wife's solicitor did not suggest in his further evidence that any thought of this nature had crossed his mind, and I am left to conclude that it did not occur to him.

Unfortunately, no such opinion of counsel was taken. The first time after discovery that counsel saw the papers was very shortly before October 18, 1957, the date fixed for the hearing. Then he got his brief and accompanying papers sent down in two lots (I was not told which came first), just in advance of a

conference on October 16, 1957. It was not thought fit to let me see the contents of the brief, and all I can say is that even at this late stage counsel seems to have been left to make his own analyses, and the solicitor's estimate of the time properly needed to analyse all the papers he had had copied was something in the area of 30 hours. That is not the sort of way to get an opinion of the beneficial type to which I referred in *Francis* v. *Francis and Dickerson*.[10]

Moreover, the most substantial costs had been incurred, and their increase by fighting the case for the first day would be relatively small. The opportunities in relation to issuing a fresh summons referable to a later date of alleged neglect and returnable by the date fixed for hearing of the original summons had passed.

Counsel faced with such a position is in a predicament and may well find himself taking a line to which he would not have committed himself if given the sort of opportunity I have previously mentioned. It is symptomatic of this sort of position that at the hearing the court had difficulty in eliciting what figures were and what figures were not in dispute. This applied to several matters at various stages of the hearing but is best exampled by the necessity the court was put to as regards eliciting that figures in a certain document as to journalistic fees (1954/5 £183 and 1955/6 £54) were not being challenged. To put counsel in the position of having to give a snap opinion in such a case when months had been allowed to pass after discovery invites comment. It could not produce any cover for the past and it was rightly not submitted to be something to be taken into account as regards the costs of the hearing.

The question thus arises as to the date at which the solicitor in charge of the wife's case ought to have concluded that the case should not continue. No detailed argument was addressed to me by either side as to which date should be taken between May 10, 1957, when the copies of the many documents arrived, and the first part of August, 1957, when the summons for directions was taken out. It seems hardly to lie in the solicitor's mouth to say that he attended the area committee on May 23, 1957, on an occasion when he was not in a position to have made himself fully aware of the effect of discovery, although in fact I cannot see from his own evidence how by then he had confirmed to himself any of the figures with any accuracy. There is also much to be said for not adopting a date more than a month after May 10, 1957, but there is certainly no reason why he should not have taken all reasonable steps to inform himself or, alternatively, to get counsel's opinion by August 1, 1957.

One further point and one of some general concern remains to be dealt with. It was argued to be of importance that the area committee, after being informed by the husband's solicitors in their letter of May 17, 1957, that in the latter's view the

[10] [1956] P. 87, 90; [1955] 3 W.L.R. 973; [1955] 3 All E.R. 836.

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proceedings could not succeed, took no step to terminate the legal aid certificate after having heard the wife's solicitor. On that fact it was sought to found the submission that the continuance of those proceedings by the wife's solicitors could not thereafter be held to be unreasonable in that he was entitled to rely and act on the fact that the certificate was not revoked.

To my mind such a submission cannot be sustained. The position between the Legal Aid Fund and a solicitor is one thing: that between the same solicitor and an opposing party is quite different. Here, again, section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, shows that the rights of such other parties cannot be prejudiced by the fact that an opponent is receiving legal aid. Proceedings before a committee constituted under the Legal Aid and Advice Act, 1949, neither are nor are intended to constitute any sort of trial or other process affecting the rights of an opposing party. Further, as I think Mr. Latey agreed, it would seem most undesirable that on an issue such as is now before me there should be investigated exactly what took place and what was said before the area committee. The position might naturally have been different had the issue been raised that there was an improper procurement of legal aid which could of itself result in the court's inherent jurisdiction as regards an officer of the court to be invoked.

Mr. Latey, by his submission, made it plain that what was really sought to be relied on was the opinion of the area committee. This opinion, expressed after having heard one side upon materials as may be placed before it is, if properly obtained, conclusive as between the solicitor and the Law Society as regards the former's claims on the Legal Aid Fund. As between the solicitor and an opposing party it was naturally conceded by Mr. Latey not to be binding on the court: but I go further and hold that it is no more admissible in evidence than the opinion of any other third party (compare *Hollington* v. *Hewthorn*).[11]

It was submitted that in the past few years solicitors have come to view with respect and to rely on the opinions of these committees or, to be exact, of their sub-committees because of the stature of those composing them. The argument proceeded that the impact of their decisions on the mind of a solicitor was relevant and that the same line of reasoning could be applied as that in *Ingram* v. *Ingram*,[12] a decision relating to a very special field, that of the relations between husband and wife. Once, however, it is realised that the area committee is not a judicial tribunal, that its decision is of necessity ex parte, that the person appearing on behalf of his client before the committee is the solicitor himself, and that much may depend on precisely what material and arguments he adduces, it becomes apparent how fallacious is the argument that such an opinion should be allowed to weigh to the

[11] [1943] K.B. 587, 595; 59 T.L.R. 321; [1943] 2 All E.R. 35.

[12] [1956] P. 390, 403; [1956] 2 W.L.R. 782; [1956] 1 All E.R. 785.

disadvantage of the opposing litigant. The opinions of certifying committees, area sub-committees and area committees are no more admissible in evidence than that of other extraneous persons on matters on which the court forms its own conclusions objectively and without expert evidence.

For a number of generations solicitors have been given special and indeed generous cover when they obtain the advice of properly instructed counsel. It is in my view neither necessary from the professional angle nor permissible in principle to provide a proliferation of further umbrellas.

It was urged that there could have been fears that the fee for consulting counsel might be disallowed on the legal aid taxation. In this particular case I cannot think there was any prospect of such a disallowance. Apart from all other factors it would, having regard to the letter of May 17, 1957 from the opposing solicitors have been impossible to disallow the fee even on a party and party basis. I cannot accept that there was any real fear as regards this.

In the above circumstances I ruled against questions as to what was said to and by the area committee when the wife's solicitor attended. I also ruled against the question asking whether he relied on their opinion; but I permitted the latter question to be put de bene esse and that in turn led to the solicitor being similarly cross-examined on the point. I must accordingly record that I would find myself in considerable difficulty over accepting his evidence that in this particular case the decision of the area committee was a really material factor affecting his continuance of the litigation. At that stage he was much incensed with his opposing solicitor, determined not to abandon the proceedings, and probably unable to look at the position objectively. Having seen and heard him on this point I have regretfully concluded that he was probably in any event intending to carry on with this litigation on the strength of his own opinion.

It having been established that the solicitor's conduct was of that serious nature to which the speeches in *Myers* v. *Elman* [13] refer, and that the matter is thus one on which there is jurisdiction to make an order against that solicitor, the question of discretion arises. It is urged that all that was done was intended for the benefit of the lay client. But assuming that to be so how can that justify oppressive procedure running the husband into ever-increasing costs? The jurisdiction of the court is intended to protect defendants from precisely that sort of oppression. To my mind this is a case where the solicitor throughout was bent on pressing on with litigation regardless of all other factors.

In the earliest stages his disregard for other factors to some

[13] [1940] A.C. 282.

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extent appears from the way he started proceedings after advising the wife to run up accounts without telling her to inform her husband. At the later stages the cause of that disregard may not be a matter which it is necessary to determine, but in so far as it is relevant I have no doubt that his feelings against his opposing solicitor accounted for a good deal. In the witness-box those feelings emerged time and again, as did his great difficulty in appreciating, or indeed remembering, matters which tended against the particular point he was pursuing. It was from this and not from conscious intention that stemmed a general unreliability of testimony and also a certain amount of the above disregard.

In those circumstances it seems to me that the husband ought to be indemnified, in that he should be protected against the consequences of proceedings being continued after the beginning of August, 1957. On principle I would have thought that the wife's solicitors should be ordered to pay the costs from then on a solicitor and client basis, but no authority has been cited for making an order other than for party and party costs.

On the figures in the registrar's report that entails a payment by the solicitors as regards party and party costs of £105 in addition to the £45 previously mentioned: the £105 relates solely to costs up to and including those of October 21, 1957. (That still leaves the husband to bear his own costs to the extent of £108.) If the solicitors to the wife wish despite the above figures being available to have a further and formal taxation as to the £105 I am inclined to think they are entitled to insist on it subject to questions of the incidence of the further costs.

There is also the question as to whether I should give any further guidance to the registrar on his taxation of the wife's solicitor's bill as submitted under Schedule 3 of the Legal Aid and Advice Act, 1949. This includes just over £200 profit costs up to October 21, 1957 (subject to the 15 per cent. reduction made under the Schedule). In this connexion I have had in mind authorities such as *Re Dartnall, Sawyer* v. *Goddard*,[14] but having regard to the area committee's decision, it seems to me I should give no further guidance or indicate that the solicitors should bear any costs of proceedings prior to October 21, 1957, than those which I have dealt with earlier in relation to the excessive documents.

[His Lordship then heard argument as to costs incurred since October 21, 1957, and said:] Exercising my discretion in accordance with the recognized principles I order the solicitors to pay all those costs. As to the legal aid taxation, my guidance to the registrar is that as from the period after October 21, 1957, and up to the notice of change of solicitors there should be no costs allowable in respect of the issues which have been dealt with today. As regards the transcript I think one half of that should

[14] [1895] 1 Ch. 474.

be paid by the solicitors. All costs which I have ordered the wife's solicitors to pay to the husband are on a party and party basis and the orders are made against the firm and not against any particular individual.

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Solicitors: *Donald A. Kershaw & Co.; Patersons, Snow & Co.; Walter, Burgis & Co.*

J. B. G.

[CHANCERY DIVISION.]

In re NOS. 55 & 57, HOLMES ROAD, KENTISH TOWN. BEARDMORE MOTORS LTD. *v.* BIRCH BROS. (PROPERTIES) LTD.

1958
April 30;
May 1.

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Landlord and Tenant—Business premises (Security of tenure)—Limitation — Application for new tenancy — Summons naming wrong respondents—Application to amend—Amended summons served out of time—Effect on vested rights—Whether amendment proper—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 29 (3)—*R.S.C., Ord.* 53D, *r.* 3 (2).

Practice—Parties—Misdescription—Amendment—Limitation of action.

Limitation of Action—Vested right to limit—Amendment of proceedings —Misdescription of parties.

On March 24, 1932, the applicants took an assignment of a lease of premises due to expire at Christmas, 1957. The lessors were Birch Bros. Ltd. On March 29, 1947, the freehold reversion expectant on the term was assigned by Birch Bros. Ltd. to Birch Bros. (Properties) Ltd., who were registered as freeholders on September 10, 1947. Birch Bros. (Properties) Ltd. was not a subsidiary of Birch Bros. Ltd., though the two had the same office, secretary and directors. On April 16, 1957, Birch Bros. (Properties) Ltd. served on the applicants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating the tenancy at Christmas, 1957. On June 13, 1957, the applicants served a counter-notice on Birch Bros. (Properties) Ltd., and on July 30, 1957, within the time required by the Act, issued a summons applying for a new tenancy under section 24 (1) of the Act, and naming Birch Bros. Ltd. respondents. The summons was served by a process server on the secretary common to both companies. On October 17 the master granted the applicants leave ex parte to amend the summons by altering the respondents' name. On October 28, out of time, the amended summons was served on Birch Bros. (Properties) Ltd., who now asked that the amendment be struck out and the summons dismissed:—

Held, that the mistake was more than a mere misnomer; and that the applicants' failure to serve a summons on Birch Bros. (Properties) Ltd. within the time prescribed by section 29 of the Landlord and Tenant Act, 1954, for applying for a new tenancy, gave Birch Bros. (Properties) Ltd. a vested right; and that the court, proceeding on the analogy of R.S.C., Ord. 16, r. 11, should not, by allowing the amendment, divest them of a right in favour of which time had run.

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W. Hill & Son v. *Tannerhill* [1944] K.B. 472; 60 T.L.R. 410 and *Alexander Mountain & Co.* v. *Rumere Ltd.* [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 144, 483 (C.A.) distinguished.

Adjourned summons.

By a lease dated October 31, 1907, and made between Birch Bros. Ltd. and W. Parkyn & Sons Ltd., premises known as numbers 55 and 57 Holmes Road, Kentish Town, were demised to W. Parkyn & Sons Ltd. for a term of 50 years and a half quarter from October 31, 1907. On March 24, 1932, the term was assigned to the applicants, Beardmore Motors Ltd. On March 29, 1947, the freehold reversion expectant on the term was assigned to Birch Bros. (Properties) Ltd., a company which was formed specially for the purpose of taking over the properties owned by Birch Bros. Ltd. The two companies, Birch Bros Ltd. and Birch Bros. (Properties) Ltd. had a common office, a common directorate and a common secretary. Birch Bros. (Properties) Ltd. were registered as freeholders of the premises on September 10, 1947.

On April 16, 1957, the landlords, Birch Bros. (Properties) Ltd. served upon the applicants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating their tenancy at Christmas, 1957 (the date of expiry of the lease), and stating that they would oppose the tenants' application for a new tenancy. By a counter-notice dated June 13, 1957, the applicants gave notice to Birch Bros. (Properties) Ltd. of their unwillingness to give up possession of the premises.

By originating summons issued on July 30, 1957, the applicants, Beardmore Motors Ltd., applied for a new tenancy under section 24 (1) of the Landlord and Tenant Act, 1954. The summons was addressed to Birch Bros Ltd., and was served by a process server on the secretary of Birch Bros. Ltd. and Birch Bros. (Properties) Ltd. The solicitors to Birch Bros Ltd. seeing that the wrong respondents had been named in the summons, notified the applicants' solicitors of the mistake before August 16, 1957, but the applicants took no steps to amend until October 17, 1957, when the master gave the applicants leave ex parte to amend their summons. Pursuant to the said leave, the summons was amended by the insertion of the word "(Properties)" between "Birch Bros." and "Ltd." in the name of the respondents on October 18, 1957. The amended summons was served on Birch Bros. (Properties) Ltd. on October 28, 1957. At the hearing before the master on November 14, the respondents took the point that leave to make the amendment should not have been granted, and that at the time the amendment was made the period of limitation prescribed by section 29 of the Landlord and Tenant Act, 1954, for issuing an application for a new tenancy against Birch Bros. (Properties) Ltd. as landlords had expired, that the amendment should be struck out and the summons dismissed.

W. A. Bagnall for the applicant.
P. G. Langdon-Davies for the respondents.

The following cases were cited in argument: *Weldon* v. *Neal* *; *W. Hill & Son* v. *Tannerhill* †; *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.*‡; *Alexander Mountain & Co.* v. *Rumere Ltd.*‡‡; *Challinor* v. *Rodor* §; *Hudson* v. *Fernyhough* ¶; *Osborne* v. *Snook.*‖

HARMAN J. stated the facts and continued: The section relevant for this purpose is section 29 of the Landlord and Tenant Act, 1954. Section 29 (3) provides: "No application under sub-"section (1) of section 24 of this Act shall be entertained unless "it is made not less than two nor more than four months after "the giving of the landlord's notice under section 25." The landlords' notice under section 25 was given on April 16; therefore there were four months to run to August 16. Consequently the originating summons issued on July 30 was in time, but the amendment was out of time.

The first objection taken is that it is not a matter of discretion; the court has no power to entertain this application, it is said, because it was not made within four months from April 16. The first point taken by the applicants in answer to that is that the application was "made" on July 30. The applicants admit that they misdescribed the respondents, but they say that that is not a matter which is fatal; a mere misdescription will never be effective to defeat the application. The necessary amendment can and ought to be allowed, and that will not cause the application to bear a date later than that of its original issue, because there is an inherent jurisdiction to correct a mistake of this sort.

The first case which was cited in support of the applicants' contention was *W. Hill & Son* v. *Tannerhill.*[1] The headnote reads: "W. Hill, an individual trading alone and without partners "as 'W. Hill & Son,' issued a writ in the firm name contrary to "R.S.C., Ord. 48A, r. 1. The period of time prescribed by the "Limitation Act, 1939, within which the action must be brought "having expired, W. Hill applied for an order substituting as "plaintiff in the action 'W. Hill trading as W. Hill & Son': "*Held*, that, as W. Hill was an actually existing person and the "real plaintiff in the action, he was entitled to the order." Scott L.J. in the leading judgment acknowledges the principle that one must not make an amendment so as to divest a vested right of another party, the leading case for that proposition being *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.*[2] But, says the Lord Justice, that did not apply to the kind of case

* (1887) 19 Q.B.D. 394.
† [1944] K.B. 472; 60 T.L.R. 410.
‡ [1932] 1 K.B. 485.
‡‡ [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 144, 483 (C.A.).
§ (1885) 1 T.L.R. 527.
¶ (1889) 61 L.T. 722.
‖ [1953] 1 W.L.R. 322; [1953] 1 All E.R. 332.
[1] [1944] K.B. 472; 60 T.L.R. 410.
[2] [1932] 1 K.B. 485.

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that he had before him. He says that the plaintiff always was W. Hill, he misdescribed himself, having regard to the rules, as W. Hill & Son. But to put that right was not to interpose a new plaintiff or to alter the effect of the Limitation Act, 1939, because the right person was always there.[3] I understand and accept that principle, but is that the case here?

I ought in this connexion to refer to *Alexander Mountain & Co.* v. *Rumere Ltd.*[4] The headnote there is[5]: "In the case "of the mere misnomer of a plaintiff on a writ, the defendant, "by a summons supported by an affidavit, can compel the "plaintiff to amend. If the defendant does not exercise this "power, and the matter proceeds to trial, the misnomer can "then be amended, and in no circumstances can it affect the "substantive judgment which the court is called on to pro-"nounce." The Court of Appeal overruled Lord Goddard C.J. in the matter, and Cohen L.J. decided the point largely upon an article in the Law Journal of May 9, 1942, p. 150, to which he lent his approval in his citation. It goes like this[6]: "'it is "'submitted that there never was a time, not even in the "'days before the rigour of the procedure at common law had "'been modified by statute, when such a judgment on the trial "'of an action could have been appropriate in a mere case of "'misnomer. It may be doubted whether it would have occurred "'to anyone in the above case to suggest a judgment in this form "'if the plaintiff had been an individual, one of whose names had "'been omitted, or wrongly abbreviated instead of a corporation. "'There is, however, no magic in the name of a corporation. It "'is true that a corporation, whether limited or otherwise, can "'sue only in its corporate name, but, equally, an individual can "'only sue in his proper name.'"

Mr. Bagnall, in a persuasive argument, says that this was merely a case of the landlord being sued in the wrong name. The applicants intended to sue the right respondents, but, by a slip of the pen a word was left out and the wrong corporate name was given. But the identity of the person (albeit an artificial person) remained the same. Therefore the application was made within time, and the mere amendment of the name will not be against the policy of the law. The answer put forward to that argument —and I think the conclusive answer—is that here there are two existing companies, one Birch Brothers Ltd., and the other Birch Brothers (Properties) Ltd. The applicants knew that there were two such companies; they also knew that Birch Brothers (Properties) Ltd. were their landlords, but they chose to sue Birch Brothers Ltd. I cannot say that they intended, when they used the one title, to use the other. It is not as if the other title were that of a non-existing person, or that

[3] [1944] K.B. 474, 475.
[4] [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 144, 483 (C.A.).
[5] [1948] 2 K.B. 436.
[6] Ibid. 436, 441.

they were under any misapprehension. They simply gave the name of an existing company which they knew, and knew as not being their landlords, as respondents to the summons. It is not, in those circumstances, open to me to say that this was a mere misnomer. I can only assume that they intended to sue Birch Brothers Ltd., of whom they knew and who, indeed, were the original freeholders of this property, when they issued the summons in the way they did. Therefore, it seems to me, cases about mere misnomer have nothing whatever to do with this point.

The second point taken by the applicants is that the application was made on the day it was first issued, namely July 30, 1957, notwithstanding that the wrong respondents were there named, and that to insert the right respondents is a mere exercise of the amending power which the Rules of the Supreme Court give and which is frequently resorted to. The rules, which are embodied in R.S.C., Ord. 53D, are mandatory in form, and they are made not in accordance with any rule-making power given by the Act but by the rules committee under section 99 of the Judicature Act, 1925, to which I will refer in a moment. Rule 3 ordains that an application for a new tenancy under section 24 of the Act of 1954 shall be made by originating summons in the Chancery Division, stating the premises to which the application relates and the business carried on there, particulars of the current tenancy, and the applicant's proposal as to the new tenancy. Secondly, it states that the person who is the applicant's landlord as defined in section 44 of the Act of 1954 shall be made respondent to the summons. Rule 5 provides that no appearance need be entered to the summons. I think it is unfortunate for everybody that it was seen fit by the rules committee to provide that in this kind of application no appearance need be entered. Why they should make such a rule in matters which are necessarily highly controversial, and which, if I may say so, would be more suitable to proceedings by writ, I am quite unable to understand. If appearance were necessary, either Birch Brothers Ltd. would have appeared and would then have been in a position to take the point that they were not the landlords straight away, or Birch Brothers (Properties) Ltd. would have appeared under protest and moved to set aside the proceedings. Either way the issue would have been raised at an early stage. The rule provides that the summons must be returnable at a date which will allow at least 14 days to elapse between the date of service and the return date. What the effect of that may be remains to be decided hereafter. As far as I can see, having issued a summons, an applicant may put it in his pocket for as long as he chooses.

The respondents' objection to this summons, therefore, is that it does not name as the respondent to the summons, or it did not as issued, the person who is the applicants' landlord as defined by the Act. The rule, therefore, was not complied with. Therefore, say the respondents, it was not an application under section 24 (1) because it was not made in accordance with the rules.

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Prima facie, I think that must be so. It did not comply with the rules, and, therefore, was not an application "made," that is to say, properly made under the section. The applicants, however, contend that this is only a rule made by the rules committee like any other under the Judicature Act, and all such rules may be amended as justice requires. Section 99 (1) of the Judicature Act, 1925, says: "Rules of Court may be made under this Act for "the following purposes:—(*a*) for regulating and prescribing the "procedure . . . in . . . the High Court . . . in all causes and matters ". . . in which—[that court has jurisdiction]—and any matters "incidental to or relating to any such procedure or practice includ- "ing . . . the manner in which, and the time within which, any "applications which under this or any other Act are to be made to "the Court of Appeal or to the High Court shall be made." So that the mandatory part of the rule which says that the landlord must be made a respondent is a provision which the rules committee were expressly entitled to make under section 99 (1) (*a*) of the Judicature Act. But it is a rule which, of course, is subject to any other relevant rule, and I am referred to R.S.C., Ord. 70, r. 1, which says: "Non-compliance with any of these rules . . . shall not "render any proceedings void unless the court or a judge shall "so direct, but such proceedings may be set aside either wholly "or in part as irregular, or amended, or otherwise dealt with in "such manner and upon such terms as the court or judge shall "think fit." I do not see any reason why I should direct that the proceedings are void. But the question is whether I ought to allow them to be amended under the discretion given me by the rest of the rule, and here comes in the question of policy.

It is said that the analogy to the passing of time under the Limitation Act has no bearing on the present case, because Order 53D is a code, and the court has power to amend as it chooses, and to add parties as it, in its discretion, sees fit, and no analogy to other statutes ought to be allowed to affect the matter. Rule 6 (3) of Order 53D provides that: "The preceding provisions of "this rule are without prejudice to the power of the court or "judge . . . to order notice of the proceedings to be given to any "person or any person to be made a party to the proceedings." Therefore the rules themselves, it is said, contemplate that a party may be added to the proceedings if the court thinks that he ought properly to be so added. The question for me, therefore, is whether I ought to allow an amendment of this sort, or whether I ought not to act by analogy to the refusal of the court to make amendments which divest a vested right. There is no doubt in the present case that Birch Brothers (Properties) Ltd., by August 16, 1957, could have said: "We have got through the four months since "we served our notice, and although the tenants served a counter- "notice, they have not taken any proceedings against us. We are "therefore free." That does seem to me to be a vested right. They were entitled, as its seems to me, to congratulate themselves and consider themselves free of that worry. Ought I

to take that away from the landlords by a subsequent amendment? If one turns to Ord. 16, r. 11 (which is at least analogous even if it is not the pertinent rule in the case) it speaks of misjoinder and nonjoinder, and provides: "No cause or matter "shall be defeated by reason of the misjoinder or nonjoinder of "parties. . . . The court . . . may, at any stage of the proceedings ". . . order that the names of any parties . . . be added. . . . "Every party whose name is so added as defendant shall be "served with a writ of summons or notice . . . and the pro-"ceedings as against such party shall be deemed to have begun "only on the service of such writ or notice." So that if the present proceedings had been begun by writ and an amendment had been allowed adding Birch Brothers (Properties) Ltd., and they had been served (as they must have been) with the writ, the writ would only have run against them from the date of its service, and would, therefore, be out of time. It is suggested that that analogy ought to apply here, and that either I should not allow the amendment by adding Birch Bros. (Properties) Ltd. at all, because this is not mere procedure but concerns fundamental vested rights, or, if I do allow them to be added, it would be futile because they must then be treated as parties as from the day when the amendment was made, which was too late.

I do not see any answer to the last argument. Once I conclude (as I have done) that this was not a case of mere misnomer or misdescription, I ought not to depart from the well-settled rule that, where a man has a vested right in favour of which time has run—for instance, under the Limitation Act or in respect of the right to sue under Lord Campbell's Act—then that right ought not to be taken from him either by adding parties or adding causes of action which would bring in a new liability. Even if Order 53D is a code, I should proceed on the analogy of Order 16, rule 11, which specifically provides that, when an amendment is made by adding a defendant, proceedings shall not be, so to speak, antedated as against him.

Therefore, I conclude that the application to amend ought not to have been successful, and that the objection taken succeeds. I say with the greatest regret that it seems to me that the applicants are the authors of their own misfortune, having been given the chance to remedy what they had done, and having refused to take it. Therefore, I attach no weight to the fact that the two companies no doubt each knew what the other knew by virtue of their common board and common secretary, and that this in other circumstances might have been a highly technical and unmeritorious defence. I do not see that it would have made any legal difference though it certainly makes a difference to the unwillingness of the court to come to such a conclusion that

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the applicants were granted such a locus poenitentiae. I propose to send the matter back to chambers, striking out the name of the landlord company.

Order accordingly.

Solicitors: *Ballantynes; Gouldens.*

P. P.

[chancery division.]

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Dec. 18, 19, 20.

Upjohn J.

JENNINGS *v.* KINDER (INSPECTOR OF TAXES). HOCHSTRASSER (INSPECTOR OF TAXES) *v.* MAYES.

Revenue—Income tax—Scheme by employer to provide housing assistance to employees—Loss on sale of dwelling on transfer to new place of work to be made up by employer—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *Rules applicable to Sch. E, r.* 1. *Benefit to Employee—Whether reimbursement on loss an "expense"—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 160.

M. was employed from 1941 under various contracts requiring him to work at such of their factories as his employers should direct. In 1951 M. entered into an agreement with his employers under a scheme which they operated for the assistance of employees in the purchase of dwelling-houses. By the agreement, the employers undertook (inter alia), if M. were transferred from his home, to reimburse any loss which he might incur on the sale thereof, reserving to themselves an option to purchase. M., in pursuance of that agreement, bought a house for £1,850, of which £300 was advanced to him by the employers by way of tax-free loan. On his transfer to another factory in 1954 M. sold the house with the consent of the employers for £1,500, and they paid him the sum of £350 to compensate for his loss. M. was assessed under Schedule E to income tax on the sum of £350:—

Held, that he was not taxable on the sum of £350 under Schedule E since that sum was not a profit arising from his employment, but something wholly collateral.

J., who was employed by the same employers, joined the housing assistance scheme and purchased a house, in which he was living when he was required by his employers to go to a new place of employment. He sold his house and suffered a loss of £450, which was reimbursed to him in accordance with the scheme. As a person to whom the Income Tax Act, 1952, s. 160, applied, he was assessed to income tax on the sum of £450 as being "paid in respect of "expenses" and as such being a perquisite of his employment:—

Held, that a loss on sale of a house was not an "expense" within the normal meaning of the word or within the Income Tax Act, 1952, s. 160 (1),[1] and, accordingly, the sum was not assessable to tax.

[Reported by M. B. Kelly, Esq., Barrister-at-Law.]

[1] Income Tax Act, 1952, s. 160 (1): "Subject to the provisions of "this Chapter, any sum paid in "respect of expenses by a body corporate to any of its directors or to "any person employed by it in an "employment to which this Chapter "applies shall, if not otherwise "chargeable to income tax as income "of that director or employee, be "treated for the purpose of paragraph 1 of Schedule 9 to this Act "as a perquisite of the office or "employment of that director or

CASES STATED by General Commissioners under the Income Tax Act, 1952, s. 64.

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The second case, which was heard first by the court, was an appeal by Eric John Lazare Hochstrasser (Inspector of Taxes) against a decision of the General Commissioners of Income Tax for Langbaurgh East, Yorkshire, disallowing an assessment to income tax made on Leonard Harry Mayes under Schedule E in the sums of £1,170 which included the sum of £350 paid or credited to him by his employers under their housing assistance scheme.

The following facts appear from the case stated. Since December, 1941, Leonard Harry Mayes had been an employee of Imperial Chemical Industries Ltd., and immediately before September, 1950, he had been employed by them at Welwyn, Herts. He was then transferred to their factory at Hillhouse, Lancs, and on April 27, 1951, he entered into a service agreement with his employers. At or about this time the scheme operated by his employers to provide assistance with the purchase of housing for their married male staff came to his notice, and on June 1, 1951, he entered into an agreement based on that scheme with his employers. The agreement was a lengthy document which carried out in great detail the provisions of the scheme. In so far as is material, the housing scheme provided that the employers were prepared to offer their employees assistance in the purchase of a house provided that the price was within certain limits. It stated that the company were prepared to make an interest-free loan to an amount which varied in relation to gross Imperial Chemical Industries Ltd. emoluments, and set out the terms of the loan, which was to be secured by a mortgage of the house; where there was a first mortgage by a building society or a private lender, the interest-free loan was to be secured by a second mortgage. In cases where the employee financed the purchase, it would be a first mortgage. By paragraph 2 of the scheme: "It is not the present intention of the "company to require the interest-free loan to be repaid until the "expiration of fifteen years," or the earlier of the following events: transfer by the company to a new locality so that the employee ceased to reside in the house, or giving up possession of the whole or any part of the house, or retiring from the service on pension, or leaving the company's employment or death. The scheme continued "Subject to your maintaining the house in "good repair, the company will guarantee you against loss or

"employee and included in the emolu- "ments thereof assessable to income "tax accordingly: Provided that "nothing in this subsection shall "prevent a claim for a deduction "being made under paragraph 7 of "the said Schedule 9 in respect of "any money expended wholly, exclu- "sively and necessarily in performing "the duties of the office or employ- "ment."

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"depreciation of the house on the following terms: 1 (*a*) The "value of the house on the happening of any of the following "events, namely: (i) If you are subsequently transferred by the "company and you wish to sell or let the house. (ii) If you "die whilst in the service of the company: (iii) If you retire "on pension. (*b*) In the event of your being transferred by the "company, and by reason of such transfer you wish to sell or "let the house, you will offer the house to the company who "will have the right to buy it at a valuation price. If the house "is purchased by the company and the valuation price is less than "the original cost price plus improvement costs, the difference is "made up by the company under guarantee. If the house is "not purchased by the company, the provisions of the two "following sub-clauses (*c*) and (*d*) will apply. (*c*) If the house "is sold within one year after such one of the three events "mentioned in (*a*) above as shall first happen and the sale is a "bona fide sale at the best price reasonably obtained and is not "for the purpose of a speculation, the company will pay you or "your executors or administrators, in the case of your death, "the amount (if any) by which the sale price is less than the "original cost price, together with improvement costs. (*d*) If the "house is not sold within one year, a valuation is made at the "end of that year and if the valuation price is less than the "original cost price, plus any improvement costs, the company "will pay the difference."

The scheme further provided that where the employee desired to sell his house for his own reasons, but not for one of the reasons set out in paragraph 2 above, that the company would consent to the sale if good and sufficient reasons were given, and if there were a loss, that the company would bear that loss.

In June, 1951, Mayes bought a house at No. 16, Ribble Road, Fleetwood, for the sum of £1,850. Of this amount £90 was provided by Mayes, £1,460 was borrowed on a first mortgage from the Abbey Building Society and £300 was borrowed on a second mortgage from his employers, who paid all legal costs including stamp duties, together with the expense of removal from Welwyn to Fleetwood. In October, 1951, Mayes was transferred to Wilton, Yorks, and, in accordance with the housing agreement, offered his house to the employers, who declined to accept it. With their consent, the house was sold for £1,500 and the loss of £350 was made good to Mayes by the employers. The commissioners found that the terms of Mayes' employment were completely independent of the housing agreement and that salaries paid by Imperial Chemical Industries Ltd. compared favourably with salaries paid by other employers not operating a housing scheme.

The contentions made before the commissioners on behalf of Mayes were that any benefit received by him under the housing scheme was to meet a loss of capital, and as such were not taxable, and further that if there had been any taxable benefit it should

have been assessed for the year 1950–51. The Inland Revenue contended however that the sum of £350 represented a profit from Mayes' employment for which he was chargeable to income tax and that no deduction could be allowed in respect of it under rule 7 of Schedule 9 to the Income Tax Act, 1952. The commissioners decided that the £350 was a payment made against a capital loss and was not therefore taxable.

The Crown appealed.

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In the first case Charles Maurice Jennings appealed from a decision of the General Commissioners of Income Tax for Stockton Ward, County Durham, against an additional assessment in the sum of £450 made on him under Schedule E to the Income Tax Act, 1952, for the year 1953–54.

The facts in this case were admitted to be as follows: Jennings joined Imperial Chemical Industries Ltd. in July, 1944, when he was living in London. In January, 1949, he was transferred to Wilton, Yorks, and in April, 1952, he was again transferred to Billingham, Durham, and on each occasion he acquired a house under his employers' housing assistance scheme. On the first transfer he sustained a loss of £80 which was made good to him in accordance with the scheme. On the second transfer he again sustained a loss and the sum of £450 was paid to him. In both cases his costs and removal expenses were paid by the employers. When Jennings began his employment in 1944 he did not know of the housing scheme and was not thereby moved to join because of it. If there had been no such scheme he would still have been employed by Imperial Chemical Industries Ltd. and he considered that his remuneration was adequate for the work which he did. It was further admitted that an employee's salary was calculated independently of any benefits which he might derive from the housing scheme, and that the sum of £450 was not salary for services under Jennings' service agreement with his employers.

It was contended on Jennings' behalf that the sum of £450 received by him was to meet a capital loss sustained by him and was therefore not taxable, and further that any benefit accruing to him under the scheme was not a reward for his services. It was also contended that if any benefit under the housing scheme was a taxable emolument, the like amount was wholly and exclusively and necessarily expended by Jennings in the performance of the duties of his employment, and that, therefore, no taxable profit emerged.

On behalf of the Inland Revenue it was said that the sum of £450 represented a profit or emolument of the taxpayer from his employment and was in the nature of income, and was accordingly assessable to tax under Schedule E and Schedule 9 rules 1 and 4 of the Income Tax Act, 1952, and that an additional assessment

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in respect thereof was properly made on him for the year 1953–54, and, further, that if tax was chargeable, no reduction in respect of the £450 was allowable under rule 7 of Schedule 9, in that any expense incurred by Jennings in selling his house was not incurred wholly, exclusively and necessarily in performing the duties of his employment. The commissioners upheld this contention and were also of opinion that the loss on the sale of the house in 1953 was not money wholly, exclusively and necessarily expended in the performance of the duties of the office or employment held by Jennings within the meaning of rule 7 of Schedule 9 to the Income Tax Act, 1952, and accordingly they confirmed the additional assessment.

The taxpayer appealed.

John Pennycuick Q.C. and *Alan Orr* for the Crown.
F. N. Bucher Q.C. and *H. H. Monroe* for the taxpayers.

The cases cited in argument were referred to in the judgment.

UPJOHN J. I have before me two appeals by way of case stated from the General Commissioners for Income Tax: one by the Crown and one by the subject. Both raise precisely the same point and they are in their essential facts indistinguishable one from the other, save that in Jennings' case an additional point arises on section 160 of the Income Tax Act, 1952. The appeals raise, to my mind, novel and important points. In Mayes' appeal the commissioners for a division of York decided in favour of the subject, and in Jennings' appeal on the very next day the commissioners for a division of Durham decided in favour of the Crown. I propose to take Mayes' case first, as upon its facts it is the simpler.

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[His Lordship stated the facts and continued:] In the case reference is made to a written agreement of employment dated April 27, 1951. As will be seen from what follows, that date gives rise to certain difficulties, but it has this morning been agreed that the Crown will accept the statement made by Mr. Bucher for the respondent Mayes upon instructions that, although that was his first written agreement, he was employed under earlier oral contracts, and one of the terms of those contracts was that he was obliged to move to such of his employers' factories or offices as they should from time to time direct. [His Lordship then read the material parts of the scheme and continued:] Very briefly, the effect of this scheme if you entered into it was that you purchased a house with or without the assistance of an interest-free loan according to your desires. The company, in the events I have mentioned, would guarantee you against loss, that is to say, if there was a transfer to another place you had to offer the house to the company, who might buy it. If they did

not buy it, if the house was sold within a year and there was a loss, the company paid you the amount of the loss. If there was no sale, then at the end of the year there was a valuation, and the company would pay you the amount of the loss as estimated by the valuation. That was how the scheme worked. It was, of course, purely optional as to whether the employee entered into it or not.

Of course, no one doubts that the scheme was introduced to benefit both employer and employee. The scheme was introduced in 1948, when housing conditions were more difficult even than they are now, and it is quite clear from the evidence that was given before the commissioners, and from their findings, that the principal object of introducing this scheme was so that the employee should be free from worry on transfer. He knew that if he was transferred away if he liked he could go into the scheme, and he could be guaranteed against loss. The advantage to Imperial Chemical Industries was twofold. They had more contented employees, and, of course, they also had the call on the house when the employee left it on transfer or death, and that might be quite valuable, because they could then offer the house to the person coming in to take the place of the employee who was transferred, and they could offer him accommodation which might otherwise be difficult to get.

The assessment is made upon the respondent Mayes under Schedule E. The charging section is section 156, which at the relevant time before it was amended in 1956 provided: "The "Schedule referred to in this Act as Schedule E is as follows: ". . . (2) Tax under this Schedule shall also be charged in respect "of any office, employment or pension the profits or gains arising "or accruing from which would be chargeable to tax under "Schedule D but for the proviso to paragraph 1 of that Schedule." It is not disputed that the tax is charged upon the respondent under that paragraph. The first of the rules which by section 156 (5) are applicable to a charge under Schedule E provides: "Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E, or to whom any annuity, pension or "stipend chargeable under that Schedule is payable, in respect" —now these are the important words—"in respect of all salaries, "fees, wages, perquisites or profits whatsoever therefrom for the "year of assessment, after deducting the amount of duties or "other sums payable or chargeable on the same by virtue of any "Act of Parliament, where the same have been really and bona "fide paid and borne by the party to be charged." It is this loss of £350 payable which the Crown seek to tax as being a salary, fee, wage, perquisite or profit arising "therefrom" for the year of assessment. As I have said, in Mayes' case they failed. In Jennings' case they succeeded.

The argument on behalf of Mayes is this: He says that his

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payment of £350 does not arise from his office or his employment because it is not a profit; it is not in any sense a reward for services, and therefore he says it is not a profit that arises from the employment. A profit or perquisite, it is submitted, must essentially arise as a reward for services, whether past, present or future. The Crown, on the other hand, offer a dichotomy. It is submitted that if you leave out transactions for full value between employer and employee, the consideration being something other than services, for example, the purchase for full value in money or money's worth of an employee's house or a motor-car, you find upon the authorities that every payment by an employer to an employee must either be a personal gift, that is, a gift to an employee on grounds personal to him and not to him qua employee, when admittedly it is not taxable, or a payment to him as an employee and because he fulfils some office or employment, in which case it is a profit from the office or employment, and is taxable. Mr. Pennycuick says that putting it the other way round and leaving out of account transactions for full consideration in money's worth, every payment to the employee is a profit from his office and taxable unless personal to him, and it is said that all the authorities show that.

With all respect to the argument of the Crown, I do not think they show any such easy dichotomy. In my judgment, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future. I venture to think that the Crown's argument is based on a misinterpretation of some of the authorities, and for this reason, that in so many cases on this much litigated branch of the law it was clear from the very nature of the payment that it was in respect of services, and the whole question was whether it was a profit from the employment or a personal present, and the possibility of its being a payment not in connexion with services simply did not arise. For that reason, the point which is in the forefront of this case frequently did not rise to the surface in many of the well-known cases.

Having expressed my view on the law, I turn to the authorities which seem to me to justify that view. The first is *Hunter* v. *Dewhurst*.[1] That is a difficult case which has been the subject of subsequent judicial comment. I read the part of the

[1] (1932) 16 T.C. 605.

headnote relating to *Dewhurst's* case: "The respondent desired "to retire from active management of the company, but his "co-directors wished to be able still to consult him, and it was "agreed that he should resign the office of chairman, receive as "'compensation' a lump sum in lieu of the provision under "article 109, waiving any future claim under that article, and "remain on the board . . . at a reduced rate of remuneration." It was held in the House of Lords that in the circumstances of that case the sum received was not assessable to income tax. Lord Atkin said this [2]: "This sum is expressed in the article to "be 'by way of compensation for the loss of office.' I will "assume, without expressing any opinion on the matter, that this "sum, if received by any ex-director, would fall within the words "'salary or profit whatsoever' and would come 'from' the office "of director, as being part of the remuneration which he was "entitled to under his contract of employment. But the cir-"cumstances in which the first payment was made seem to me "to negative the proposition that the payment was received "'from' the office. Rule 1 appears to me to indicate emolu-"ments either received from the employer or from some third "party (such as tips, permitted commission and the like) as a "reward for services rendered in the course of the employment." That is, I think, a helpful expression of opinion upon the general scope of rule 1.

The next case in *Prendergast* v. *Cameron.*[3] In that case a director received the sum of £45,000 in consideration of which he did not resign from his office of director, and it was held that that sum was properly assessable as a profit arising from the office of director under Schedule E. Lord Maugham said [4]: "On "these facts and findings, the question is whether the £45,000 "was paid to the appellant in his capacity as a director and to "induce him to continue to hold his office of a director, so that "the sum comes within the charging words of rule 1, of Schedule "E, 'all salaries, fees, wages, perquisites or profits whatsoever "'therefrom' (that is, from the office of a director), or whether "the sum was paid merely to obtain his agreement not to serve "the notice for, say, one day, leaving him perfectly free to retire "on the next day, in which case the sum, as the Master of the "Rolls held, would not be profit arising from the office." So Lord Maugham is there quite clearly saying that a payment might have been made to him in connexion with his office of director which might well not fall in the category of a profit from his office at all.

The next case in *Beak* v. *Robson.*[5] In that case the respondent director covenanted in consideration of the payment of £7,000 that he would not compete with the company when his employment had come to an end within a radius of 50 miles, and it was

[2] (1932) 16 T.C. 605, 644.
[3] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35; 23 T.C. 122.
[4] [1940] A.C. 549, 557.
[5] [1943] A.C. 352; 59 T.L.R. 90; [1943] 1 All E.R. 46; 25 T.C. 33.

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held on assessment under Schedule E for £7,000 that it was a payment for giving up a right wholly unconnected with his office and operative only after he ceased to hold that office, and the assessment was discharged. Lord Simon said [6]: "The considera-" tion which he has to given under the covenant is to be given " not during the period of his employment, but after its termina-" tion. He is giving to the company for a sum of £7,000 the " benefit of a covenant which will only come into effect when " the service is concluded. I agree with Lord Greene M.R. in the " view that to treat this £7,000 as a profit arising from the respon-" dent's office 'is to ignore the real nature of the transaction.' " It is quite true that, if he had not entered into the agreement " to serve as a director and manager, he would not have received " £7,000. But that is not the same thing as saying that the " £7,000 is profit from his office of director so as to attract tax " under Schedule E." Lord Simon there quite plainly is saying that you must look at the facts of every case, and it is not every payment that is made to a director which accrues to him as a profit from his office. That actual decision is no longer the law, because the law has been altered by statute, but that does not affect the value of Lord Simon's statement.

The next case is *Tilley* v. *Wales*,[7] where a director was assessed under Schedule E in the sum of £40,000. Part of that was to commute his salary and part was capitalization of a pension. In the House of Lords it was held as appears from the headnote "that so much of each payment of £20,000 in the " years 1938–39 and 1939–40 as represented a sum paid in com-" promise of reduction of salary was assessable to Income Tax " under Schedule E, *Prendergast* v. *Cameron*,[8] but so much as " represented capitalization of pension was not so assessable, " *Hunter* v. *Dewhurst*.[9] The case was remitted to the special " commissioners to apportion the two payments accordingly." That, again, is another example of a payment to a director part of which was a profit from his office and part of which was not.

The next case is *Moorhouse* v. *Dooland*.[10] That was the case of the cricketer's benefit. I only desire to refer to the judgment of Jenkins L.J.[11] He said this: "I hope I will not be thought " to undervalue these arguments if I say that I regard them as " disposed of by the application of the principle that the question " whether a given receipt is a profit of an employment must be " decided from the standpoint of the recipient."

Then, finally, there is the recent case of *Bridges* v. *Hewitt*.[12] In that case certain shares were transferred to the directors in consideration of their serving the company for four years thereafter. There was a difference of opinion, and Jenkins L.J. delivered a dissenting judgment agreeing with the judgment of

[6] [1943] A.C. 352, 355.

[7] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; 25 T.C. 136.

[8] [1940] A.C. 549.

[9] (1932) 16 T.C. 605.

[10] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1.

[11] [1955] Ch. 284, 305.

[12] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281.

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Danckwerts J. in the court below. But nevertheless he made a helpful review of the cases.[13] The first was *Herbert* v. *McQuade*,[14] the Clergy Sustentation Fund Case, and the second was *Blakiston* v. *Cooper*,[15] the Easter offerings case. I do not propose to read the passages which he read, but there is no doubt that reading those passages alone affords some support to the view of the Crown that the moment you find a payment is made to a man qua employee then automatically, apparently, it follows that it is a profit of his employment. But the reason, I venture to think, is one that I have already given, namely, that in those cases and, indeed, in the case next referred to in the judgment of Jenkins L.J., *Seymour* v. *Reed*,[16] there were only two possible alternatives; either it was a profit from the employment or it was a personal present.

In *Seymour* v. *Reed* Lord Cave said this: "These words and "the corresponding expressions contained in the earlier statutes "(which were not materially different) have been the jubject of "judicial interpretation in cases which have been cited to your "Lordships; and it must now (I think) be taken as settled that "they include all payments made to the holder of an office or "employment as such, that is to say, by way of remuneration for "his services, even though such payments may be voluntary, but "they do not include a mere gift or present (such as a testimonial) "which is made to him on personal grounds and not by way of "payment for his services. The question to be answered is, "as Rowlatt J. put it: 'Is it in the end a personal gift or is it "'remuneration?' If the latter, it is subject to the tax; if the "former, it is not."

Then Morris L.J. said this in *Bridges* v. *Hewitt*[17]: "In "my judgment the shares were not a profit from the office of "managing director because they were not received by way of "remuneration for services rendered as managing director. They "were received while Bearsley was managing director, but they "represented an expression of gratitude or a testimonial for what "he had done, including what he had done before ever he "became a director or managing director."

Now follows, I venture to think, what is an extremely important summary of the law, a little later on that page: "Accordingly, "the fact that someone who receives a benefit is the holder of "an office does not by itself prove that what he received was a "profit from the office. That has to be decided by considering "on the evidence whether what was received was received as "remuneration for the services rendered in the office." That, I respectively believe, is the true test.

Then Sellers L.J. said this[18]: "In this way the transfer of "the shares is 'linked up' with the respective offices, but the

[13] [1957] 1 W.L.R. 674, 682.
[14] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.
[15] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.
[16] [1927] A.C. 554, 559; 43 T.L.R. 584; 11 T.C. 625.
[17] [1957] 1 W.L.R. 674, 698.
[18] Ibid. 701.

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"question is whether that necessarily or on a reasonable view "involves that the transfer was a payment of remuneration for "services rendered to the company or a profit of the employment. "I would not regard the transfer as having those attributes or of "such a character."

I now relate the law as I have endeavoured to state it to the facts. The housing agreement formed no part of the employee's remuneration, nor did any payment made thereunder. It formed no part of his contract of service, nor was it an inducement held out to him to enter into the company's employment, for he did not know of it until he had been employed for quite a long time. Of course, the housing agreement into which he entered—he need not, of course, if he did not want to—was an advantage to him, and so it was to his employers, for the reasons I have mentioned earlier. The matter must, as Jenkins L.J. said in *Moorhouse* v. *Dooland*,[19] be regarded from the point of view of the employee. Save in the most general sense it does not seem to me accurate to say that to enter into the housing agreement or to receive a payment thereunder was a profit arising from his office. Of course, in a general sense, it was connected with his office; because if he had not been employed he would not have entered into it. It was offered to him, I entirely agree, in his character as an employee and not because of any characteristic personal to himself, and in that sense again it did accrue to him because he was employed. In another sense also it was connected with his employement in this way, that he entered into it because he knew that he might be transferred, and in that case he would be guaranteed against loss when he wanted to sell his house on transfer. But, as Lord Simon pointed out in *Beak* v. *Robson*,[20] those considerations are not really conclusive of the matter at all. You must find, looking at the true nature of the transaction, whether it was a profit arising from his office. In my judgment, as I have said, it was not. It was in no true sense a reward for his services. It was an advantage to him but not, in my judgment, a profit. It was something which was wholly collateral and really had nothing to do with the office or the services which he was bound to render to his employers.

That is fatal to the Crown's claim, and I do not propose to examine the alternative claims advanced on behalf of Mayes upon the footing that the payment does arise from the office of employment, for the simple reason that in this very technical branch of the law it is too difficult and artificial to apply the law to a payment in respect of which I, at any rate, am prepared to deny the major premise as to its character. Accordingly, Mayes' case must be dismissed with costs.

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I turn to Jennings' case. In that case, as I have said, the

[19] [1955] Ch. 284, 305. [20] [1943] A.C. 352, 355.

Crown succeeded. But it is admittedly indistinguishable except for the application of section 160 of the Income Act, 1952. That arises in Jennings' case for this reason, that he was an employee in an altogether higher grade than Mayes, and he was at the relevant time receiving emoluments in excess of £2,000 a year. That is a condition necessary to bring section 160 into operation, and I shall now read it. Subsection (1): "Subject to the provisions "of this Chapter, any sum paid in respect of expenses by a body "corporate to any of its directors or to any person employed by "it in an employment to which this Chapter applies shall, if not "otherwise chargeable to income tax as income of that director "or employee, be treated for the purposes of paragraph 1 of the "Ninth Schedule to this Act as a perquisite of the office or "employment of that director or employee and included in the "emoluments thereof assessable to income tax accordingly: Pro-"vided that nothing in this subsection shall prevent a claim for a "deduction being made under paragraph 7 of the said Ninth "Schedule in respect of any money expended wholly, exclusively "and necessarily in performing the duties of the office or employ-"ment."

The whole question, therefore, is whether that applies to this sum of £450 paid to him by his employers. The chapter is headed "Expenses allowances to directors and others," and I approach this section with the view that "expenses" there is referring to the ordinary expenses that directors and employees incur and not to a payment such as this. That is not conclusive of the matter. First of all you have to find a sum paid in respect of expenses to an employee. £450 has been paid. But is it in respect of expenses? To what expense has the employee been put? That is plainly what the section contemplates. The answer is, in the year of assessment he has not been put to any expense at all. Unfortunately for him, he received rather less for the sale of a house than he had hoped, but he has not been put to any expense. He merely made a loss on the sale of his house, and that cannot in any ordinary use of language be described as an expense, I would have thought, for the purposes at all events of section 160. The only expense to which the employee was put was when he purchased the house some years before in another year of assessment, and all that has happened is that he has not received as much as he paid for it. It does not seem to me that that payment has the character of an expense for the purposes of section 160 at all. Accordingly, in Jennings' case I must allow the appeal, discharge the assessment, and the Crown must pay the appellant's costs.

Appeal dismissed in Mayes' case.
Appeal allowed in Jennings' case.

Solicitors: *Solicitor of Inland Revenue; J. W. Ridsdale.*

[PRIVY COUNCIL.]

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TENNEKOON, COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS . . . . . APPELLANT;

AND

DURAISAMY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Privy Council—Leave to appeal—Jurisdiction of Commonwealth court—"Civil suit or action"—Ceylon—Order of Commissioner for Registration of Indian and Pakistani residents—Appeal to Supreme Court—Court's discretion to grant leave to appeal to Privy Council—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, *s.* 15*—Appeals (Privy Council) Ordinance (Legislative Enactments of Ceylon,* 1938, *c.* 85), *s.* 3, *Sch., r.* 1 (*b*)*—Ceylon Charter of Justice,* 1833, *s.* 52.

Ceylon—Citizenship—Indian resident—Intention to settle permanently in Ceylon—Proof—Indian and Pakistani Residents (Citizenship) Act, No. 3 *of* 1949 *(as amended by Indian and Pakistani Residents (Citizenship) (Amendment) Act, No.* 37 *of* 1950, *s.* 4), *s.* 22.

Conflict of Laws—Domicile—Change—Standard of proof—Difference between proving change of domicile and intention permanently to settle.

An appeal to the Supreme Court of Ceylon under section 15 of the Indian and Pakistani Residents (Citizenship) Act, 1949, from an order of the commissioner refusing or allowing an application for registration as a citizen of Ceylon is a "civil suit or action in "the Supreme Court" within the meaning of section 3 of the Appeals (Privy Council) Ordinance of Ceylon (c. 85 of the Legislative Enactments, 1938), which provides for appeals to the Privy Council by parties "to civil suits or actions in the Supreme Court," and accordingly an appeal from the Supreme Court's decision on appeal from the commissioner lay to the Privy Council in the discretion of the Supreme Court under rule 1 (*b*) in the Schedule to the Appeals (Privy Council) Ordinance where that court were of opinion that the question involved was "one which by reason of "its great general or public importance" ought to be submitted to the Board.

The words "civil suits or actions" in section 3 of the Appeals (Privy Council) Ordinance are not to be read as limited to a proceeding in which one party sues for or claims something from another in regular civil proceedings, but must bear the same meaning as they bore in section 52 of the Ceylon Charter of Justice of 1833, which was that every application to a court for relief or remedy through the exercise of the court's power or authority, or otherwise to invite its interference, constituted an action, for it would be difficult to imagine an intention to exclude from the range of permissible appeals under the Charter cases differentiated by reference to the form of the proceedings, regardless of the gravity of the result occasioned by them.

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* *Present*: LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

Commissioner of Stamps, Straits Settlements v. *Oei Tjong Swan* [1933] A.C. 378; 49 T.L.R. 428 followed.

Dictum of Basnayake J. in *Silverline Bus Co. Ltd.* v. *Kandy Omnibus Co. Ltd.* (1956) 58 N.L.R. 193, 213, that "civil suit or "action" in section 3 of the Appeals (Privy Council) Ordinance is limited to "a proceeding in which one party sues for or claims "something from another in regular civil proceedings," disapproved.

Decision of the Supreme Court of Ceylon affirmed.

The respondent, a married Indian resident in Ceylon, applied in 1951 under section 4 (1) of the Indian and Pakistani Residents (Citizenship) Act, 1949, to be registered as a citizen of Ceylon together with his family, stating in his application that he had been continuously resident in Ceylon during the requisite period prescribed by the Act. At an inquiry before a deputy commissioner the respondent, who was employed as head clerk on an estate, gave evidence, inter alia, that remittances he had made to his mother in India were made under an estate-group scheme and that on an official "B" form signed by him for that purpose he had declared himself to be "temporarily resident in Ceylon." The deputy commissioner, in his order refusing the respondent's application, said that the respondent's domicile of origin was India and that there was a presumption that the domicile continued unless the respondent had adopted a Ceylon domicile of choice; that the burden of proving that he had changed his Indian domicile and had "permanently settled in Ceylon" within the meaning of section 22 of the Act of 1949 lay on him, and that there was clear evidence that the presumption of continued Indian domicile had not been rebutted, since on his own admission, as declared on the "B" form, he was temporarily resident in Ceylon. An appeal by the respondent to the Supreme Court under section 15 was allowed, and against that decision the commissioner appealed: —

Held, that the Act made no reference to domicile, and the question of proving a change of domicile did not come into the matter at all. The Act placed on an applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon.[1] Apart from his signature on the "B" form no action of the respondent indicated that his residence in Ceylon was of a temporary nature; on the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country, and in those circumstances the deputy commissioner was not justified in treating the statement on the "B" form as a sufficient ground for refusing the application.

Dictum of Lord Buckmaster on "declarations as to intention" in *Ross* v. *Ross* [1930] A.C. 1, 6 applied.

[1] In Privy Council Appeal No. 23 of 1956, which was heard together with the present appeal, and which the Supreme Court had treated as governed by this case, the commissioner had stated: "I am of opinion "... that what the Act requires is "that an applicant should have permanently settled in Ceylon not "merely by the date of his application, but at any rate by the date "of coming into operation of the Act, "namely, August 5, 1949." The Board, in the course of their judgment dismissing the commissioner's appeal, said: "In their Lordships' opinion "the provisions of the Act, and in "particular the use of the present "tense in section 6 (1), make it "reasonably clear that an applicant "must prove that he is 'an Indian "'or Pakistani resident,' as defined "in section 22, at the date of the "application. If the relevant date "had been the coming into operation "of the Act, there would surely have "been an express reference to that "date in section 6 (1)."

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Thomas v. *Commissioner for Registration of Indian and Pakistani Residents* (1953) 55 N.L.R. 40 approved.

Decision of the Supreme Court of Ceylon (1955) 56 N.L.R. 313 affirmed.

APPEAL (No. 18 of 1956) from a judgment of the Supreme Court of Ceylon (February 18, 1955), reversing an order (January 25, 1954) made by the appellant, the commissioner for the registration of Indian and Pakistani residents, refusing the respondent's application for the registration of himself, his wife and his four children as citizens of Ceylon.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: On March 29, 1951, the respondent (hereafter called "the applicant") applied for registration as a citizen of Ceylon, under section 4 (1) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, hereafter referred to as "the Act." His application was refused by Mr. Adhihetty, one of the deputy commissioners, on January 25, 1954, but an appeal by the applicant to the Supreme Court of Ceylon was successful. The commissioner now appealed from the decision of the Supreme Court, with the leave of that court.

Before counsel for the commissioner opened the appeal, counsel for the applicant took a preliminary objection to the jurisdiction of the Board, on the ground that the Supreme Court had no power to give leave to appeal to Her Majesty in Council in this case. It was held that that objection failed, for reasons which are stated in the judgment of the Board.

The main question in the appeal was whether the deputy commissioner who dealt with this case was justified in holding that the applicant had failed to prove that he was "permanently "settled in Ceylon" within the meaning of section 22 of the Act (as amended by section 4 of the Indian and Pakistani Residents (Citizenship) (Amendment) Act, No. 37 of 1950).

The Act came into operation on August 5, 1949. It made provision for granting the status of a citizen of Ceylon to Indian and Pakistani residents in Ceylon who were possessed of a special residential qualification, upon the conditions and in the manner therein prescribed. The residential qualification was defined in section 3 as consisting of "uninterrupted residence in Ceylon" immediately prior to January 1, 1946, for a period of not less than 10 years (in the case of a single person) or seven years (in the case of a married person) combined with "uninterrupted residence in "Ceylon" from January 1, 1946, until the date of the application for registration. Continuity of residence was to be deemed to be uninterrupted by occasional absences from Ceylon not exceeding 12 months in duration on any one occasion. Section 4 of the Act provided that any Indian or Pakistani resident possessed of this residential qualification "may, irrespective of age or sex exercise "the privilege of procuring registration as a citizen of Ceylon for "himself or herself, and shall be entitled to make application "therefor" in the manner prescribed by the Act. The section

further permitted the additional registration of wives and of dependent minor children ordinarily resident in Ceylon and, in certain defined circumstances, extended the privilege of procuring registration to widows and orphaned minor children of Indian or Pakistani residents.

Section 6 of the Act (as amended by section 3 of the said Act, No. 37 of 1950) provided as follows: "It shall be a condition for "allowing any application for registration under this Act that the "applicant shall have—(1) first proved that the applicant is an "Indian or Pakistani resident and as such entitled by virtue of "the provisions of sections 3 and 4 to exercise the privilege of "procuring such registration, or that the applicant is the widow "or orphaned minor child of an Indian or Pakistani resident and "as such entitled by virtue of those provisions to exercise the "extended privilege of procuring such registration; and (2) in "addition, except in the case of an applicant who is a minor "orphan under fourteen years of age, produced sufficient evidence "(whether as part of the application or at any subsequent inquiry "ordered under this Act) to satisfy the commissioner that the "following requirements are fulfilled in the case of the applicant, "namely—(i) that the applicant is possessed of an assured income "of a reasonable amount, or has some suitable business or "employment or other lawful means of livelihood, to support the "applicant and the applicant's dependants, if any; (ii) where "the applicant is a male married person (not being a married "person referred to in paragraph (*a*) of section 3 (2)), that his "wife has been ordinarily resident in Ceylon, and in addition, "that each minor child dependent on him was ordinarily resident "in Ceylon while being so dependent; (iii) that the applicant is "free from any disability or incapacity which may render it "difficult or impossible for the applicant to live in Ceylon accord-"ing to the laws of Ceylon; (iv) that the applicant clearly "understands that, in the event of being registered as a citizen "of Ceylon—(*a*) the applicant will be deemed in law to have "renounced all rights to the civil and political status the appli-"cant has had, or would, but for such registration in Ceylon have "had, under any law in force in the territory of origin of the "applicant or the applicant's parent, ancestor or husband, as the "case may be, and (*b*) in all matters relating to or connected "with status, personal rights and duties and property in Ceylon, "the applicant will be subject to the laws of Ceylon."

Section 22 of the Act (as amended by section 4 of the said Act, No. 37 of 1950) defined an "Indian or Pakistani resident" as "a person—(*a*) whose origin was in any territory which, "immediately prior to the passing of the Indian Independence "Act, 1947, of the Parliament of the United Kingdom, formed "part of British India or any Indian State, and (*b*) who has "emigrated therefrom and permanently settled in Ceylon; and "includes—(i) a descendant of any such person; and (ii) any "person permanently settled in Ceylon, who is a descendant of

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" a person whose origin was in any territory referred to in the " preceding paragraph (*a*); . . ."

The Act made provision for the appointment of an officer to be known as the Commissioner for the Registration of Indian and Pakistani Residents, of deputy commissioners and of investigating officers. Applications for registration were to be addressed to the commissioner or a deputy commissioner and were to be in a prescribed form containing all relevant particulars and supported by affidavit. Certified copies of documents might also be submitted. Each application was to be referred to an investigating officer for investigation and report, and the commissioner (or deputy commissioner) was to take such report into consideration in dealing with the application. Where he was of opinion that there was a prima facie case for allowing the application, he must give public notice that, in the absence of any written objection received by him within a month, an order allowing the application would be made, and, in the absence of any such objection, the application was to be allowed. If any objection was received, an inquiry into the nature of the objection was to be ordered.

Where the commissioner (or deputy commissioner) was of opinion that a prima facie case had not been established, he must serve on the applicant a notice setting out the grounds on which the application would be refused and giving the applicant an opportunity within three months to show cause to the contrary. If no cause was shown, an order refusing the application was made. If cause was shown, an inquiry was to be ordered, unless the commissioner (or deputy commissioner) took the steps he was authorized to take when there was a prima facie case for allowing an application (s. 9 (3)).

Such inquiry was to be conducted by the commissioner or a deputy commissioner, who was to have all the powers of a District Court to summon witnesses, compel the production of documents and administer oaths, but the proceedings were to be as far as possible " free from the formalities and technicalities of the rules " of procedure and evidence applicable to a court of law," and might be conducted " in any manner not inconsistent with the " principles of natural justice, which to him " (the commissioner or deputy commissioner) " may seem best adapted to elicit proof " concerning the matters that are investigated." At the close of such an inquiry the commissioner (or deputy commissioner) must either take the steps he was authorized to take whenever there was a prima facie case for allowing an application, or make an order refusing the application.

Section 15 of the Act provided that an appeal against an order refusing or allowing an application was to lie to the Supreme Court.

The applicant applied, on March 29, 1951, to be registered under the Act as a citizen of Ceylon together with his family, stating in his application that he was a married man, an Indian or Pakistani resident, had been continuously resident in Ceylon

during the period of seven years commencing on January 1, 1939, and ending December 31, 1945, and from January 1, 1946, to the date of the application, and making a declaration in the terms of section 6 (2) (iii) and (iv) of the Act. In his supporting affidavit he deposed that he had been born in India on July 1, 1912, and had been married in April, 1932, and that he was employed as head clerk at Glentilt Estate, Maskeliya, having also a share of Rs.2,000 in boutique No. 13, Main Street, Maskeliya. In his covering letter he stated that he came to Ceylon in March, 1931, went back to India for his marriage in April, 1932, and returned to Ceylon with his wife in June, 1934, "from which time I am continually residing in Ceylon with my "wife and children. My four children are all born in Ceylon.

"During the above period of our stay in Ceylon, I had been to "India with my family to see my aged parents and relations on "four occasions and stayed in India not more than 15 days during "each trip, and we did not visit India during 1942–49."

The application was supported by a letter from one M. G. E. de Silva, a Justice of the Peace of Maskeliya, who wrote that from the year 1934 the applicant and his family had "been con-"tinually resident in Ceylon with the exception of short leaves "which amounted to not more than one month on each occasion."

In the course of the investigation, the applicant produced to the investigating officer a certificate dated August 18, 1951, from the Superintendent of Brunswick Group, Maskeliya, where he had been employed from September, 1934, to September, 1944, stating that "according to Mr. Duraisamy's statement, verified "by the Estate records, he and his family had been in continuous "residence on this estate, except for short visits to India for about "15 days once in two years."

On January 28, 1952, the applicant answered a questionnaire, stating that the only visit he, his wife and minor children had paid to India or Pakistan since January 1, 1936/January 1, 1939, was a visit to India in April, 1942, for one month to see his mother, and he further declared that he had remitted sums of Rs. 70 in May, June and July, 1951, to India for his mother. He subsequently stated, in answer to an inquiry from the office of the Commissioner for the Registration of Indian and Pakistani Residents, that these remittances were made under the estate-group scheme on special permit obtained from the Exchange Controller, Colombo, and that he had declared himself on the appropriate forms of application for this purpose, known as "B" forms, to be temporarily resident in Ceylon.

On September 9, 1952, R. T. Ratnatunga, a Deputy Commissioner for the Registration of Indian and Pakistani Residents, gave the applicant notice that he had decided to refuse his application for registration unless he showed cause to the contrary within a period of three months. The grounds for such refusal were specified as follows: "You have failed to prove that you had "permanently settled in Ceylon; the contrary is indicated by

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" the fact that, in seeking to remit money abroad, you declared " yourself to be temporarily resident in Ceylon."

The applicant replied on September 26, 1952, stating the purpose of the remittances to be for the maintenance of his mother and two invalid sisters, and requesting a reconsideration of his case. The deputy commissioner acknowledged this letter on October 9, 1952, and stated that an inquiry would be held under section 9 (3) of the Act.

At the inquiry, which was held on January 25, 1954, before V. D. Adhihetty, a deputy commissioner, the applicant gave evidence substantially confirming his personal history and circumstances as stated in his application. With regard to his visits to India he said that these were not correctly stated in the superintendent's certificate dated August 18, 1951. " The actual visits " I paid to India during this period are in June, 1939, May, 1942, " and September, 1949. From the time I came to Ceylon in " 1939, I have paid six visits to India up to date."

As to the remittances to India, his evidence was as follows: " My mother and sister are dependent on me. From 1935 on- " wards I have been supporting my mother and sister. Before " the exchange control I used to send Rs. 25 per month for the " maintenance of my mother and sister. I applied to the Con- " troller for a permit in December, 1949. The Controller sent me " a general permit to the superintendent of the estate, and " informed me that I had to remit money through the estate- " group scheme. Under this permit I sent money to India " through the estate-group scheme from March, 1950, about " Rs. 50 a month. I had a renewal permit from April 7, 1951, " authorizing me to send Rs. 70 a month. Under this permit I " sent three sums of Rs. 70 a month in May, 1951, June, 1951, " and in July, 1951. I signed ' B ' forms under the estate-group " scheme for the various sums I had remitted to India since 1950 " through the estate-group scheme, and for each remittance I " perfected a ' B ' form wherein I made a declaration that I was " temporarily resident in Ceylon. I ceased sending money from " July, 1951, when I came to know definitely that remitting " money will affect my citizenship rights through the estate-group " scheme. It is a fact that I declared myself temporarily resident " in Ceylon for the purpose of remitting money to India."

At the end of the inquiry the deputy commissioner made an order refusing the application, and the applicant appealed to the Supreme Court of Ceylon. The appeal was first argued before Fernando A.J., and that judge on August 6, 1954, reserved the case for the decision of two or more judges as the Chief Justice should determine.

On February 7 and 8, 1955, the appeal was heard by a bench consisting of Gratiaen J. and Sansoni J. On February 18, 1955, the court delivered judgment allowing the appeal with costs and directing the commissioner to take the appropriate steps under the Act on the basis that a prima facie case for registration had

been established. The judges in giving their judgment said: "The main provisions of the Indian and Pakistani Residents "(Citizenship) Act, No. 3 of 1949 (hereinafter called 'the Act'), "must now be examined with special reference to the qualifica- "tions prescribed for acquiring citizenship by registration. Bear- "ing in mind the legislative plan as a whole, we conclude "generally that the intention was to admit any Indian or Paki- "stani residing in Ceylon to the privilege of Ceylon citizenship "(if claimed within a stipulated period of time) provided that he "satisfied certain tests prescribed by statute for establishing that "his association with the Island could not (or could not longer) "be objected to as possessing a migratory or casual character. "The main question before us relates to the meaning of the "words 'permanently settled in Ceylon' in section 22 of the Act "(as amended by section 4 of Act No. 37 of 1950) which defines "an 'Indian or Pakistani resident.'"

After reading section 22 and dealing with an argument—not relied upon before the Board—as to the effect of the word "emigrate" in that section, the judges continued: "Section 6 "(1), read with section 22, directly raises the question whether "an applicant is 'permanently settled in Ceylon.' We therefore "propose to postpone our discussion of section 6 (1) until we have "first examined the other special qualifications and conditions "for registration prescribed by the Act: (1) the applicant must "possess a minimum qualification of 'uninterrupted residence' "as defined in section 3; (2) his wife (if he is married) and his "minor dependent children (if any) must also possess certain "residential qualifications—section 6 (2) (ii) in its recently "amended form; (3) he must establish a reasonable degree of "financial stability—section 6 (2) (i); (4) he must be free from "any disability or incapacity of the kind referred to in section 6 "(2) (iii); (5) he must 'clearly understand' the statutory conse- "quence of registration—section 6 (2) (iv).

"One observes in all these requirements an underlying decision "to deny Ceylon citizenship to non-nationals whom Parliament "for one reason or another would consider unsuitable for that "privilege. Hence the insistence on the long and 'uninter- "'rupted residence' of the applicant himself and on the residen- "tial qualifications of his immediate family (if any) regarded as a "unit; and the further safeguard that his prospects of useful "citizenship were not likely to be endangered by poverty or other "handicaps. Each of these requirements, if satisfied, would "guarantee a more enduring quality to the tie between the new "citizen and the country which he has elected to adopt, 'for "'better, for worse,' as his own."

Later, the judges observed: "An Indian or a Pakistani resid- "ing in Ceylon is in our opinion entitled as of right to exercise the "privilege of being registered as a citizen of Ceylon if at the time "of his application (made within the requisite period of time)

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"(1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration; and (2) he satisfies all the other relevant conditions laid down in section 6 (2) of the Act; and (3) the requirement as to 'origin' in paragraph (*a*) of the words of the definition is satisfied, or, he is at least a descendant of a person whose origin was as aforesaid."

1958. March 17, 18, 19, 20, 24 and 25. *Sir Frank Soskice Q.C.* and *Montague Solomon* for the appellant.

Walter Jayawardena and *Sirimevan Amerasinghe* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Rangoon Botatoung Co. Ltd.* v. *The Collector, Rangoon*[2]; *R.M.A.R.A.R.R.M* v. *Commissioner of Income Tax*[3]; *Subramaniam Chetty* v. *Soysa*[4]; *Vander Poorten* v. *Settlement Officer*[5]; *Clarke* v. *Bradlaugh*[6]; *Hansraj Gupta* v. *Official Liquidators of Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*[7]; *Sockalingam Chetty* v. *Mani Kam*[8]; *Soertsz* v. *Colombo Municipal Council*[9]; *Settlement Officer* v. *Vander Poorten*[10]; *In re W. Carter Smith, Ex parte Commissioner of Taxation*[11]; *Bowie or Ramsay* v. *Liverpool Royal Infirmary*[12]; *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.*[13]; *Lissenden* v. *C.A.V. Bosch Ltd.*[14]; *Watt or Thomas* v. *Thomas*[15]; *D'Etchegoyen* v. *D'Etchegoyen*[16]; *Gulbenkian* v. *Gulbenkian*[17]; *Douglas* v. *Douglas*[18]; *Wahl* v. *Attorney-General*[19]; *Hodgson* v. *De Beauchesne*[20]; *Stanley* v. *Bernes*[21]; *S. P. Poravia Pillai* v. *Commissioner for Registration of Indian and Pakistani Residents*[22]; *V. Paramasivam* v. *Commissioner for Registration of Indian and Pakistani Residents*[23]; *In re Craignish, Craignish* v. *Hewitt*[24]; *In re Annesley, Davidson* v. *Annesley.*[25]

May 19. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts and statutory provisions set out above and continued: Their Lordships agree

[2] (1912) L.R. 39 I.A. 197; 28 T.L.R. 540.
[3] (1935) 37 N.L.R. 447.
[4] (1923) 25 N.L.R. 344.
[5] (1946) 47 N.L.R. 217.
[6] (1881) 7 Q.B.D. 38; (1883) 8 App.Cas. 354, H.L.
[7] (1932) L.R. 60 I.A. 13.
[8] (1930) 32 N.L.R. 65.
[9] (1930) 32 N.L.R. 62.
[10] (1942) 43 N.L.R. 436.
[11] (1908) 8 N.S.W., S.R. 246.
[12] [1930] A.C. 588; 46 T.L.R. 465.
[13] [1921] 2 K.B. 608.
[14] [1940] A.C. 412; 56 T.L.R. 347; [1940] 1 All E.R. 425.
[15] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.
[16] (1888) 13 P.D. 132.
[17] 54 T.L.R. 241; [1937] 4 All E.R. 618.
[18] (1871) L.R. 12 Eq. 617.
[19] (1932) 147 L.T. 382.
[20] (1858) 12 Moo.P.C.C. 285.
[21] (1830) 3 Hagg.Ecc.R. 373.
[22] (1953) 54 N.L.R. 407.
[23] (1955) 56 N.L.R. 514.
[24] [1892] 3 Ch. 180; 8 T.L.R. 205, 451.
[25] [1926] Ch. 692; 42 T.L.R. 584.

with the last passages they have quoted from the judgment of the Supreme Court, subject to one qualification. They think that the Supreme Court has gone too far in using the words " entitled " as of right." Section 6 (1) of the Act, read with section 22, places upon the applicant for registration the burden of proving that he has " permanently settled in Ceylon," and " in addition," of proving the matters set out in section 6 (2). In order to discharge this burden of proof he must supply evidence that at the time of his application he has the intention of settling permanently in Ceylon. It would appear from the passage just quoted that in the opinion of the Supreme Court an applicant provides *conclusive* evidence of this intention if, having satisfied all the other conditions laid down in the Act, he " demonstrates " it by electing irrevocably to apply for registration. Their Lordships would agree at once that this election, combined with the long and continuous residence in Ceylon which the Act prescribes, and supported as it must be by an affidavit, affords strong evidence that an applicant has permanently settled in Ceylon. The decision to apply for citizenship is one of great importance, especially as it would appear to preclude the applicant from ever thereafter obtaining Indian citizenship—(see section 5 (3) of the Indian Citizenship Act, 1955, and compare section 11 of that Act), and the commissioner should certainly attach great weight to the fact that the applicant has satisfied the conditions set out in paragraphs (1), (2) and (3) in the passage just quoted from the judgment. This fact, taken by itself, is sufficient in their Lordships' opinion to discharge the initial burden of proof which lies upon the applicant and to establish a prima facie case for registration as a citizen of Ceylon; but they cannot find that this fact precludes the commissioner from coming to a decision, after considering all relevant matters, that at the time of his application the applicant had not a genuine intention to settle permanently in Ceylon.

Their Lordships are, however, of opinion that the Supreme Court was clearly right in allowing the appeal of the applicant from the decision of the deputy commissioner.

It is plain, from the notice of September 9, 1952, already quoted, and from the terms of the order of January 25, 1954, that the deputy commissioner based his refusal of the application entirely upon his view that the applicant had failed to prove that he had permanently settled in Ceylon. In their Lordships' view the approach of the deputy commissioner to the determination of this question was wrong in two important respects.

First, he said in the course of his order: " Applicant's domicile " of origin is clearly India and there is a presumption that this " domicile continues, unless the applicant has adopted a Ceylon " domicile of choice, that is, in other words, he had permanently " settled in Ceylon. The burden of proof that he had changed " his Indian domicile or, in other words, that he had permanently

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" settled in Ceylon as required by section 6 read with section 22 " of the Act, lies on him."

Their Lordships do not regard the question of proving a " change of domicile " as coming into the matter at all. The burden of proving a change of domicile is indeed a heavy one, as is illustrated by the case of *Winans* v. *Attorney-General* [1] and many other cases. The Act has made no reference to domicile, but has placed upon the applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon. Their Lordships have already expressed their view as to the manner in which that burden of proof can be discharged. They think it likely that the legislature deliberately refrained from any reference to change of domicile, in order to free the commissioner or deputy commissioner (who may not be a lawyer) from the responsibility of investigating a question which, as the judges of the Supreme Court observed " in most cases " would present formidable obstacles even to an experienced judge " trained in the law."

Secondly, the deputy commissioner concluded his order by saying: " the applicant has admitted that he has made several " remittances to India from March, 1950, to July, 1951, through " the estate-group scheme by perfecting ' B ' forms wherein he " declared that he was temporarily resident in Ceylon. The " applicant is an educated man and he knew the implications of " declaring that he was temporarily resident in Ceylon. There " is clear evidence that the presumption referred to above has not " been rebutted. On his own admission he was temporarily " resident in Ceylon at the date of his application. The applica- " tion is therefore refused."

In *Ross* v. *Ross* [2] Lord Buckmaster observed: " Declarations " as to intention are rightly regarded in determining the question " of a change of domicile, but they must be examined by consider- " ing the person to whom, the purposes for which, and the circum- " stances in which they are made and they must further be " fortified and carried into effect by conduct and action consistent " with the declared expression."

In the present case the purpose for which the applicant signed form " B " is beyond doubt. His mother and crippled sisters were resident in India and dependent on him. He found that under the estate-group scheme there would be difficulties in sending remittances to these relatives if he stated in form " B " that he was permanently resident in Ceylon. Therefore, to quote his evidence, " for each remittance I perfected a ' B ' form wherein I " made a declaration that I was temporarily resident in Ceylon . . . " it is a fact that I declared myself temporarily resident in Ceylon " for the purpose of remitting money to India."

In their Lordships' view documents signed in these circumstances and for this purpose were of little evidential value for the

[1] [1904] A.C. 287; 20 T.L.R. 510. [2] [1930] A.C. 1, 6.

purpose of determining the question before the deputy commissioner, especially as they were not "fortified and carried into "effect by conduct and action consistent with the declared "expression." Apart from the signature of the "B" forms no action of the applicant indicated that his residence in Ceylon was of a temporary nature. On the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country. In these circumstances the deputy commissioner was not justified in treating the statement made on the "B" forms as a sufficient ground for refusing the application. Their Lordships agree with the realistic view taken in similar circumstances by Nagalingam A.C.J. in the case of *Thomas* v. *Commissioner for Registration of Indian and Pakistani Residents*.[3]

For these reasons the decision of the deputy commissioner cannot stand, and the order made by the Supreme Court should be upheld.

Their Lordships now turn to the preliminary objection to their jurisdiction, already mentioned. This objection was based on The Appeals (Privy Council) Ordinance of Ceylon (cap. 85, vol. II, Legislative Enactments of Ceylon, p. 420), hereafter referred to as "The Appeals Ordinance," the relevant parts whereof are the following:

"3. From and after the commencement of this Ordinance the "right of parties to civil suits or actions in the Supreme Court "to appeal to His Majesty in Council against the judgments and "orders of such court shall be subject to and regulated by— "(*a*) the limitations and conditions prescribed by the Rules set "out in the Schedule, or by such other Rules as may from time "to time be made by His Majesty in Council; and (*b*) such "general Rules and Orders of Court as the judges of the Supreme "Court may from time to time make in exercise of any power "conferred upon them by any enactment for the time being in "force." And

"Rule 1. Subject to the provisions of these rules, an appeal "shall lie—(*a*) as of right, from any final judgment of the "court, where the matter in dispute on the appeal amounts to "or is of the value of five thousand rupees or upwards, or where "the appeal involves directly or indirectly some claim or question "to or respecting property or some civil right amounting to or "of the value of five thousand rupees or upwards; and (*b*) at the "discretion of the court, from any other judgment of the court, "whether final or interlocutory, if, in the opinion of the court, "the question involved in the appeal is one which, by reason of "its great general or public importance or otherwise, ought to be "submitted to His Majesty in Council for decision."

The Supreme Court granted leave to appeal to the Privy Council on the ground that its decision involved a question of "great general or public importance" within the meaning of rule 1 (*b*). It was conceded before the Supreme Court by the

[3] (1953) 55 N.L.R. 40.

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respondent that a question of "great general or public importance" was involved, but it was argued that no appeal lay from its judgment, on the ground that an appeal to the Supreme Court under section 15 of the Indian and Pakistani Residents Citizenship Act was not a "civil suit or action in the Supreme Court" within the meaning of section 3 of the Appeals Ordinance. The Supreme Court did not accept this argument. The Acting Chief Justice referred to two conflicting lines of decision and allowed the application with some hesitation, observing that "the question that "arises for decision is admittedly one which by reason of its great "importance should be submitted to Her Majesty in Council for "decision." Gratiaen J. said that "it may be conceded that "the proceedings" before the deputy commissioner "did not at "that stage constitute a 'civil suit or action'" but "had no "hesitation in reaching the conclusion that the parties to the "appeal were parties to a 'civil suit or action in the Supreme "'Court.'"

It was argued before their Lordships that the judges of the Supreme Court were wrong, that they had not power to grant leave to appeal, and that consequently their Lordships had no jurisdiction to hear the appeal, unless and until an application to Her Majesty for special leave to appeal was successfully made. It is thus necessary to examine whether the proceedings before the Supreme Court were a "civil suit or action" within the meaning of section 3. There has been a conflict of authority in Ceylon upon the point.

The words "civil suit or action" first occur in section 52 of the Charter of 1833, which conferred on the subject a right to appeal to the Sovereign. It is in the following terms: "52. And "We do further grant, ordain, direct, and appoint that it shall be "lawful for any person or persons being a party or parties to any "civil suit or action depending in the said Supreme Court to "appeal to Us Our heirs and successors in Our or Their Privy "Council against any final judgment, decree, or sentence, or "against any rule or order made in any such civil suit or action, "and having the effect of a final or definitive sentence, and which "appeals shall be made subject to the rules and limitations "following."

There follow a number of rules and limitations designed, among other things, to exclude cases considered of insufficient importance to be the subject-matter of an appeal to the Privy Council. It is to be observed that the section enabled a person, subject to these rules and limitations, to appeal as of right to the Sovereign. Section 53, which their Lordships think unnecessary to set out here, preserved intact the right of the Sovereign to admit appeals from the subject even where the subject could not appeal as of right.

It was argued before the Supreme Court and their Lordships that a civil suit or action means a proceeding in which one party sues for or claims something from another. No doubt the words

are properly applicable to such cases, and they are the cases to which the words are most frequently applied. But it is necessary to inquire whether the application of the words as they appear in section 52 of the Charter must be limited to such cases. Their Lordships would make the general observation that section 52 of the Charter was granting to a subject labouring under a sense of grievance the fundamental right of appealing to the Sovereign and that, though it would be natural to exclude from the range of permissible appeals cases of insufficient importance, it would be difficult to imagine an intention to exclude cases differentiated by reference to the form of the proceedings, regardless of the gravity of the result occasioned by them. And as section 3 of the Appeals Ordinance sets out the manner in which "the right of parties to civil suits or actions in the Supreme Court "to appeal to His Majesty in Council" is to be regulated, their Lordships do not doubt that the words "civil suits or actions" must be given the meaning which they bore in the Charter of 1833.

The meaning of the words "civil cause" was considered by the Board in the case of *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan*.[4] The Commissioner of Stamps, under an ordinance of the Straits Settlements, had certified the amount of duty payable on the estate of a deceased person. The executor of the deceased appealed to the Supreme Court against the commissioner's decision and succeeded. An appeal by the commissioner to the Court of Appeal was dismissed. The commissioner applied to the Court of Appeal for leave to appeal to His Majesty in Council but leave was refused on the ground that it was not competent to that court to grant leave. Their Lordships' Board held that this last decision was wrong, and that under the law of the Straits Settlements it was competent for the Court of Appeal to grant leave to appeal. In arriving at a decision the Colonial Charter of 1855 came under their Lordships' consideration. Section 58 is to the following effect: "58. And we do "hereby further ordain, that if the East-India Company or any "person or persons, shall find him, her, or themselves aggrieved "by any judgment, decree, order, or rule of the Court of Judica-"ture of Prince of Wales' Island, Singapore, and Malacca, in any "case whatsoever, it shall be lawful for him, her, or them to "appeal to us, our heirs, or successors, in our Privy Council, in "such manner, and under such restrictions and qualifications, as "are hereinafter mentioned; that is to say, in all judgments, "decrees, or determinations made by the said Court of Judicature "in any civil cause, the party or parties against whom or to "whose immediate prejudice the said judgment, decree, or deter-"mination shall be or tend, may by his or their petition, to be "preferred for that purpose to the said Court, pray leave to "appeal to us, our heirs or successors, in our Privy Council, "stating in such petition the cause or causes of appeal"; then follow some provisions as to stay of execution and security for

[4] [1933] A.C. 378; 49 T.L.R. 428.

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costs; and finally, upon such provisions being satisfied, the "party or parties so thinking him, her or themselves to be "aggrieved shall be at liberty to prefer and prosecute" the appeal.

Lord Macmillan, delivering the judgment of the Board, said [5]: "It is true that the Ordinance in section 80 which deals with "appeals from decisions of the commissioner does not confer a "right of appeal to His Majesty in Council. But the Colonial "Charter of 1855 provides for leave to appeal being granted by "the court of the Colony from 'all judgments, decrees or deter-"'minations made by the said Court of Judicature in any civil "'cause.' And section 1154 of the Civil Procedure Code, pro-"vides that subject to certain conditions 'an appeal shall lie from "'the Court of Appeal to His Majesty in Council (*a*) from any "'final judgment or order.' Wider language it would be difficult "to imagine. Their Lordships do not think it necessary to repeat "the reasons adduced by the Chief Justice against excluding the "decision of the Appeal Court in the present instance from the "scope of these provisions and content themselves with express-"ing their agreement. The decision against which the commis-"sioner sought to obtain leave to appeal was in their Lordships' "view not a mere award of an administrative character but a "judgment or determination made by the court in a civil cause "within the meaning of the Charter and a final judgment or order "within the meaning of section 1154 of the Civil Procedure Code, "and as such the court could competently have granted leave to "appeal from it to His Majesty in Council."

Their Lordships interpret the words "wider language it would "be difficult to imagine" as applying both to the Charter of 1855 and to section 1154 of the Civil Procedure Code.

The Board was then considering the words "civil cause," but their Lordships see no good ground for drawing any distinction between these words and "civil action." They agree with the observations just quoted, and they see no good ground for distinguishing the present case from the case just cited. They propose to follow that case, although the decision was arrived at without the assistance of argument by counsel, and to hold that the Supreme Court had power to grant leave to appeal in the present case. The preliminary objection therefore fails.

Reference was made in the course of the argument to the definition of the word "action" in the Courts Ordinance (cap. 6, Legislative Enactments of Ceylon, Vol. 1, p. 25), and in the Civil Procedure Code (cap. 86, Legislative Enactments of Ceylon, Vol. II, p. 428), both of which are earlier in date than the Appeals Ordinance. In each of these earlier Ordinances "action" is defined to mean "a proceeding for the prevention or redress of a "wrong." It was argued that the order of the deputy commissioner could not be said to be a wrong in the sense that a tort or a breach of contract can be said to be a wrong, as there was

[5] [1933] A.C. 378, 392.

nothing illegal in the action of the deputy commissioner. On the other hand, it was argued that the word " wrong " in the definition has a wider connotation and would include the consequence of an order made by a commissioner which is wrong though legally made. It is not necessary for their Lordships to decide the point. The Charter was granted long before the two Ordinances mentioned were enacted and, as their Lordships have already pointed out, the words " civil suits or actions " in the Privy Council Appeals Ordinance must bear the same meaning as they bore in the Charter.

In addition to the definition of " action " (contained in section 5) mentioned above the Civil Procedure Code contains the following in section 6: " 6. Every application to a court for relief " or remedy through the exercise of the court's power or autho- " rity, or otherwise to invite its interference, constitutes an " action." This is what their Lordships think is the meaning of " action " in the Charter and in the Appeals Ordinance though, as will have been seen, they do not found their decision on this section.

After the application for leave to appeal to the Privy Council had been granted in the present case a bench of five judges (one of whom dissented) in the case of *Silverline Bus Co. Ltd.* v. *Kandy Omnibus Co. Ltd.*,[6] after a very full and careful review of two conflicting lines of authority, decided that an application to the Supreme Court for a writ of certiorari was not a " civil suit " or action " within the meaning of section 3 of the Appeals Ordinance. Counsel for the commissioner in the present case did not contend that the decision in the *Silverline* case [6] was wrong: the point actually decided is not before their Lordships, and they have heard no argument upon it. It follows, however, from the views which they have already expressed that they cannot accept the view of Basnayake C.J. that the words " civil suit or action " in section 3 of the Appeals Ordinance should be limited to " a " proceding in which one party sues for or claims something from " another in regular civil proceedings."

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of this appeal.

Solicitors: *T. L. Wilson & Co.; Smiles & Co.*

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[6] (1956) 58 N.L.R. 193, 213.

[COURT OF APPEAL.]

C. A.

1958
April 29, 30;
May 1, 2.

Jenkins,
Parker and
Pearce L.JJ.

REGINA *v.* PATENTS APPEAL TRIBUNAL. *Ex parte* BALDWIN & FRANCIS LTD.

Crown Practice—Certiorari—Inferior tribunal—Patents Appeal Tribunal—Whether certiorari will lie to tribunal—Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *ss.* 9, 85 (10).

Patents — Appeal Tribunal — Jurisdiction — Whether amenable to certiorari.

Crown Practice—Certiorari—Error of law on face of record—Construction—Evidence necessary to enable court to construe documents part of record—Whether certiorari applicable.

Evidence—Construction of documents—Extrinsic evidence—Meaning of words—Technical terms.

Section 85 (10) of the Patents Act, 1949, provides: "An "appeal to the Appeals Tribunal under this Act shall not be "deemed to be a proceeding in the High Court."

A company made application for a patent whereupon, on the publication of its specification, the owners of a prior patent opposed the grant of the patent applied for on the grounds, inter alia, that its specification could not fairly describe the invention or the method by which it was to be performed without referring to their prior patent and that such a reference should be directed under section 9 of the Act. Both the patent applied for and the prior patent concerned improvements designed to prevent the re-closing of an electric circuit in which an earth fault had developed until that fault was repaired.

Subsequently, on investigation by the superintending examiner on behalf of the comptroller, it was decided that the later invention could not be performed without substantial risk of infringement of the prior patent, and, accordingly, there being no proposals for amending its specification by a final decision dated August 31, 1956, the superintending examiner ordered that the patent applied for be sealed with a reference to the prior patent.

On appeal to the Patents Appeal Tribunal, the tribunal reversed that decision. The owners of the prior patent being dissatisfied with the tribunal's decision, from which there was no appeal, applied for an order of certiorari on the grounds that there was an error of law appearing on the face of the record in that the tribunal had misconstrued the rival specifications, or one of them:—

Held, (1) that the decision of the tribunal was that of an inferior tribunal to which an order of certiorari would issue.

Reg. v. *Patents Appeal Tribunal, Ex parte Champion Paper & Fibre Co.* [1957] 1 W.L.R. 248; [1957] 1 All E.R. 227; [1956] R.P.C. 323 approved.

(2) That the specifications formed part of the record.

Reg. v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796 applied.

But (3) that to determine whether the specifications had been misconstrued it was necessary for the court to be informed by evidence to understand the language used therein, and, as on an application for certiorari the court could not look at evidence given in the proceedings or receive new evidence on affidavit, the application failed.

Dicta of Parke B. and Tindal C.J. in *Shore* v. *Wilson* (1842) 9 Cl. & F. 355, 555, 566, and of Parke B. in *Neilson* v. *Harford* (1841) 1 Web.P.C. 295, 370, applied.

Decision of the Divisional Court affirmed.

APPEAL from the Divisional Court.

The facts are taken substantially from the judgment of Parker L.J.

This was an appeal from a decision of the Divisional Court (Lord Goddard C.J. and Donovan J.), refusing an application for an order of certiorari to quash an order made by the Patents Appeal Tribunal (Lloyd-Jacob J.) on January 17, 1957. That decision reversed a decision of the superintending examiner made in pursuance of section 9 of the Patents Act, 1949.

On November 23, 1950, the respondents, Anderson Boyes & Co. Ltd., made application for patent No. 703630, and in due course filed and published a complete specification, entitled "Improvements in or relating to protective systems for poly-"phase alternating current loads." Whereas there already existed inventions ensuring that the development of an earth fault in a circuit would automatically break the circuit, the improvement in question was designed to prevent the re-closing of the circuit while the earth fault remained unrepaired. The appellants, Baldwin & Francis Ltd., were owners of a prior patent, No. 658823, the complete specification of which was entitled "Improvements in and relating to earth leakage protec-"tion systems for electric motors, cables and other apparatus." Like the respondents' improvements, the appellants' improvements were designed also to prevent the re-closing of a circuit in which an earth fault had developed until that fault was repaired.

In due course the appellants opposed the grant of the patent applied for, on the ground, inter alia, provided for in section 14 (1) (*g*) of the Patents Act, 1949: "that the complete specifica-"tion does not sufficiently and fairly describe the invention or "the method by which it is to be performed." Their contention was that the specification could not fairly describe the invention or the method by which it was to be performed without referring to the appellants' patent, and that such a reference should be directed under section 9 of the Act.

In due course the matter was investigated by Mr. Vincent, the superintending examiner, on behalf of the comptroller, and by an interim decision dated June 15, 1956, he decided that the invention could not be performed without substantial risk of infringement of the appellants' patent. He allowed one month to enable the respondents to submit proposals for amending the specification. No such proposals were forthcoming, and accordingly the superintending examiner, by a final decision dated August 31, 1956, ordered that the patent applied for be sealed with a reference to the appellants' patent. The present respondents thereupon appealed (as is provided for in the Act) to the Patents Appeal Tribunal, which, on January 17, 1957, gave a

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written decision reversing the decision of the superintending examiner. From that decision of the Patents Appeal Tribunal there could be no further appeal, none being provided for by statute, and the appellants' only remedy, accordingly, was by way of an order of certiorari to quash the decision for an error of law on the face of the record.

The appellants, being dissatisfied with the decision of the tribunal, accordingly applied to the Divisional Court for an order of certiorari. There was no question of lack of jurisdiction, but it was contended before the Divisional Court that there were two errors of law appearing on the face of the record. First, it was said that the tribunal had misconstrued section 9 of the Patents Act, 1949. As to that, the Divisional Court could find no such error; and there was no appeal from that part of the decision. Secondly, it was said that the tribunal had erred in misconstruing the rival specifications, or one of them. As to that, the Divisional Court refused to consider the meaning of the specifications, holding that they were unable to do so without being instructed in the technicalities of electrical engineering.

From this part of the decision the appellants appealed.

J. P. Graham Q.C., *Anthony Cripps Q.C.* and *Mervyn Heald* for the appellants.

G. W. Tookey Q.C., *S. I. Levy Q.C.* and *John Hall* for the respondents.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Davies* v. *Price* *; *In re Dowty's Application.*†

JENKINS L.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. referred to the facts and continued: That an order of certiorari will lie, in a proper case, to quash a decision of that tribunal is, I think, clear. Though the tribunal consists of a judge of the High Court, the Patents Act, 1949, specifically provides, by section 85 (10), that "an appeal to the Appeal "Tribunal under this Act shall not be deemed to be a proceeding "in the High Court." Accordingly, the decision of the tribunal is a decision of an inferior tribunal of a kind to which an order of certiorari will issue; and indeed that was decided by the Divisional Court in *Reg.* v. *Patents Appeal Tribunal, Ex parte Champion Paper and Fibre Co.*[1]

Mr. Graham, on behalf of the appellants, puts his contention in this way. Before the tribunal can decide whether there is a substantial risk of infringement, it must construe the rival specifications. The construction of a written document is a matter of

* [1958] 1 W.L.R. 434; [1958] 1 All E.R. 671.

† (1944) 61 R.P.C. 52.

[1] [1957] 1 W.L.R. 248; [1957] 1 All E.R. 227; [1956] R.P.C. 323.

law. Reading the decision of the tribunal (so he says) it is clear that the tribunal must have misconstrued the specifications, and accordingly there is an error of law on the face of the record.

It is clear that proceedings such as these are in no sense by way of appeal. The court can look, and look only, at the reasoned decision, and at such other documents as can fairly be said to form part of the record. If no reasoned decision is given, the error of law, if error there be, will not be detected. The face of the record (as Lord Sumner put it in *Rex* v. *Nat Bell Liquors Ltd.*[2]) was then "the inscrutable face of a sphinx." In the ordinary case, where, as here, what is called a "speaking order" is made, the error, if error there be, takes the form of the misconstruction or misapplication of a statute or regulation. This case, so far as I know, is the first case where it is said that the error consists of the misconstruction of some other document. Logically, however, if that document does form part of the record and the decision on its face shows that the tribunal has misconstrued it, I do not see why certiorari will not lie. It is an error of law, albeit one different from that sometimes found.

The first question, therefore, is whether these specifications form part of the record. As regards the appellants' specification, an extract of this is set out in the tribunal's decision, and, following the decision of this court in *Regina* v. *Medical Appeal Tribunal, Ex parte Gilmore*,[3] I think that the effect of this is to make the whole specification part of the record. As regards the respondents' specification, it is true that specific extracts are not set out, but it is their application (as the title to the decision shows) which is the document initiating the proceedings, and, looked at in that way, again I should have thought formed part of the record. Indeed, Denning L.J., in *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[4] said: "It "appears that the Court of King's Bench always insisted that "the record should contain, or recite, the document or informa- "tion which initiated the proceedings and thus gave the tribunal "its jurisdiction." Accordingly, in my judgment both these documents (as Mr. Graham contends) form part of the record. Whether (as he also contends) the decision of the superintending examiner forms part of the record I find it unnecessary (for reasons which will appear hereafter) to determine.

So far, therefore, I agree with Mr. Graham's argument. But the next question is whether either of these documents has been misconstrued. This, of course, means that the court must itself decide what the right construction is. The documents in this case, by their very nature, are dealing with technical matters of science, and technical terms are used. Where technical words

[2] [1922] 2 A.C. 128, 159; 38 T.L.R. 541.

[3] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796.

[4] [1952] 1 K.B. 338, 352; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

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are used in a document, prima facie they are used in their technical sense; and, where the words are technical words of science as opposed to technical legal terms, evidence of experts or of books dealing with the subject is admissible, to inform the court of their meaning. Thus, when the language of the instrument is such that the court does not understand, it is competent to receive evidence of the proper meaning of that language, and this is so whether it is written (for instance) in a foreign tongue or contains technical terms of science or art.

I need only refer to two passages in *Shore* v. *Wilson*.[5] The first passage is from the judgment of Parke B., where he said[6]: "This being assumed, as a matter which cannot be controverted, "I apprehend that there are two descriptions of evidence (the "only two which bear upon the subject of the present inquiry), "and which are clearly admissible in every case for the purpose "of enabling a court to construe any written instrument, and to "apply it practically. In the first place, there is no doubt that "not only where the language of the instrument is such as the "court does not understand, it is competent to receive evidence "of the proper meaning of that language, as when it is written "in a foreign tongue; but it is also competent, where technical "words or peculiar terms, or indeed any expressions are used, "which at the time the instrument was written had acquired an "appropriate meaning, either generally or by local usage, or "amongst particular classes."

Tindal C.J. said[7]: "Such investigation does of necessity take "place in the interpretation of instruments written in a foreign "language; in the case of ancient instruments, where, by the "lapse of time and change of manners, the words have acquired "in the present age a different meaning from that which they "bore when originally employed; in cases where terms of art or "science occur; in mercantile contracts, which in many instances "use a peculiar language employed by those only who are con-"versant in trade and commerce; and in other instances in "which the words, besides their general common meaning, have "acquired, by custom or otherwise, a well-known peculiar "idiomatic meaning in the particular country in which the party "using them was dwelling, or in the particular society of which "he formed a member, and in which he passed his life. In all "these cases evidence is admitted to expound the real meaning "of the language used in the instrument, in order to enable the "court or judge to construe the instrument, and to carry such "real meaning into effect. But whilst evidence is admissible in "these instances for the purpose of making the written instru-"ment speak for itself, which without such evidence would be "either a dead letter, or would use a doubtful tongue, or convey "a false impression of the meaning of the party, I conceive the

[5] (1842) 9 Cl. & F. 355.
[6] Ibid. 555.
[7] Ibid. 566, 567.

" exception to be strictly limited to cases of the description above " given."

Of course, those judgments were dealing with the admissibility of evidence, but in my judgment not only is the court competent to receive such evidence, but it must do so, to understand the language used. One judge may, by reason of his training or by reason of experience, have more knowledge of technical terms of science than another, but both must inform themselves by evidence of the meaning of the language used—unless the matter involved is one of which judicial notice can be taken. Without in any way seeking to limit the matters of which judicial notice may be taken, I am quite clear that in the present case the court must be informed by evidence, be it only the evidence derived from books dealing with the matter. A case might, of course, arise (as Jenkins L.J. mentioned in argument) where the two rival specifications are expressed in identical language. In such a case, infringement must arise, whatever the construction. But in a case, as here, where similar improvements are the subject of rival specifications expressed in different words, the exact meaning of the technical words used must be a matter of evidence. To take an example in the present case: the appellants' specification uses the expression " current injected . . . " by means of a . . . resistance." It is clear, in my view, that evidence is necessary, and indeed as I understand it evidence was given in the proceedings, as to the exact meaning and implication of that expression. One can perhaps test the matter by imagining that these were infringement proceedings tried by a judge and jury. In that case it is clear that, while the construction of the documents would be for the judge, it would be for the jury to determine on the evidence the exact meaning of the terms used. Thus, in *Neilson* v. *Harford* [8] Parke B. said: " Then we " come to the question itself, which depends on the proper con- " struction to be put on the specification itself. It was contended " that of this construction the jury were to judge. We are " clearly of a different opinion. The construction of all written " instruments belongs to the court alone, whose duty it is to " construe all written instruments, as soon as the true meaning " of the words in which they are couched, and the surrounding " circumstances, if any, have been ascertained by the jury; and " it is the duty of the jury to take the construction from the " court, either absolutely, if there be no words to be construed as " words of art, or phrases used in commerce, and the surrounding " circumstances to be ascertained, or conditionally, where those " words or circumstances are necessarily referred to them."

Accordingly, I am satisfied that we cannot construe the specifications without being informed by evidence, and, that being so, the application for an order of certiorari must fail in limine. On such an application, not being one going to jurisdiction, this

[8] (1841) 1 Web.P.C. 295, 370.

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court cannot look at the evidence given in the proceedings or receive new evidence on affidavit.

In these circumstances, I find it unnecessary to consider further the specifications, the decision of the superintending examiner, or the decision of the tribunal itself.

In my judgment, the Divisional Court were right, and this appeal should be dismissed.

Pearce L.J. I agree.

Jenkins L.J. I also agree.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *Parker Garrett & Co. for Benson Burdekin & Co., Sheffield; Bristows, Cooke & Carpmael.*

J. A. G.

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